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Reserved

Central Administrative Tribunal, Allahabad.

Registration T.A.No.91 of 1986

Swadhinta Nath Dubeyt ... Applicant

Vs.

Union of India and others ... Respondents

Connected with

Registration No. TA 92 of 1986

Swadhinta Nath Dubey ... Applicant

Vs.

Union of India and others ... Respondents.

2. Registration No. TA 44 of 1986

Sri Brahma Shankar Sharma ... Applicant

Vs.

Union of India and others ... Respondents.

Connected with

Registration T.A.No. 90 of 1986

Brahma Shankar Sharma ... Applicant

Vs.

Union of India and others ... Respondents.

Hon. D.K. Agrawal, JM
Hon. K. Obayya, AM

(By Hon. D.K. Agrawal, JM)

The above Transferred Applications were registered on receipt of record of the four Civil Suits filed in the Court of Munsif Hawali Bareilly. Therefore, they are being disposed of by this common order as common questions of law and facts are involved.

2. The brief facts are that the Applicant S.N.Dubey posted as lower Division Clerk in Stores Canteen Department at Bareilly was transferred by an

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order dated 8.7.1982 to Misa Mari Depot in Assam. He represented against his transfer but the competent authority did not find force in the representation. The Applicant, however, did not proceed to join at Misa Mari on one or the other ground. In the first instance, he filed Civil Suit No.202 of 1983 on 17.5.83 (T.A.No. 92 of 1986) against the aforesaid transfer order. The Disciplinary Authority, thereafter passed an order of compulsory retirement under rule 19 (ii) of Central Civil Service (Classification, Control and Appeal) Rules read with clause (b) to second proviso of Art. 311 (2) of the Constitution of India on 12.8.83 on the ground that it was not practicable to hold an enquiry. Thereupon, Civil Suit No.443 of 1984 (T.A.No 91 of 1986) was filed assailing the order of compulsory retirement dated 12.8.1983 as well as the appellate order dated 9.12.1983.

3. The Applicant Brahma Shankar Sharma was posted as lower Division Clerk at Bareilly Canteen Stores Depot and was transferred by an order dated 7.10.1982 to Deemapur Depot. The order of transfer was defied on one or the other ground. Civil Suit No.13 of 1983 T.A.No. 44 of 1986 was filed by him for a declaration that the order of transfer was bad in law. The Disciplinary Authority, thereafter, passed an order of compulsory retirement on 4.7.1983 under rule 19(ii) of the CCS (CCA) Rules read with clause (b) of second proviso of Art.311 (2) of the Constitution, which gave rise to Civil Suit No.442 of 1984 (Registration TA No.90 of 1986)

4. It may be mentioned that Original Suit No. 13 of 1983 (T.A.No.44 of 1986) filed by B.S.Sharma on 7.1.1983 was dismissed for want of prosecution on

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16.7.1985. Misc. Application No. 23 of 1985 filed on 13.1.1985 for restoration was also dismissed on 3.1.86. Thereafter, Misc Application No. 5 of 1986 was filed on 23.1.1986 for restoration of Misc. Application No. 23 of 1985. Meanwhile, the case was transferred to this Tribunal. However, the learned counsel for parties have been heard on merits and, therefore, we are proceeding to dispose of the cases on merits.

5. Two points are involved in these cases, first -ly, whether the transfer orders of the Applicants were validly passed and, secondly, whether clause (b) of second proviso of Art.311 (2) of the Constitution read with Rule 19 of CCS (CCA) Rules, 1965 were properly applied to the case of each of the Applicants and the impugned orders of compulsory retirements ^{be validly &} ~~were~~ passed against them.

6. As regards the transfer orders, it would appear that Sri S.N.Dubey was transferred from Bareilly to Misa Mari in the circumstances, as stated by the Respondents in paras 6 and 7 of the written statement, which mentions that one Sri N.C.Joshi who was working at Misa Mari (hard station) completed his tenure of hard station and, therefore, he was to be transferred to his choice station, i.e., Bareilly. Consequently by a letter dated 24.5.1982, enquiry was made as to whether any IDC posted at Bareilly was willing to be transferred to Misa Mari. Therefore, the Applicant, i.e., S.N.Dubey, who had the longest stay at Bareilly was ordered to be transferred on 8.7.1982 after due consideration of his representation dated 1.6.1982 by the competent authority. Similarly, Sri B.S.Sharma was transferred to Deemapur Depot on account of the vacancy there vice Sri S.K.Bali. Sri Sharma had second

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longest stay at Bareilly; a lady who had longest stay at Bareilly was exempted. The transfer of Sri Sharma was also effected after taking into account that no other LDC posted at Bareilly was willing to be posted at Deemapur. The representation of Sri Sharma was also considered and rejected by the competent authority. Thus, it cannot be urged on behalf of the Applicants that their transfer was made by an authority other than the appointing authority. The transfer order may have been signed by the Asstt. General Manager (Administration) but in view of the facts stated above, it is clear that the General Manager, Canteen Stores Department, who was appointing authority had duly applied his mind to the representation of the Applicants before the actual order of transfer was passed and communicated to the Applicants. We are, therefore, unable to persuade ourselves to hold that the order of transfer of each of the Applicants was either arbitrary or against the statutory rules. Therefore, in view of the decision of the Hon'ble Supreme Court in Gujarat Electricity Board and another Vs. Atmaram Sungomal Poshani (1989 (3) Part II SLJ -69) , we are of opinion that there is no ground to interfere with the impugned orders of transfer.

7. The next point, which is most important, is as to remedy available to a civil servant who has been imposed major penalty by attracting clause (b) of the second proviso to Art.311 (2) of the Constitution. In the instant case before us, the Applicants have already availed the departmental remedy. The Applicant Sri S.N.Dubey filed an appeal

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on 23.10.1983 vide annexure RA 23 and the appellate order was passed on 9.12.1983 vide annexure RA 24. The other Applicant, namely, B.S.Sharma filed appeal on 6.8.1983 and appellate order is dated 22.11.1983. The impugned orders as well as the appellate orders have been assailed on two grounds- firstly, that even if it be assumed that the Applicants were absconding or the department arrived at a finding that they cannot be served or there was apprehension that the Applicants will not participate in the inquiry, although no material existed to arrive at such a conclusion, still the enquiry should have proceeded ex parte on the basis of material before the Disciplinary Authority. Secondly, it was urged that it was obligatory on the part of the appellate authority to afford an opportunity to the Applicants to reply to the charge against them and if necessary, the hearing of appeal should have been postponed for a reasonable length of time to enable a chance to the Applicants to offer their version. We have given serious thought to the above two points raised on behalf of the Applicants. The impugned orders dated 12.8.1983 and 4.7.1983 passed in the case of S.N.Dubey and B.S.Sharma have been carefully perused by us. The perusal of the said impugned orders go to show that the competent authority made an attempt to serve the charge sheet by Registered Post at the address as recorded in the Service Book of the Applicants and the registered letter having been returned undelivered, a notice was published in Hindustan Times and thereafter, the impugned orders were passed repeating the language of clause b) of second proviso to Art.311 (2) of the Constitution to the effect that it was not reasonably practi-

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cable to hold an enquiry. The Applicant-S.N.Dubey has drawn our attention to his representations dated 6.6.1983 and 26.7.1983, annexures RA 18 and RA 19 and replies thereto by the department dated 9.8.1983 and 11.8.1983, annexures RA 20 and RA 21 to indicate that he was in constant touch with the departmental authorities and that he was not absconding nor it can be said that he was not available at the address known to the department. Similarly, B.S.Sharma has urged in the plaint of Civil Suit No.442 of 1984 (T.A.No.90 of 1986) that he was in correspondence with the department ; that he was not absconding; that it is incorrect to say that the department was not in a position to communicate with him.. Thus, it has been urged that there was no valid ground for the Disciplinary Authority to dispense with the inquiry and invoke the extraordinary provision as laid down in clause (b) to second proviso of Art.311 (2) of the Constitution. We do feel that necessary proof that the Applicants were not available to the authorities is wanting on record. Then, as laid down in para 62 of the judgment in the case of Satya Bir Singh Vs. Union of India (1985 (4) SCC-452), the facts of the present case warranted an ex-parte inquiry rather than doing away with the inquiry. There is another mistake committed by the appellate authority inasmuch as the appellate authority did not record any reason as to why the opportunity of inquiry was not being afforded to the Applicants. The perusal of the appellate orders dated 9.12.1983 and 22.11.1983 would go to indicate that the appellate authority had not given any reason

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as to why and how the disciplinary authorities were justified in invoking the provision of the second proviso to clause (b) of Art.311(2) of the Constitution. It would appear that in para 97 of its judgment the Hon'ble Supreme Court in the case of Satyabir Singh (Supra) has laid down that the appellate authority has to afford an opportunity to the delinquent civil servant unless it records reasons otherwise. Thus, we are of opinion that the Disciplinary Authority as well as the Appellate Authority violated the principles of natural justice. It may also be relevant to mention at this stage that the contents of the charge sheet have not been disclosed either in the impugned orders or appellate order or at any stage of the proceedings before the learned Munsif or before this Tribunal. Thus, the authorities have chosen to contain the contents of the charge sheet to themselves or their records, which have been kept away even from the Tribunal.

8. In the above circumstances, we are of opinion that on technical grounds, the impugned orders have to be set aside without going into merits of the case.

9. In the above background, the impugned orders dated 12.8.1983, appellate order dated 9.12.1983 in the case of S.N.Dubey and order dated 4.7.1983 and appellate order dated 22.11.1983 in the case of B.S. Sharma are set aside with liberty to the competent authority to act in accordance with law. The transfer orders of the Applicants are upheld with a direction that it will be open to the competent authority, if so desired, to change the order of transfer (due to long gap) in public interest. The parties are directed to bear their own costs.

Chhaya
MEMBER (A)

Dated: 9th Jan.1990
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MEMBER 9/90
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