

CENTRAL ADMINISTRATIVE TRIBUNAL

ALLAHABAD BENCH

ALLAHABAD.

Allahabad this the 3rd day of April 1997.

Original application No. 1799 of 1992.

Hon'ble Dr. R.K. Saxena, JM
Hon'ble Mr. D.S. Baweja, AM

Nakharu, S/o Sri Kanhaiya, working
as Office Khalasi in the office of
Divisional Engineer, N. Rly., Chunar,
Dist. Mirzapur, R/o Railway Quarter
No. 159 B, Rly. Colony, Chunar, Dist.
Mirzapur.

..... Applicant.

C/A Sri S.S. Sharma

Versus

1. Union of India through General Manager, N. Rly., Baroda House, New Delhi.
2. D.R.M. Northern Railway, Allahabad.
3. Sri Sangeev Lohia, Divn. Engineer, Northern Railway, Chunar, Dist. Mirzapur.

..... Respondents.

C/R Sri A.V. Srivastava

O R D E R

Hon'ble Mr. D.S. Baweja, AM

This O.A. No. 1799/92 alongwith Contempt application 1233/93 in the same O.A. have been heard together. However separate judgements are being delivered.

2. The applicant has challenged the transfer order dated 25.11.92 with a prayer to quash the same.
3. The applicant joined Railway service on 13.4.79 as a casual Khalasi under Inspector of Works (IOW), Northern Railway, Allahabad Division, Churk.

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He was allowed CPC scale in 1984. He was posted as Man in 1985 and after working for about 10 months, he transferred on 10.10.85 as Gangman under Permanent Way Inspector, Chunar. Thereafter he was transferred as Khalasi under Assistant Engineer, Chunar. A vacancy arose of Office Clerk ^{and} under Assistant Engineer, Chunar and the applicant made an application for this post. He was selected and vice order dated 13.8.91, he was posted as Office Khalasi in the grade Rs. 750-940 under Assistant Engineer, Chunar. On 5.8.92 the applicant fell ill and was under treatment of Railway Doctor at Mughalsarai. While still under sick leave, the respondent No. 3, Divisional Engineer issued his transfer order dated 4.8.92, posting him Khalasi under IOW Churk. A copy of the order was pasted at his residence on 25.11.92 when he came to know about this order. The applicant made a representation dated 9.12.92 to Senior Divisional Engineer, Allahabad but he did not get any satisfactory reply. Being aggrieved, he has filed the present application on 22.12.92 challenging the transfer order dated 4.8.92.

4. The applicant has challenged the transfer order on several grounds. The main grounds are as under:-

(i) The transfer order has been passed by Divisional Engineer, respondent No. 3 with malafide intention as he refused to work at his residence.

(ii) The transfer order posting him as Khalasi from the post of Office Khalasi entails change of category as well as the seniority unit and therefore his transfer is in violation of the policy instructions laid down by Railway Board. Further respondent No. 3 is not competent

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to pass such an order and Divisional Railway Manager Allahabad was the competent authority.

(iii) Juniors to the applicant in the same post are being continued and the applicant being senior, has been transferred out.

(iv) The transfer had been effected in mid-session affecting the education of his children. His transfer has also put him into hardships as his wife was undergoing medical treatment.

(v) The applicant has not been afforded any opportunity of hearing in compliance with principles of natural justice, before passing the impugned order.

5. Subsequent to filing of the application and submission of the counter reply by the respondents, the applicant has filed the supplementary affidavit taking the additional grounds assailing the transfer order. The applicant has stated that he is a scheduled caste employee and in terms of the policy instructions laid down by the Railway Board vide letters dated 16.8.78 and 19.1.70 scheduled caste/scheduled tribe employees are to be transferred only for very strong reasons. Transfer of the applicant is in violation of these instructions.

6. The respondents have filed the counter reply through Sh. Hatesh Khanna, Senior Divisional Engineer(I), strongly contesting the application. It is submitted that the posting of applicant as Trolleyman was irregular as the applicant had been given CPC scale only in June 1989 and this was done without approval of the competent authority for change of category. It is further submitted that there was no regular vacancy for Office Clerk

and the applicant was posted on adhoc basis as Office Khalasi ^{clerk} against work charged post. The post was only for a period of 12 months and it had not been extended further. The work of the applicant was not found satisfactory and therefore he has been transferred back. It is further asserted that the transfer order does not entail any change in category or change in cadre. He has been posted back as Khalasi where he was earlier working before being posted as Office Khalasi against adhoc vacancy on work ~~charge~~ basis. It is also submitted that the allegations of malafide are baseless as the applicant was never asked to work at the residence of respondent No. 3. Transfer has been done on the administrative ground and not in colourable exercise of power by respondent No. 3 as he is competent to transfer group 'D' staff within his jurisdiction. The transfer is in the same scale and back to his original post and no opportunity of hearing is required to be given before passing such an order. In view of these facts, the transfer of the applicant is not arbitrary and with malafide intention and therefore the respondents contend that the grounds taken are not valid and the application deserves to be dismissed.

7. The applicant has filed rejoinder affidavit controverting the submissions of the respondents and maintaining the grounds advanced in the application.

8. The respondents have filed a suppl. counter to the suppl. affidavit filed by the applicant countering the submissions of the applicant with regard to violation of the extant instructions ^{try} and transfer of schedule ~~caste~~ caste

cheduled tribe staff. It is asserted that as there was no requirement of Khalasi in the Office of Assistant Engineer, Chunar and the applicant has been posted at Churk in the adjoining district which is not far away.

9. Vide order dated 15.1.93, it was directed to maintain status quo if the order of the transfer has not been effected. However the stay was not extended further vide order dated 7.9.93 and any time subsequently.

10. We have heard Sh. S.S. Sharma learned counsel of the applicant and Sri A.V. Srivastava the counsel for the respondents. We have also given careful consideration to arguments advanced during the hearing and the relevant material brought on record.

11. From the averment made by the applicant, we observe that he has challenged the transfer order on two distinct grounds. One ground is the challenge of the transfer as such on the plea that the applicant is scheduled caste employee and his transfer is in violation of the policy instructions of the Railway Board. In addition the pleas of hardship and mid-session transfer have been also taken. The other ground is that transfer involves change in category and seniority unit affecting his promotion prospects and also the order has been passed by the authority who is not competent. As brought earlier, the grounds of assailing the transfer order being in violation of the extant instructions for transfer of the scheduled caste/schedule tribe employees ^{has been taken up subsequently}. These two grounds are contradictory in nature. If the applicant

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takes a stand that he cannot be transferred out of Chunar ~~employee~~, being a scheduled caste, then it could be inferred that the applicant ~~has~~ reconciled to his alleged change in ~~his~~ ~~category~~. On the other hand if the ground of challenging of transfer ^{is} on account of involving change in category and seniority ~~unit~~, then the validity of his transfer will depend on the findings of merit on this ground. If for a moment it is taken that there is no merit in this prayer, then the plea of the transfer does not remain dominant. This is because that it is not applicant's case that even if he is to be posted out from the post of office Khalasi to Khalasi, he cannot be posted out of the present place of posting.

12. In view of this apparent contradiction in the pleadings of the applicant as brought out above, we will first go into the plea of the applicant that transfer order is illegal as it involves change in category and seniority of the applicant. The applicant while working as Khalasi at Chunar under Assistant Engineer, Chunar came to know of the vacancy of the Office ~~G~~ ^{Khalasi} Clerk in the office of Assistant Engineer, Chunar. He applied for the same and his case was considered by Senior Divisional Engineer (I). He was posted as Office Khalasi vide order dated 3.8.91 (Annexure-A-6). Respondents have averred that this posting was for a limited period against the work charged post sanctioned on Extra Labour Application (ELA) for a period of 12 months and there was no regular vacancy. We have carefully gone through the order dated 3.8.91. Though the order does not specifically mention the sanction of the post for 12 months, but considering the contents of this order and the facts and circumstances

as emerging from the rival contentions, we are inclined to subscribe to the version of the respondents on the following reasons :-

(a) The letter dated 3.8.91 though does not specifically refer to the sanction of the post for 12 months but it mentions approval of Extra Labour application (ELA), ~~sanction~~ signifying that the posting was against work charged post. The applicant has not specifically controverted the submission of the respondents and also ~~has~~ has not brought any documentary evidence or record ^{to show} that he was posted as office Kahalsi against a regular vacancy.

(b) If there was a regular vacancy of the office ~~at~~ Khasi, we presume that the same would have been filled up by inviting applications ^{the} from eligible Khasis. This presumption is being made as the respondents are silent on this issue and that fact the grade of the two posts is the same. The applicant has stated that he applied for the post when came to know of the vacancy. It means no body else was considered and no applications were called for. Appointment of the applicant in the manner made cannot be ~~as~~ regular. The procedure followed for posting the applicant clearly demonstrates that posting of the applicant was on a ~~adhoc~~ basis.

(c) The applicant in para 4 (X) of the application has averred that as per Railway Board circular dated 9.9.69 (A-2), Divisional Railway Manager (DRM) is the competent authority to allow the change of category. In view of this, the transfer order dated 4.8.92 which he alleges involves change in category ~~is~~ ^{and} issued by Divisional Engineer is therefore illegal. The applicant has admitted that, he was posted

as office Khalasi ~~with~~ the approval of Senior Divisional Engineer. Going by his own submissions, his change of category from Khalasi to office Khalasi ~~is~~ required ^{as office clerk with} DRM's approval. Therefore his posting ^{as office Clerk with} Senior Divisional Engineer was against the rules. However since the therapproval of ^{Senior} Divisional Engineer was against the rules. However since it suited the applicant, he did not raise any objection but now he has challenged the transfer alleging change in category from office Khalasi to Khalasi being not ordered by the competent authority. These facts lead us to subscribe the contention of the respondents that ~~since~~ the posting of the applicant as office Khalasi was for a limited period on adhoc basis and in view of this, the approval of the competent authority was not taken. In view of the above reaons, we are of the view that applicant was posted Office Khalasi for a temporary measure against Work charged post for a limited period. He does not acquire lien or right on the said post and his posting back as Khalasi involves no illegality or violation of the extant rules.

13. The applicant has also assailed the transfer order on the allegations of malafide against respondent No. 3. Sri Sanjeev Lohia, Divisional Engineer ^{who} has been made as respondent No. 3 by name. We find that no counter reply has been filed by him. The applicant has pleaded that since respondent No. 3 has not filed the counter reply denying the allegations of malafide the same stand proved because, the formal denial of malafide by the department is inconsequential. He has cited in support of judgement in case of "C.S. Manral Vs. U.O. 1986 Administrative Tribunal cases 587. We have

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carefully gone through this judgement and are in respectful agreement with what is held in this judgement that for non refutal, the allegation of malafide should be held proved. However it is to be seen whether the grounds advanced alleging malafide are sufficient to deem the same as proved in case of non denial. The only averment made alleging malafide is that one day he was asked to work at the house of the respondent No. 3 but the applicant refused. The applicant has not given any details with regard to the date and whether order was oral or in writing and the applicant refused in writing or verbally. This is just a bald statement with no supporting evidence. In the absence of the date, it is difficult even to correlate with the transfer order. The ground advanced is too flimsy to have even suspicion of malafides. Therefore though the respondent No. 3 has not filed reply refuting the allegation but we are of the view that the ~~basis of~~ ^{grounds of} alleging malafide as the basis for his transfer ~~is~~ ^{are} not convincing.

14. Another ground advanced by the applicant is that juniors have been allowed to continue as office ^{Khalasi} ~~Clerk~~ while he has been posted out as Khalasi in violation of Railway Board instructions vide letter dated 27.7.1966 (A-3). The applicant has just given the names as Sh. Mohamad Kalim and Sh. Kapil Nigam. No other details have been disclosed with regard to their date of posting and the seniority list. The respondents have denied this stating that these two employees are working as Khalasi and not as office Khalasi. In the rejoinder reply the applicant has simply denied this submission without furnishing any details to support his denial. In view of this, we accept the version of the respondents and unable to find any merit in this ground also.

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15. Keeping in view the deliberations in para 12, 13, 14 above, none of the grounds advanced challenging the impugned transfer order being arbitrary and illegal as it results in change in category and seniority unit of the applicant survive.

16. Now we come to challenge of the impugned transfer order on the ground that applicant being scheduled caste employee, the transfer is in violation of the Railway Board policy instructions contained in letters dated 19.11.70, 10.2.74, 14.1.75 and 16.8.78. The applicant has cited the following case laws in support of his submissions:-

(i) R. Nanoo Vs. DRM Trivendrum (1989) 10 ATC 137

(ii) S.S. Verma Vs. U.O.I. (1993) 23 ATC 596

(iii) B.S. Verma Vs. U.O.I. (1994) 26 ATC 313

(iv) G. Prabhakaran Vs. D.R.M. S.C. Railway (1995) 29 ATC 45

(v) Judgement of Allahabad Bench Harish Chandra Vs. U.O.I? O.A. 725 of 1995 and Gulab Chand Vs. U.O.I. in O.A. 672 of 1995.

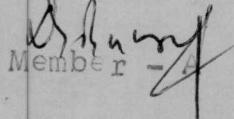
We have carefully gone through these judgements and are in respectful agreement with what is held in these judgements, that the government is bound by its own guidelines and the transfer of the scheduled caste and scheduled tribe employees is to be done ~~for~~ very rarely and for very strong reasons only. The applicant is entitled for protection against the transfer in terms of the circulars of Railway Board until and unless the respondents are able to bring his case within the ambit of letter dated 14.1.75 and other letters referred to above. As brought out earlier

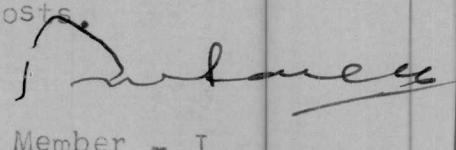
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earlier, the issue challenged in the application is not a straight case of transfer. The transfer is incidental. The main issue is that the applicant's category has been changed from office Khalasi to Khalasi. We have already recorded our findings on this aspect that this relief is devoid of merit. Once it is established that there is no illegality in the posting of the applicant back as Khalasi then the transfer is inherent in being posted as Khalasi. It is not applicant's case that he, even if he is to be posted back as Khalasi, he cannot be posted out of Chunar and entitled of protection as per the Railway Board circulars being ^{employed} schedule caste. Though the applicant has advanced these grounds through the supplementary affidavit but no modification to his reliefs prayed for has been done. The relief still remains that the transfer order be cancelled and the applicant be allowed to continue as office Khalasi. Since we find no merit in his prayer to allow him to continue as Office Clerk and no specific prayer that even if he is to be posted as Khalasi he should be posted at Chunar, we are of the opinion that this ground of challenge does not survive.

17. In the premise of the above discussion, the application is devoid of any force and substance and the same is dismissed. No order as to costs.


Member - A


Member - J

Arvind.