Reserved

CENTRAL ADMINISTRATIVE TRIBUNAL
ALLAHABAD BENCH, ALLAHABAD.

Allahabad, this the 24th day of May 2005.

QUORUM : HON. MR. D. R. TIWARI, A.M.

O.A. NO. 1054 of 2003

Vinoy Kumar Singh, aged about 34 years, Son of Harendra Prasad Singh, R/O 864, C.D.Shastri Colony, Mughalsarai (Chandauli).

…….. ……..Applicant.

Counsel for applicant : Sri K.K. Mishra.

Versus

1. The Union of India through the General Manager, East Central Railway, Hazipur.
2. General Manager(P), East Central Railway, Hazipur.
3. Divisional Railway Manager, East Central Railway Mughalsarai (Chandauli).
4. Senior Divisional Personnel Officer, East Central Railway, Mughalsarai (Chandauli).
5. Senior Divisional Commercial Manager, East Central Railway Mughalsarai (Chandauli).

…….. ……..Respondents.

Counsel for respondents : Sri K.P. Singh.

O R D E R

BY HON. MR. D.R. TIWARI, A.M.

By this O.A., filed under Section 19 of the A.T. Act, 1985, the applicant has prayed for quashing of the impugned order dated 4.4.2003, passed by the Respondent No.2 qua to the applicant (Annexure-A1).

2. Shorn of details, the relevant factual matrix to decide the controversy is that the applicant, at the relevant time, was working as Ticket Collector at Mughalsarai junction of East Central Railway. While working as Ticket Collector at Mughalsarai, the applicant was transferred from Mughalsarai Division to Samastipur Division by Respondent No.2. It has been submitted that the

impugned order dated 4.4.2003, passed by the Respondent No.2, has been communicated to the applicant vide order dated 8.4.2003, passed by the Respondent No.4 (Annexure A-2). Against this transfer order, the applicant's wife and his mother represented to the competent authority vide their letter dated 19.7.2003 and 10.7.2003 respectively for cancellation of transfer order of some of the applicant.

3. Being aggrieved by the above transfer order, the instant O.A. has been instituted by the applicant. The Respondents filed the C.A. and the applicant had also filed the rejoinder affidavit. The impugned order has been assailed on the following grounds :-

i) The O.A. has been challenged firstly on the ground of arbitrariness, discrimination and colourable exercise of powers.

ii) It has been submitted that the order is in violation of statutory provisions of Rule 226 of Indian Railway Establishment Code which provides that inter-Division transfer can be ordered by the General Manager and not by Respondent No.2. The case of Devendra Nath Bag Vs. Union of India and others, 1989 ATC(2) of Calcutta Bench has been relied upon in this connection. It has also been submitted that inter-Division transfer cannot be passed except in exigencies of service.

iii) Certain factual aspects have also been made the basis of challenge by showing that two similarly indicted employees in the complaint of S.P.(GRP), Allahabad do not figure in the impugned transfer order and thus, it suffers from vice of discrimination. It has also been mentioned that his name did not even figure in the complaint of the S.P.(GRP), Allahabad.

iv) It has also been argued that the instant transfer is penal in nature as the applicant will lose his seniority in the new division resulting in delayed promotion. Moreover, the foundation of

impugned order is on misconduct which casts stigma and consequently punitive in nature.

v) The applicant has refuted the claim made by the Respondents in their C.A. that the basis of transfer is public complaint whereas nothing is on record to prove the said allegation.

vi) It has been pleaded that confirmation of the interim order of the Tribunal by the Hon'ble High Court in the case of Anil Kumar Singh Vs. U.O.I. in O.A. No.663/03 shows that the transfer of the applicant was not proper and not on administrative ground. The High Court displayed its displeasure when it observed as under :-

"The petitioner was asked by the Court vide order dated 23.7.2003 to file an affidavit explaining as the Respondent was facing a criminal trial and charge sheet has been filed in the criminal court. Why the authority could not muster courage to initiate enquiry against him. An affidavit has been filed saying many things without replying the questions put to the authority."

It has been further pleaded that no transfer should be ordered when some disciplinary or criminal cases are pending against the official. In support of his submission, he has relied on the case decided by the Principal Bench in the case of Jasbir Singh Vs. Union of India - 2003(1) ATJ 267.

Additionally, some more grounds have been taken up in Para 5 of the O.A. However, I shall examine only those grounds, which have been stressed during the course of arguments.

4. The Respondents, on the other hand, as stated above, have filed the Counter Affidavit wherein it has been submitted that the transfer order of the applicant had been made by the Competent Authority and the same was communicated through G.M.(P) ECR, Hazipur vide office order No.357/2003 Docket No.ECR/HRDPOS, 383 COMML. Dated 4.4.2003. It has been further

submitted that based on letter dated 4.4.2003, Senior D.P.O., E.C. Railway, Mughalsarai has issued Office Order No.366/2003 dated 8.4.2003. It is, thus, clear that on the basis of letter dated 8.4.2003, issued by Sr. D.P.O., E.C. Railway, Mughalsarai, Senior D.C.M., Mughalsarai has simply advised Chief Inspector of Tickets, Mughalsarai that the staff concerned, who are on order of transfer, are to be spared with immediate effect. They have contended that the settled legal position is that transfer is an incident of service and who should be transferred where, is a matter for appropriate authority to decide and they have placed reliance on the judgments of Apex Court in the case of Gujrat Electricity Board and others Vs. Atmaram Sunjomal Poshani, Mrs. Shilpi Bose Vs. Union of India and Union of India Vs. S.L. Abbas.

ii) It has been submitted that a confidential report of the Superintendent of Police (Railway), GRP, Allahabad was formulated and after in-depth inquiry, the applicant, along with others, recommended for inter-division transfer without attaching any stigma. It has been further submitted that the transfer order has been made on administrative ground on the basis of the complaint made by the public regarding illegal money extortion and this contention has been supported by many decisions of the Court/Tribunal cited in the C.A. It has been further argued that the question of transfer from one Division to another Division and consequential effect, if any, has been considered in the case of R.K. Bhatnagar Vs. Union of India & others (1984) Vol.I SLJ 261 wherein it was held that seniority of applicant on transfer to the other Division will be fixed on the basis of length of service and the applicant cannot make a grievance.

iii) It has been finally pleaded that points raised by the applicant are frivolous meriting rejection as the transfer order has been passed by the Competent Authority in accordance with rule and is a valid order which does not suffer from any legal

infirmity and the O.A. is devoid of merits and be dismissed.

5. During the course of the argument, Shri K.K. Mishra, learned counsel appearing on behalf of the applicant, relied on the following judgments in support of his contention :-

a) Sri Sanjay Namdevrao Dhakre Vs. Divisional Manager (OPR) Central Railway, Bhusawal & others. 2004(1) ATJ 328.

b) T.L. Gupta Vs. Union of India & others 2003(2) ATJ 658.

c) Kamlesh Trivedi Vs. ICAR & others ATC Vol.7 page 212(F.B.), decided on 27.4.98.

d) Jasbir Singh Vs. Union of India & ors. - 2003(1) ATJ 267.

The learned counsel commenced his argument with the observation of the Hon'ble High Court on the conduct of the respondents in the case of Anil Kumar Vs. Union of India in O.A. No.663/03 which is similar in nature arising out of the same impugned order in which case the Govt. approached the Hon'ble High Court in writ petition. From this, he tried to persuade the court that after exchange of affidavits, the observation of the Hon'ble High Court implied that the transfer order was certainly not based on the administrative ground. He also submitted that the confidential letter of the S.P., Railway, Alahabad, which was the basis for transfer of the applicant, supports the contention of the applicant that the transfer was not made on administrative ground. His second contention relates to the fact that the confidential letter of the S.P. Railway, Allahabad contains six names, who were allegedly involved in anti-social activities and were involved in many offences under the criminal law. He has submitted that even if it is assumed that the basis of transfer is the complaint, mentioned in the confidential letter, then also, the two employees namely, Harihar Prasad Singh and Vijay Kumar were given a favourable

treatment as their names do not figure in the list of officials to be transferred from one division to the another. By this argument, he concludes that the discrimination is writ large on the face of record as the applicant has been singled out for being transferred to another Division. The third limb of his argument rests on the fact that the transfer in the fact situation of this case, is certainly punitive in nature in as much as it is stigmatic. For this purpose, he placed strong reliance on the decision of Kamlesh Trivedi of the Full Bench, decided in the year 1998. The Full Bench was called into decide the various aspects relating to transfer. This judgment was delivered after review of various case laws of the Apex Court, High Courts and the Coordinate Benches. Finally, Para 12 of the Full Bench judgment, according to the counsel, is relevant, which is as under :-

> "Reliance upon the judgment in K.K. Jindal V. General Manager, Northern Railway (supra), to contend that every order of transfer must be preceded by an inquiry, we must at once say is misconceived..... What the court observed was that a finding of misconduct which attaches a stigma to a public servant cannot be arrived at without inquiry and any order of transfer based upon such a finding would be bad. This is made clear in paragraph 18 of that judgment where the court said :
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> .....Though transfer per se does not constitute a punishment, in certain circumstances it may be punitive. It would be so if ordered on reaching a conclusion that the person concerned is indulging in undesirable activities."

He also relied on Sanjay Namdevrao Dhakre (supra) decided by Mumbai Bench of the Tribunal wherein it was held that the applicant was transferred because he was involved in criminal court case and no opportunity of hearing was given - transfer order was quashed being punitive and in violation of principles of natural justice. He further relied on T.L. Gupta

(supra) decided by the Principal Bench, New Delhi wherein it was held that for any misconduct, disciplinary proceedings are to be taken and transfer is not the remedy - transfer order was quashed. He has also placed reliance on the case of Jasbir Singh Vs. Union of India & others - 2003(1) ATJ 267 wherein the Principal Bench considered the scope of Railway Board Circular dated 13.4.1967 regarding the transfer of the employee against whom disciplinary proceedings or criminal proceedings are pending. The Principal Bench has finally held that no transfer should be ordered in case of those employees against whom the above proceedings are pending and accordingly, in the above mentioned case, the Bench has quashed the order. His next limb of the argument was that the seniority of the applicant in case of inter-Division transfer, is bound to be affected. He submitted that seniority of group 'C' officials, to which the applicant belongs, is maintained division-wise. For this purpose, he relied on the Railway Board letter No.E(NG)I/68/SR6/28 dated 25.1.1969 which finds mention in the compendium on Transfer of Non-Gazetted Railway Servants - Master Circular No.24. Para 4.8 of the circular is as under:-

> "Transfer of Railway servants from one unit of seniority to another unit of seniority on administrative grounds except on promotion/due to shrinkage of cadre/legal requirements etc., should be ordered rarely and in public interest only e.g. in cases where the conduct on an employee is under investigation or where in the interests of the Administration it is considered that the Railway servant should be kept at another station. In such cases of transfer, the Railway servants so transferred are given protection of seniority, causing hardship to the staff awaiting promotion in the unit to which they have been transferred. Therefore, such transfers should be ordered only when absolutely inescapable. Where an enquiry is pending against the Railway servant, the same should be processed

expeditiously and the matter finalized as early as possible, so that the Railway servant may be transferred back to his original unit of seniority."

He concluded his argument by saying that O.A. deserves to be allowed on merit on the basis of the points made by him.

6. Learned counsel for the respondents Shri K.P. Singh, endeavoured hard to counter the claims/submissions made by the counsel for applicant. The following case laws in support of the argument has been relied upon by the counsel for respondents :-

a) Ramji Lal Chauhan Vs. Union of India & others - (1991) 16 ATC 372.

b) V. Thiagarajan Vs. Collector of Customs and Central Excise and 2 others, (1991) 16 ATC 734

c) A. Marimuthu Vs. U.O.I. and another (1990) 12 ATC 305.

d) Rajeshwar Prasad Singh Vs. U.O.I. and others. (1987) 2 ATC 368.

e) Mrs. Shilpi Bose and others, Vs. State of Bihar and others - AIR 1991 SC 532.

f) Union of India and others Vs. S.L. Abbas. AIR 1993 SC 2444.

g) Union of India and others Vs. Sri Janardham Debanath and Another - 2004(2) SLJ 446 SC.

h) State of Madhya Pradesh and another Vs. S.S. Kourav and others. - AIR 1995 SC 1056.

He has refuted the contention of the applicant that the Railway Board Circular dated 2.11.1998 puts an embargo on inter-Division transfers for Ticket Checking staff and other staff in the mass contact area. His argument is that instead of assisting the applicant in any way, it provides great assistance to the respondents. The subject itself stipulates inter-Divisional transfer of Ticket Checking staff and other staff in mass contact area. The said Railway Board Circular clearly provides that

the Ticket Checking staff detected to be indulging in mal-practices is required to be invariably sent on inter-Divisional and inter-Railway transfer as a matter of policy. As such, he has argued that the Railway Board circular dated 2.11.98 is a matter of policy and any staff of the category, mentioned therein, would be transferred to other division or other railways.

He has submitted that the transfer order on administrative ground on the basis of complaint from public is valid. In support of his argument, he relied on the decision of Tyagarajan, Marimuthu and Janardham Debanath (supra). The contention of the counsel for applicant that this transfer would be penal in nature as it would affect the seniority of the applicant, has been forcefully refuted by the counsel for respondents. He has further placed reliance on the Apex Court judgment in the case of Mrs. Shilpi Bose, S.L. Abbas and S.S. Kourav (supra) to contend that the transfer on administrative ground cannot be interfered by the Courts and Tribunals except when the transfer is vitiated by malafide or the transfer has been ordered in violation of statutory provisions. He has emphasized that in the fact situation of the case in hand, the applicant along with others were indulging in mal-practices, money extortion from passengers, anti-social and criminal activities. The cases have been registered in the appropriate courts for trial. In view of this, the Railway administration has taken a decision in the interest of smooth running of the administration to transfer the applicant from Mughalsarai Division to Samastipur division. It has been submitted that in serious cases of indiscipline, inter-divisional transfers are affected. In the present controversy also a group of TCs/TTs were reported to be working together for illegal activities and thus, their immediate transfer was necessary in public interest so that such serious incidents may not be repeated. Departmental disciplinary proceeding for serious offences will be initiated separately at the

transferred place as per extent rules. As such, the O.A. is devoid of merit and may be dismissed.

7. I have heard very carefully the counsel for the parties and given anxious consideration to the rival submissions made across the bar. I have also perused the records. I have also gone through the written arguments of the counsel for the parties. As per the request of the counsel for the parties, these written arguments are kept on records of O.A. No.663/03 as only one copy has been made available.

8. At the outset, I would like to put on record the settled legal position about the scope of judicial review in the matter of transfer on administrative ground and in the exigency of service. The Apex Court through various judgments has repeatedly held that transfer from one place to another place is an incident of service and employee has no choice in the matter. Whenever, a public servant is transferred, he must comply with the order, but if there be any genuine difficulty in proceeding on transfer, it is open to him to make representation to the Competent Authority for stay, modification or cancellation of transfer order.

9. From what has been discussed above, the following three issues emerge for consideration and adjudication :-

i) Whether the impugned order is in violation of Rule 226 of the Code ibid and its effect on seniority;

ii) The transfer order is discriminatory in as much as two others have not been transferred.

iii) Whether the impugned order is punitive in nature and stigmatic.

10. The question of the impugned order being in violation of the statutory provisions, need not detain me long although this argument has been forcefully pleaded in the pleading but during the course of the

argument, a very feeble attempt was made by the counsel for applicant at the stage of hearing and the argument of the respondents that the transfer order was passed by the Competent Authority and the same was communicated through the GM(P), ECR, Hazipur. On this score, the contention of the applicant is negatived and the respondents succeed. The issue relating to seniority has also been very forcefully argued by the counsel for the parties. It is true that Para 5.8 of the Master Circular provides that the transfer to another unit of seniority should not be resorted to in normal circumstances and should be ordered rarely and in public interest. It causes hardship to the staff awaiting promotion in the seniority unit to which the transferee goes and it further provides for transfer back immediately on completion of investigation etc. Be that as it may, this does not rule out transfer to another unit of seniority. The applicant is being transferred with same salary and status and gets the protection of seniority. Hence, the contention of the applicant cannot be sustained in law.

11. The next issue about this order, being discriminatory, is of vital importance. Counsel for the respondents argued that the transfer order issued is not entirely from the complaint of the S.P. Railways but the information about the undesirable employees has been checked up from other sources also. He contended that some other employees have also been transferred whose names do not figure in the confidential complaint, stated above. He argued that the list is not exhaustive and the administration is not bound to go by the said complaint alone. The fact remains that the applicant's name was definitely there and that perhaps was the basis for transferring him and non-inclusion of two other employees whose names figure in the complaint is discriminatory. The assertion of the respondents that other persons have also been transferred, does not absolve them from the charge of discrimination against the applicant. It appears to offend the equality clause of Article 14 of

the Constitution and it suffers from the vice of discrimination and arbitrariness. On this ground alone, the impugned order is liable to be quashed.

12. The next issue regarding the transfer being punitive and stigmatic requires a detailed examination. The contention of the counsel for respondents and his reliance on the judgments, cited supra, do not lend assistance to him. The judgments relied on him mainly relate to the transfer order on administrative ground and in public interest and the challenge to those orders have been based on the grounds of malafides or on the ground of violation of statutory provisions. On this count, no one can dispute the legal position settled by the decision of the Supreme Court that Courts and Tribunals are not Appellate Forum and cannot interfere in the matters of transfer except on the ground of malafides and violation of statutory rules. It may, however, be pointed out that the decision of each case is dependent upon its own facts and circumstances. In this connection, it is useful to quote the observation of the Hon'ble Supreme Court in Ambika Quarry Works etc. v. State of Gujrat and others :-

> "The ratio of any decision must be understood in the background of the facts of that case. It has been said long time ago that a case is only an authority for what it actually decides, and not what logically follows from it."

If one has regard to the above, one is required to decide the issues involved in each case. In view of this, I would like to hold that the impugned order of transfer, in the facts and circumstances of this case, is punitive in nature and at the same time very much stigmatic. The order has been passed after reaching a conclusion on the basis of complaint and an inquiry, which was conducted behind the back of the applicant. This is clear from para 5A of the CA. The General Manager, while disposing of the representation of the applicant in O.A. No.663/03, has stated that "after taking all

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aspects into consideration, and with judicious application of mind, I am of the considered opinion that the transfer of the applicant including other 06 TCs of Mughalsarai Division to other Division vide GM(P) HJP's E.O.O. No.357 of 2003, docket No.ECR/HRD/POS, 383 dated 04.04.2003 is proper in the overall administrative interest", a copy of which is at RA-2 of this O.A. Perusal of this letter leaves me in no doubt that the applicant has been transferred on the basis of a decision taken against him in an inquiry conducted behind his back and it certainly attaches stigma. I get support for this view from Para 12 of the decision in Kamlesh Trivedi (supra) wherein it has been held that "What the court observed was that a finding of misconduct which attaches a stigma to a public servant cannot be arrived at without inquiry and any order of transfer based upon such a finding would be bad". Besides, in this case, the criminal proceeding is pending against the applicant and his transfer to another Division is against the ratio of the decision of the Principal Bench in the case of Jasbir Singh (supra).

From the above, there is no doubt that the order is punitive in nature as the order was passed on the ground of alleged misconduct on the part of the applicant. This order is stigmatic for other reasons also. It is a matter of common knowledge that the transfer order and other related documents form part of the personal file and service book of the employee concerned. In this case also, these documents will find place in his personal file and service book and on future occasions at the time of his promotion, they are bound to result an adverse impact.

From the legal position, explained above, there is no doubt that the transfer order is stigmatic in nature, hence, punitive.

13. The impugned order may be examined from another angle to see as to how the order is on administrative grounds. Records do not disclose that

there has been demand from Samastipur Division. It is also not the case of the respondents that the applicant, with some other employees, has been declared surplus. It is also not shown that the applicant is holding any sensitive tenure post and on completion of tenure, he must be transferred. The observation of the Hon'ble High Court, on the conduct of the respondents in case of O.A. No.663/03 is pregnant with meaning when it implicitly disliked the transfer and desired that the respondents should muster courage for taking disciplinary proceeding commencing with suspension. It may be stated that it is not without any reason that the stay of the transfer order in the case of O.A. No.663/03, which arises from the same impugned order, was confirmed. Had it been based purely on administrative ground, the decision of the court could have been different.

14. The reliance of the respondents on Railway Board Circular dated 2.11.1998 appears to be misplaced as there is no whisper in the order about the conduct of the vigilance raid and the applicant being found indulging in mal-practices. Of course, Para 3 applies to staff other than the Ticket Checking Staff but the condition precedent for resorting to the said circular is the conduct of vigilance inquiry and a finding that the employee is found indulging in mal-practices. The scope of the said circular was examined by the Principal Bench in the case of Smt. Santosh Meena Vs. U.O.I. - 2004(2) ATJ 366 wherein the mal-practices, constituting misconduct, necessitating inter-Division transfer was discussed. Needless to say that the staff, who has been found indulging in mal-practices is to be transferred on inter-Division basis. I do not find from record that the applicant was found indulging in the mal-practices. Even the confidential complaint of the S.P. Railway, Allahabad does not mention any mal-practices and simply states that they have received complaint from the public and nothing is available on record to show the public complaint. As

such, the impugned order has been passed in violation of the above guide-lines - circular dated 2.11.1998.

15. Viewed from any angle, the impugned transfer order is not on administrative ground but appears to have been made on extraneous grounds and collateral purposes which is against the principles of natural justice. I have no hesitation in holding this transfer order as penal in nature as it is highly stigmatic. Hence, the order is liable to be quashed.

15. In the light of the reasons recorded above, the O.A. succeeds on merit and is allowed. The transfer order dated 4.4.2003 and sparing/relieving order dated 8.4.2003 are quashed and set aside qua the applicant. The respondents are directed to take necessary action in terms of this order, within a period of two months from the date of receipt of a copy of this order.

Cost easy.

A.M.

Asthana/