

IN THE CENTRAL ADMINISTRATIVE TRIBUNAL
CUTTACK BENCH: CUTTACK

O.A.No.418 of 2010
S.G.Kunwar Applicant
Versus
Union of India & Others Respondents

1. Order dated: 7.10.2010

C O R A M

THE HON'BLE MR. C.R.MOHAPATRA, MEMBER (ADMN.)

In order dated 19.01.2010 (Annexure-A/2), the applicant, in his present capacity as SSE, was transferred from Sambalpur to Kantabanji which order he assailed before this Tribunal in OA No. 28 of 2010 on the ground that he is left with two years of service to retire and as such, his transfer would seriously affect his interest for post retirement settlement and it will dislocate the study of his children, besides treatment of his dependent members. The matter was listed on 27.1.2010. Considering the submission of Learned Counsel for both sides, this Bench of the Tribunal while issuing notice to the Respondents, as an interim measure stayed the order of transfer till filing of the counter and as the applicant did not avail of the opportunity of making representation against the order of transfer, this Tribunal granted liberty to the applicant to make representation to the authority meanwhile with direction that the Respondents shall consider the said representation and pass appropriate order within one month from the date of receipt of such representation. Pursuant to the order of this Tribunal, applicant submitted representation under Annexure-A/4 dated 3.2.2010. As it appears from the record, the Respondents in order under Annexure-A/5 dated 9.3.2010 intimated to the applicant that as he was working in a sensitive post having transfer liability and that the transfer is made in administrative exigency, it was

10

-2-

not possible to cancel his order of transfer. By filing counter in the said OA, the Respondents also objected to the contention of the Applicant. Considering all aspects of the matter, this Bench of the Tribunal in order dated 6th May, 2010 disposed of the matter. Relevant portion of the order is quoted herein below:

2. Law is well settled by now that transfer being an incidence of service; 'who should be transferred and posted where' is a matter for the administrative authority to decide and, unless the order of transfer is shown to be clearly arbitrary or is done by *mala fide* or is made in violation of any operative guidelines or rules governing the transfer, the Court should not ordinarily interfere with an order of transfer of a Government Servant. In the case of **Silpi Bose v State of Bihar** (reported in AIR 1991 SC 532) it was held that 'where a competent authority issued an order transferring an employee with a view to accommodate another employee, then also the said transfer order cannot be interfered with by the Court'. In the case of **Union of India v S.L.Abbas** (reported in AIR 1993 SC 2444) it has been decided that 'who should be transferred where' is a matter for the appropriate authority to decide. In the case of **Union of India v H.K.Kirtania** (reported in 1989 (3) SCC 445) and **Gujarat Electricity Board v Atmaram Sungomall Pashani** (reported in AIR 1989 SC 1443) the Apex Court took the view that transfer of an officer holding a transferable post cannot be objected to and that the Authority is the best judge to decide to distribute and utilize the services of an employee. In the case of **State of Orissa v Kishore Chandra Samal** (reported in 1992 (2) SCALE 251) it has been held that where transfer is within the cadre with the identical responsibility, no objection can be raised against the transfer order. In the case of **State of Madhya Pradesh v S.S.Kourav** (reported in AIR 1995 SC 1056) it was held that Courts and Tribunals, not being the Appellate Authority to decide on transfer of the officers (made on administrative grounds); it should allow the wheels of the administration to run smoothly and that Courts/Tribunals are not to interfere in working of the administration. In the case of **Union of India v N.P.Thomas** (reported in AIR 1993 SC 1605) it was made clear that if the transfer is not in violation of any statutory rule there should not be any vested right available to an employee to continue in his original post. Similarly law is well settled that people are prone to making the allegation of *mala fide*/usually raised by an interested party (as in the instant case) and, therefore, in very many cases, the Hon'ble Apex Court cautioned that the Courts/Tribunal should not draw any conclusion unless such allegations are substantiated beyond reasonable doubt. On perusal of records, it is seen that except making bald allegation of *mala fide*, the Applicant has filed no

11 - 3 -

substantiating/incriminating materials even to draw the presumption that the power exercised by the Respondents in passing the order of transfer in any manner suffers the vice of *mala fide*.

3. But as stated above one point strikes to the judicial conscience for taking a liberal view in the matter, that is the impending date of retirement of the Applicant. The authority is endowed with power to dispense justice and mitigate the hardship caused to an employee. But it is seen that the applicant has approached this Tribunal without availing any such opportunity by way of making representation. Hence, liberty is given to the Applicant to make representation within 15 days hence stating all the points including his impending date of retirement for his posting against any of the vacancies lying at nearby places in case it is not found feasible to allow the applicant to continue in his present place. The Respondents to whom such representation is made is directed to consider the grievance of applicant favourably and pass appropriate order within a period of thirty days from the date of receipt of such representation. Till a decision is taken in the matter, the present order of transfer shall not be given effect to. This OA stands disposed of in the afore-stated terms. No costs."

2. As it further appears from the record, no representation was submitted by the Applicant as directed by this Tribunal in the order referred to above. Therefore, Respondents in letter under Annexure-7 dated 7.6.2010 allowed three days time to file any such representation the applicant wishes to make. Thereafter, applicant submitted representation addressing to Member, CAT, Cuttack Bench, Cuttack and approached this Tribunal in OA No. 355 of 2010 alleging that no order was passed on the said representation. The said OA was dismissed by this Tribunal. However, subsequently, by making representation under Annexure-A/8 applicant prayed for cancellation of order of transfer before his authority. The Respondents vide order under Annexure-A/10 dated 7.7.2010 passed order posting the applicant as in charge/SSE (C&W), Kantabhanji. Being aggrieved by the said order the present OA has been filed by the Applicant seeking to quash the order under Annexure-A/10 and to direct the Respondents to allow the applicant to continue at Sambalpur till 28th February,

124

2010 i.e. the date of his retirement. By way of interim order, he prayed for staying the order under Annexure-A/10 and to direct the Respondents to allow the applicant to continue at Sambalpur pending final decision on this OA. The matter was listed on 10th August, 2010 when on considering the submissions of the Learned Standing counsel for the Respondents that the applicant has meantime been relieved, this Tribunal while issuing notice to the Respondents rejected the prayer for grant of any interim order without considering the reply of the Respondents. The said order of this Tribunal was challenged by the applicant before the Hon'ble High Court of Orissa in WP (C0 No. 14287 of 2010. The Hon'ble High Court of Orissa disposed of the matter on 20.8.2010 with direction to this Tribunal to dispose of the present OA within a period of two months of production of the certified copy of the order dated 20.08.2010 of the Hon'ble High Court. The certified copy of the order dated 20.08.2010 was obtained by the applicant on 20.8.2010 and was produced before this Tribunal through Memo on 13.09.2010 by the Learned Counsel for the Applicant.

3. Respondents in their counter have stated that the applicant has miserably failed to prove that the transfer is an out come of any malice or violation of any Railway rule. Moreover, guidelines never prohibit the administration to transfer any person having less than three years to retire. Rather the same has to be adhered to as far as practicable and possible but not against the interest of the administration. Unless any transfer is clear violation of statutory rule and uprooting any family from their existence, court or tribunal should not interfere with that order as if being the appellate authority. It is obligatory on the part of the administration to post him any where in the interest of administration. In order to utilize the experience of the applicant for completing some

B 85~

uncompleted work he has been transferred to a nearer station i.e. Kantabanjhi. Hence no scope is left for this Tribunal to interfere in the order of transfer which is no way affecting the career of the applicant nor will cause any problem for his two daughters who are college going students and prosecuting their study at Bhubaneswar and Sambalpur. Further stand of the Respondents is that no employee is permitted to raise objection against continuance of other persons in a particular place for long period as it is the prerogative of the authority to decide who should be transferred where and at what point of time in the interest of administration. Besides the above, by placing reliance on Annexure-R/2, it has been maintained by the Respondents that the applicant is holding a sensitive post and persons holding sensitive posts are liability to be transferred within a period of two or three years. However the Respondents have contended that if the present transfer will cause any difficulty for the education of his children or treatment of his family members, he is free to seek retention of accommodation in his previous place of posting. In so far as supply of documents is concerned, by placing reliance on the letter dated 9.7.2010 of the Senior Section Engineer (C&W), Sambalpur it has been stated by the Respondents that the applicant had intentionally and deliberately refused to accept the letter dated 5.7.2010 with its enclosures. They have also brought to the notice of this Tribunal through the counter that applicant applied for leave from 9.6.2010 to 13.06.2010 (instead of 09.07.2010 to 13.07.2010 to the office in charge i.e. Senior Section Engineer (C&W) and left the office before the same was accepted. Accordingly the Respondents disputed the allegation of the applicant that he has not been served with the representation disposal order, transfer order or the relieve order. Accordingly, Respondents have prayed for dismissal of this OA.

M - 6 -

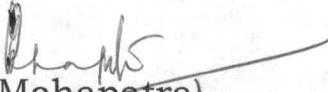
4. In course of hearing of the matter, Learned Counsel appearing for both sides emphasized on the points raised in the respective pleadings of the parties. I have considered the rival submission of the parties with reference to the materials placed in support of their pleadings. There is no doubt that transfer is an incidence of service and who should be transferred where is the prerogative of the authorities and no court/tribunal should interfere unless it is proved that the said order of transfer is an outcome of malice/mala fide exercise of power or that the order of transfer is in violation of the statutory rules. It is also not in dispute that the instructions issued by the Railway Board take the place of Rules; in other words it has the statutory force. By placing emphasis on the Railway Board instruction under Annexure-A/9 Learned Counsel for the Applicant submitted that as the applicant has only less than two years to retire, his transfer at the fag end of his service career that too without any complaint against him, is not sustainable and is liable to be set aside. Putting emphasis on the categories of posts mentioned in the order under Annexure-R/1 it was submitted by the Learned Counsel for the Applicant that the post in which the applicant is continuing does not come within any of the posts declared to be sensitive so as to face the order of transfer. This was disputed by the Learned Standing Counsel for the Respondents. But I am not inclined to go into such arena of consideration as it is not the duty of this Tribunal to determine/categorize which post comes under the category of being sensitive. Fact of the matter is that the applicant has less than two years to retire and Railway Board's instruction under Annexure-A/9 clearly prohibits transfer of an employee having 2/3 years to retire unless any complaint of his discharging of duties is noticed which is not the case of the Respondents. Looking at the contents of Annexure-R/1, *prima facie*, it gives an impression that the post in which the

L

15 - 7 -

applicant is working is a sensitive post at it clearly envisages that Section Engineer/Senior Section Engineer dealing with disposal of scrap is taken to be the sensitive post requiring transfer in every 2/3 years. Notwithstanding the above, it is a settled principle that when the language of the statute is plain and unambiguous, then the court must give effect to the words used in the statute and it would not be open to the courts to adopt a hypothetical construction on the ground that such construction is more consistent with the alleged object and policy of the Act/Rules. In this view of the matter, I do not see any justifiable reason to uphold the order of transfer especially when the same is contrary to the Railway Board's instruction which has the statutory force. Hence, the matter is remitted back to the transferring authority to re-examine the case of the applicant keeping in mind the observations made above and pass a reasoned order. Till such consideration is given in the matter, the Applicant shall be allowed to continue in his post at Sambalpur. The Respondents shall also consider the leave application of the applicant favourably and regularize the services of the applicant instead of subjecting him to any unpleasant situation adversely affecting his post retirement benefits.

5. In the result, with the aforesaid observations and direction this OA stands disposed of. No costs.


(C.R. Mohapatra)
Member (Admn.)