

**CENTRAL ADMINISTRATIVE TRIBUNAL
JODHPUR BENCH, JODHPUR**

Original Application No.212/Jodhpur/2013

Reserved on 16.04.2015

Jodhpur, this the 08th day of May, 2015

CORAM

Hon'ble Ms. Meenakshi Hooja, Administrative Member

Virendra Dugar S/o Shri Rameshwar Dugar, aged about 37 years, R/o 714, Opposite Chetan Photo Copy Shop, 1st C Road, Sardarpura, Jodhpur, at present holding the post of PRT and temporarily employed in Mechanical Branch (Power) of Divisional Office, Jodhpur NWR.

.....Applicant

By Advocate: Mr. J.K. Mishra

Versus

1. Union of India through General Manager, North Western Railway, Jaipur Zone, Near Jawahar Circle, Jaipur.
2. Senior Divisional Personnel Officer, NWR, Jodhpur Division, Jodhpur.
3. General Manager, South Eastern Railway, 11, Garden Reach Road, Kolkata-700043.
4. Shri Bir Singh Sumbrui, PRT/ Assistant Teacher, S E Rly MHSS (E/M), Chakradharpur (Jharkhand).

.....Respondents

By Advocate : Mr. R.K. Soni, counsel for respondents No.1 to 3.
Mr. D.S. Fedrick, counsel for respondent No.4.

ORDER

This OA has been filed under Section 19 of the Administrative

“(i) That the official respondents may be directed to forthwith send back the applicant to his previous Railway and on the post from which he was sent on void mutual exchange transfer i.e. as PRT/Assistant Teacher, SE Rly MHSS (E/M) Chakradharpur, (Jharkhand) by ousting the 4th respondent and allow all consequential benefits as if he were never transferred on mutual exchange transfer from SE Railway Chakradharpur to NWR Jodhpur.

In the alternative the 1st and 2nd respondents may be directed to absorb him on some suitable posts in Jodhpur Division of NWR, forthwith and will all consequential benefits including assignment of seniority as per his mutual exchange transfer as mentioned in letter of his utilisation (Annexure-A/4).

(ii) That any other direction, or orders may be passed in favour of the applicant which may be deemed just and proper under the facts and circumstances of this case in the interest of justice.

(iii) That the costs of this application may be awarded.”

2. Brief facts of the case as averred by the applicant are that he was initially appointed to the post of Primary Railway Teacher/ Assistant Teacher on 17.01.2007 at SE Railway MHSS (E/M), Chakradharpur (Jharkhand) and he was allowed mutual exchange transfer with one Shri Bir Singh Sumbrui, Assistant Teacher of North Western Railway Middle School Samdari in Jodhpur Division of North Western Railway. The requisite applications were obtained and submitted by him to his controlling authority and the same were duly forwarded to Senior DPO South Eastern Railway, Chakradharpur vide letter dated 19.12.2008 as at Annexure-A/1. The applicant was relieved for joining at Jodhpur on mutual exchange with respondent No.4 vide relieving order dated 10.11.2009 (Annexure-A/2) and the applicant reported for duty on mutual exchange transfer on dated 16.11.2009 to DPO office Jodhpur NWR. He was also told that he would soon be absorbed in personnel Branch on equivalent post. The applicant was also asked to submit his willingness to work in clerical cadre and he submitted the

order dated 08.02.2010 (Annexure-A/4) was passed by which he was temporary posted to work in Mechanical Branch (Power) for utilisation. By the same order, the respondent No.4 was also relieved on mutual exchange transfer. It transpired from the above letter that the respondent No.4 was relieved while holding the post of Assistant /PRT Teacher at Samdari. The applicant was to remain against special supernumerary post against clerical cadre equivalent post and his seniority shall be determined from the Teacher cadre and for this purpose one lowest post of clerical cadre shall remain freezed and he was given an impression that he has become surplus only after his mutual exchange transfer was finalised and he was also assured that he would soon be absorbed on an equivalent post and he in good faith followed the instructions and started working in Mechanical Branch. It has been further averred that in view of the rule of assignment of seniority on mutual exchange cases as envisaged in para 310 of IREM Vol.I, the applicant being junior (DOA – 17.01.2007) to the person (DOA-06.08.1997) with whom he has exchanged, would be entitled to get the seniority of his own. It has been further averred that in one of the recent communication dated 20.03.2013 obtained by another person under RTI (Annexure-A/5), the applicant has been shown as Surplus PRT and there has been no move for his absorption and the applicant has come to know that the school in which the respondent

his mutual exchange transfer and the Railway Primary School was closed in June 2009 along with other school and copy of the order dated 22.06.2009 of closure on Railway Primary School at Jodhpur and Railway Primary School, Samdari is at Annexure-A/6. Thus, when the applicant was ordered to be transferred, even earlier to approval of his transfer, the private respondent was surplus and thus he was not holding a post in any cadre. As per the rules in force when the posts were not vacant and staffs are working against the "special supernumerary", posts in the same grade should be created to accommodate the staff rendered surplus. In this way the 4th respondent must have been working against such supernumerary post but this fact was concealed from the applicant. The applicant met the respondent No.2 and apprised him that in as much as he was never surplus, and that he has neither been absorbed nor does he know on which post he is posted and what is his designation. It has been further averred that the mutual exchange transfer was void and non-est in the eyes of law since one can be allowed transfer only with a person who is holding a post in a cadre which the respondent No.4 was not holding at the relevant time. The respondent No.2 has done nothing in the matter and the applicant is faced with humiliation and frustration for none of his faults and his service career is being jeopardised and has therefore approached this Tribunal for redressal of his grievances

3. In reply, the official respondents No.1 to 3 have averred that the applicant applied with the respondent No.4 for his Inter Railway mutual transfer from Chakradharpur Division of South Eastern Railway to Jodhpur NWR on 12.05.2009. No objection for the said transfer was conveyed by NWR, Jaipur to SE Railway Kolkata on 02.09.2009 and SE Railway Head Quarter office Kolkata accepted the mutual transfer and issued necessary orders on 15.10.2009 and accordingly, the orders were issued by Chakradharpur Division of SE Railway to spare the applicant on 04.11.2009 and he was spared on 10.11.2009 to carry out his transfer to Jodhpur Division and he reported for duty at Jodhpur Division on 16.11.2009. Meanwhile, all schools over Jodhpur Division were closed and all posts of Teachers were surrendered on 05.11.2009. Consequent to such surrender of the posts, the Teachers were rendered surplus and were kept on 'Special Supernumerary' posts so created by taking into consideration circular dated 21.04.1989. On reporting of the applicant to Jodhpur Division, the respondent No.4 was spared to carry out his transfer to SE Railway on 08.02.2010 with whom his mutual transfer was accepted. It has been further stated that the applicant, at his own request, as per Annexure-A/3 was temporarily utilized in the cadre of Ministerial Staff in the Mechanical Power Wing and he is being allowed the benefit of his initially appointed pay band and grade pay i.e. Rs.9300-

It has been further averred that the acceptance of mutual transfer was much before the surrendering of all the post of teacher over Jodhpur Division. It has also averred that para 310 of IREM Vol-1, regarding rule of assessment and seniority of mutual exchange transfer is not applicable to the present controversy because the applicant became surplus on the count of closure of the school in the division on the date of his reporting on duty. The applicant is being utilized on special supernumerary post of a clerk in the ministerial cadre of Mechanical Branch (Power) purely on temporary and provisional basis and his seniority will be assigned only after his permanent absorption on cadre post. It has been further stated that similarly situated surplus teachers are being utilized in the ministerial cadre of different department purely on temporary and provisional basis even though they are much senior to the applicant. Therefore, the answering respondents are dealing with the matter in the light of Annexure-R/1 and as the applicant is not entitled for any relief(s) sought for by him in the OA the respondents have prayed for dismissal of the OA.

4. Private respondent No.4, in his reply has inter alia stated that the applicant and respondent No.4 applied for mutual exchange transfer accepting all the terms and conditions and further the applicant himself gave his consent vide letter dated 25.11.2009 (Annexure-A/3) to respondent No.2 that he is willing to work in same pay and grade in

Branch (P) DRM Office Jodhpur in pursuance of the order dated 08.02.2010 (Annexure-A/4) and now at this later stage, the applicant is stopped to raise any objection for mutual exchange transfer and further stated that the he himself (respondent No.4) is settled at Chakaradhapur with his family and has got all benefits of seniority, fixation, promotion etc. in this Railway from last three years. It has been averred that the applicant joined the duties in pursuance of the letter dated 08.02.2010 (Annexure-A/4) without any objection and is drawing salary continuously and further the applicant has never approached the authorities through any representation and directly filed this OA without exhausting the remedy of representation available under Section 20 of the Administrative Tribunals Act, 1985 and has therefore prayed for dismissal of the OA.

5. The applicant has filed a rejoinder reiterating the points raised in the OA and averred that Annexure-R/1 RB Circular dated 21.04.1989 has no application to the case of applicant as he was not a surplus employee and there is no question of his absorption as such. It has been also submitted that private respondent No.4 was declared surplus on 05.11.2009 and he was put on special supernumerary posts created for the purposes which was to lapse automatically on his absorption. The applicant joined at Jodhpur Division on 16.11.2009 and at that time there was no post of teacher available in Teacher cadre on which

applicant, the official respondents relieved the private respondent No.4 that too after joining of the applicant, considering him as if he were holding a regular post in teacher cadre and the applicant was considered as surplus instead and further averred that Railway servants can be transferred on mutual exchange from one cadre of a division, office or Railway to the corresponding cadre of a division. One cannot be transferred if one is not holding a post in a cadre. Thus the very mutual exchange became impracticable and in fact void. But the respondents did not follow the rules and all these grounds, the applicant has prayed for allowing the OA.

6. Counsel for respondents also filed MA No.48/2015 for taking on record letter dated 30.07.2014 by which the applicant has been incorporated in Mechanical/ Power Wing in pay band Rs.9400-34800 + 4200 grade pay against vacancies of 10% LDCE quota. The same was allowed to be taken on record.

7. Heard the parties. Counsel for the applicant contended that vide Annexure-A/1 dated 19.12.2008 the inter railway mutual transfer application of the applicant and of respondent No.4 was forwarded to Senior DPO South Eastern Railway Chakradharpur. The applicant was a primary teacher in the Railways and had sought his transfer from South Eastern Railways to North Western Railway and respondent

Eastern Railway. Further vide Annexure-A/2, the applicant was relieved on 10.11.2009 by South Eastern Railway and he joined at Jodhpur on 16.11.2009. He was waiting for his order of posting but then he was told that the schools in Jodhpur Division are being closed and under a wrong impression he gave his consent and willingness to be adjusted on the post of Clerk in same scale of pay and grade pay in Jodhpur Division and he gave his application dated 25.11.2009 as at Annexure-A/3. Thereafter, the respondent authorities issued letter dated 08.02.2010 Annexure-A/4 in which he was posted in the Mechanical Branch on a temporary basis for utilization purpose in view of the fact that all the posts in the cadre of Teachers had been declared as surplus. Counsel for the applicant contended that this order does not say anything about respondent no.4 having been rendered as surplus and the order further states that the seniority of the applicant and further promotion will be as per the seniority in the cadre of the Teachers. The applicant has got information attained by another person under RTI vide letter dated 20.03.2013 (Annexure-A/5) in which though the applicant has been shown as declared surplus PRT but there is no mention of respondent No.4 having been declared as surplus. Counsel for applicant emphatically contended that when there is no existing post then there is no provision for mutual transfer. He further referred to Annexure-A/6 which categorically states that the

allowed to join on 16.11.2009 and this fact of closure of School was concealed from the applicant. Referring to the MA No.48/2015 and the document dated 30.07.2014 filed along with it, counsel for the applicant contended that in this order the position of respondent No.4 has not been indicated but the applicant's name has been added at serial No.7, which shows that the order is not legally valid and even the reference to IREM Volume Chapter-3 para 313A for determination of seniority is not correct because that provision pertains to Medically decategorized staff. Counsel for the applicant contended that the acceptance of his mutual transfer is against the provisions of law and rules as he was allowed to join on a non-existing post and he prayed that the applicant may be repatriated to South Eastern Railway or in the alternative the applicant may be absorbed in Jodhpur Division of NWR with all consequential benefits of seniority as per mutual exchange transfer.

8. Counsel for the official respondents, per contra, contended that this case has two stages, one is of the mutual transfer and the second is of absorption and both have been finalized. The mutual transfer application of applicant and respondent No.4 are at Annexure-A/1 dated 19.12.2008 and as brought out in para 3 of the reply, that no objection for the transfer was conveyed by answering respondent No.1 to answering respondent No.3 on 02.09.2009 and the answering

04.11.2009. The answering respondent No.3 spared the applicant on 10.11.2009 to carry out his mutual transfer to Jodhpur Division and the applicant reported for duty on 16.11.2009. Counsel for respondents further submitted that all the schools of Jodhpur Division were closed and the said Teachers were rendered surplus and posts of teachers of the Jodhpur Division were surrendered on 05.11.2009 and on the basis of circular dated 21.04.1989 (Annexure-R/1), the respondents created 'Special Supernumerary' posts on the same date and the teachers were kept on Supernumerary posts till they are not absorbed in other Departments. The counsel specially referred to clause 1 (ii) and (vii) of the circular dated 21.04.1989 in this regard. In view of posts of teachers being declared surplus and supernumerary posts being created simultaneously, the mutual transfer cannot be said to be against the provisions of law. He further contended that as the applicant gave his willingness to join in the mechanical department on 25.11.2009 as may be seen from Annexure-A/3 and he was put on temporary utilisation vide Annexure-A/4 dated 08.02.2010 and has been absorbed vide order dated 30.07.2014 which has been filed with the MA No.48/2015 and with his absorption, all his rights have been protected including seniority as was also mentioned in the earlier order dated 08.02.2010 (Annexure-A/4). The applicant now cannot raise the issue again as the matter has become final and he has not challenged

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the absorption order dated 30.07.2014 and prayed for the dismissal of the OA.

9. Counsel for the private respondent No.4 contended that the applicant had already joined on 16.11.2009 as a consequence of his mutual transfer, but he has filed the OA on 19.05.2013 after a lapse of three and a half years and further he had already given his willingness to work in the mechanical department as may be seen from his letter dated 25.11.2009 (Annexure-A/3). He further pointed out that as may be seen from Annexure-R/2 filed with the reply of the official respondents, the respondents, in view of the closure of Schools, surrendered the posts of teachers on 05.11.2009 and created supernumerary post on the same day itself. The process of mutual transfer and subsequently of absorption of the applicant has already been completed and the respondent No.4 has joined at Chakradharpur, SE Railway. If his transfer is now set aside then he will face heavy loss as he has joined there more than 5 years ago. He further referred to circular dated 21.04.2006 (Annexure-R/4/1) which categorically provides that nobody can back track after forwarding of application for mutual transfer. He further submitted that the applicant has also not exhausted all the remedies as required under Section 20 of the Administrative Tribunals Act and did not even submit any representation rather he gave his willingness for being absorbed in

the clerical cadre and now he is challenging

the mutual transfer which has already materialized. In this connection he also referred the judgment of CAT, Principal Bench passed in OA No.77/2008 decided on 19.05.2013.

10. Rebutting the arguments of the counsels for respondents, counsel for the applicant contended that as stated by the respondents themselves, the posts of teachers were surrendered on 05.11.2009 and the supernumerary posts created on the same day itself, therefore the respondents had no right to allow the applicant to join to 16.11.209 but they deliberately allowed him to do so though no mutual transfer can take place against a supernumerary post. He further submitted that there is no limitation when an order is without jurisdiction and he referred to the judgment of the Hon'ble Apex Court in State of Madhya Pradesh vs. Syed Qamarali (1969 SLR SC page 228) As far as representation under Section 20 is concerned, he was posted in Mechanical Department vide order dated 08.02.2010 in temporary utilisation (Annexure-A/4) and was waiting for his final posting and there was no occasion to challenge the order dated 30.07.2014 (Annexure-MA/1) which was issued during the pendency of the OA and as far as loss to respondent No.4 is concerned, he contended there is in fact much greater loss to the applicant. Referring to order dated 30.07.2014 he referred to the provisions of determination of seniority under IREM Vol.I Chapter 3 para 313A which does not refer to

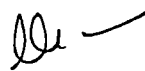
employee. He thus reiterated his arguments that since the post at the time of his joining, was not in existence his joining is not accordance with the provisions of law and he may be granted the reliefs sought for in the OA.

11. Considered the rival contentions of the parties and perused the record. It is noted that mutual transfer application was forwarded on 19.12.2008 (Annexure-A/1) and the mutual transfer was accepted on 04.11.2009 and further the applicant was relieved on 10.11.2009 and joined at Jodhpur Division on 16.11.2009. Due to closure of Schools, the posts of teachers were surrendered and Teachers declared surplus on 05.11.2009 and simultaneously supernumerary posts were created on 05.11.2009 (Annexure-R/2) and the respondent No.4 was transferred at South Eastern Railway on 08.02.2010. In view of the above, it can be said that the mutual transfer process was completed by joining of the applicant at Jodhpur and the respondent No.4 at Chakardharpur and as the process had started prior to the closure of the schools and the applicant joined on 16.11.2009, by which time supernumerary posts had already been created, the contention of the counsel for the applicant that the post did not exist at the time of joining of the applicant does not appear tenable. It is further seen that soon after joining on 16.11.2009 the applicant himself gave his willingness on 25.11.2009 (Annexure-A/3) to be taken in the

record to suggest that he made this application under some misleading impression. Further vide Annexure-A/4 he was given posting for temporary utilization in the Mechanical Department and now he has further been absorbed vide order dated 30.07.2014. Thus, from the above position it appears that the mutual transfer and allowing of the applicant to join at Jodhpur and relieving the respondents No.4 for Chakradharpur is not violative of any relevant provisions. Though it is the fact that the order dated 30.07.2014 regarding his final absorption has been issued during the pendency of the OA but with the issue of the order, which has been taken on record, process of absorption appears complete. However, it is noted that, as pointed out by the counsel for applicant that para 313 A of IREM Vol.I Chapter 3 of seniority referred in order dated 30.07.2014 does refer to medical de-categorized persons but this is not an issue for adjudication in this OA.

12. In view of the above discussions, there appears no ground to allow the reliefs sought in the OA and accordingly it is dismissed with no order as to costs.

However, if the applicant has any grievance with the absorption order dated 30.07.2014, he may represent before the competent authority in the respondent department and thereafter if any grievance remains he may file a fresh OA, if so desired, as per law.


(MEENAKSHI HOOJA)
Administrative Member

R/c

26/5/15

14/8/15

Recd
D.S. Fackrell
Adm
R/4

R/c
12/5/15