

CENTRAL ADMINISTRATIVE TRIBUNAL
ERNAKULAM BENCH

Original Application No. 276 of 2008

Friday..., this the 7th day of November, 2008

C O R A M :

HON'BLE DR. K B S RAJAN, JUDICIAL MEMBER

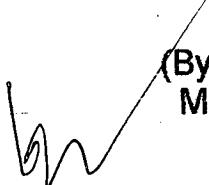
Asim Mishra,
S/o. Niwaran Chandra Mishra,
Senior Loco Pilot, C.C.R.C.,
Southern Railway, Erode,
Residing at Railway Quarters No. 382-B,
Railway Colony, Erode. ... Applicant.

(By Advocate Mr. Martin G. Thottan)

v e r s u s

1. The General Manager,
Southern Railway,
Headquarters Office,
Park Town, Chennai : 3
2. The Chief Personnel Officer,
Southern Railway,
Headquarters Office,
Park Town, Chennai – 3
3. The Senior Divisional Personnel Officer,
Southern Railway, Palghat Division.
4. The Divisional Personnel Officer,
Southern Railway, Salem.
5. P. Iyappan,
Assistant Loco Pilot,
C/o. C.C.R.C. Southern Railway,
Erode. ... Respondents.

(By Advocate Mr. Sunil Jose for R1-4 and
Mr. TC Govindaswamy for R-5)



The Original Application having been heard on 5.11.08, this Tribunal on 7-11-08 delivered the following:

O R D E R
HON'BLE DR. K B S RAJAN, JUDICIAL MEMBER

This case raises certain important questions of law and the same are as under:-

- (a) Whether a Railway employee who has applied for mutual transfer from one Railway to another, could get his application withdrawn on any plausible ground?
- (b) Whether mutual transfer is permissible between a reserved candidate and a general candidate?

2. Brief facts of the case: The applicant, a reserved candidate and native of Bhilai, Chhattisgarh joined the Palghat Division of Southern Railways as an Assistant Loco Pilot in the scale of pay of Rs 3050 – 4590 on 21-07-2003. Being eager to get posted nearby native place, he was searching for a companion for mutual transfer and could spot respondent No. 5 who was working as Assistant Loco Pilot at Solapur and who was willing to be posted at Palghat Division. Accordingly, mutual transfer applications have been filed by both vide Annexure A-1, sometimes in August, 2005. While the application for transfer was pending, the applicant in fact was

[Signature]

promoted as Senior Loco Pilot in the grade of Rs 4000 – 6000/-.

The changed circumstances coupled with lapse of sufficient time from the date of filing of the mutual application persuaded the applicant to withdraw his application for mutual transfer vide Annexure A-2 application dated 05-04-2007, addressed to DRM Palghat through proper channel. However, no communication was received in response to the above said Annexure A-2 representation. It was, however, at a later point of time that the applicant came to know that under pressure exerted by the 5th Respondent, the mutual transfer applications were being processed and hence, he had penned another representation dated 29-04-2008, enclosing a copy of his earlier representation dated 05-04-2007 reiterating his intention not to move out due to changed circumstances. Vide Annexure A-5 order dated 15.05.2008, the Divisional Personnel Officer Salem, under whose division, the applicant now is working passed the impugned order of transfer, without any reference to the request for withdrawal of transfer. The applicant has once again requested the Senior D.P.O./Salem Division, referring to his earlier communication dated 05-04-2007 requested for cancellation of his mutual transfer application. However, as there has been no response, the



applicant has moved this Tribunal, challenging the stiff attitude of the respondents in acceding to the request of the applicant for retention at his place of posting. Many a ground has been raised by the applicant one of which is that mutual transfers between a reserved candidate and a general candidate is not permissible under the existing rules. Annexure A-6 was relied upon.

3. Respondents have contested the O.A. According to them, mutual transfer requests are allowed with no loss or minimum loss of seniority. However, employees apply for mutual transfer jointly and later, one of them backs out after issuing orders even after one amongst two employees get relieved to join the new place. To curb this practice, the Railway Board has issued an order dated 21st April 2006 which reads as under:-

"2. Board have reviewed the matter and decided that as mutual transfers are ordered with the consent of both the parties, it should be made clear right at the time of forwarding applications for mutual transfer that no request for backtracking from the mutual exchange arrangement will be entertained under any circumstances. Strict adherence to this procedure may please be ensured."

4. In so far as the request of the applicant for withdrawal from mutual transfer is concerned, the same was not received by the 3rd

Respondents (para 6 of the counter). According to them, request of the applicant in this regard was received only in April, 2008.

5. The mutual transfer was accepted and the applicant and respondents were directed to be relieved vide Annexure R-2 and on the basis of the same, Respondent No. 5, after being relieved, reported to Palghat Division, vide Annexure R-3.

6. In so far as mutual transfer amongst reserved and general candidates, the Railways have brought out a clarification, vide Annexure R-4, which reads as under:-

"No. E(NG)1-2004/TR/16 New Delhi, dated 22.10.2007

The General Manager,
All Indian Railways.

Sub: Transfer from one Railway/Division/Unit to another Railway/ Division / Unit on request on bottom seniority and on mutual exchange basis.

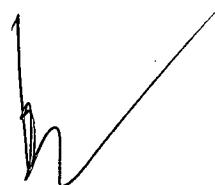
In terms of instructions contained in this Ministry's letter of even number dated 14.08.2007, mutual transfers have been restricted between employees belonging to the same community as the change disturbs roster points in post based roster. However, no restriction has been imposed on transfer on bottom seniority in recruitment grades. In the context of these instructions, the following doubts have been raised:-



- (i) Whether the restriction does not apply to employees belonging to OBCs as the same has not been mentioned in the instructions ibit; and
- (ii) Whether the restrictions on mutual transfer will apply when such transfers take place in recruitment grades.

2. The matter has been considered carefully and the same is clarified item-wise as under :

- (i) There being no reservation in posts filled by promotion for OBCs, the term 'General' should include OBCs also. In other words, staff belonging to General/OBC categories may contract mutual transfers with staff belonging to General/OBC.
- (ii) In view of the fact that the instructions do not impose any restriction on transfer on request on bottom seniority in recruitment grades mutual transfers in the recruitment grades will also be allowed without restriction provided:-
 - (a) the posts in the grade are entirely filled by direct recruitment from open market; e.g. The category of staff Nurse in grade Rs. 5000-8000, and
 - (b) in cases where posts in the grade are partly filled by promotion and partly by direct recruitment, both the employees seeking mutual transfer should have been recruited directly from the open market; the intention being that both of them should be borne in the post-based rosters maintained for direct recruitment. In other words, if one or both the employees are borne in the post-based rosters maintained for promotion, the restriction on mutual transfer as per instructions dated 14.08.07 will apply.



The receipt of this letter may please be acknowledged."

7. Respondent No. 5 has filed his reply, contending that there is no provision at all for withdrawal of application for mutual transfer. {Reference to order dated 21-04-2006 vide Annexure R-1 has also been relief in this regard, vide Annexure R-5(f) } In so far his case is concerned, in fact on the basis of applications made, he was first relieved to join Palghat Division as early as in September, 2006, vide Annexure R5-c, read with R5-a and R5-b but he has to be back to the parent railway as there was a stay of such mutual transfer between a reserved candidate and general candidate. However, later on, on the strength of Personnel Branch Southern Railway order dated 18th March 2008 (Annexure R-5(d) and order of its counterpart of Central Railway, vide Annexure R-5(e), the respondent was relieved and he joined duties at Palghat Division.

8. By a further Miscellaneous application the private respondent annexed a copy of application for transfer to Raipur by the applicant to show that the applicant is indeed interested in moving out of Southern Railway and thus, the reasons given in his



application for withdrawal of mutual transfer application are not true.

9. Counsel for the applicant argued that when the applicant applied for mutual transfer in August, 2005, he was holding the post of Asst. Loco Pilot in the scale of Rs 3050-4590. As there was no communication in regard to his mutual transfer on account of some legal issue involved relating to mutual transfers amongst reserved and general categories, he had promptly requested through proper channel for cancellation of his application. This was forwarded to senior DPO as could be seen from the endorsement made on it, vide Annexure A-2. Thus, there is no question of the same not having been received by Respondent No. 3 as alleged. Obviously, Respondent No. 3 failed to take action on the said representation. Had timely action been taken, this kind of a situation would not have arisen. Respondents alone are to be blamed for this. The applicant was promoted to the post of Sr. Asst. Loco Pilot in the grade of Rs 4,000 – 6,000 on 17-07-2007. Thus, he having moved from the direct recruitment post of Assistant Loco Assistant Pilot to promotional post of Sr. Loco Pilot, his posting to the lower post of Asst. Loco Pilot on mutual transfer



on the basis of his application, which was in fact sought to be withdrawn would be totally unjustified. Again, in so far as mutual transfer is concerned, the restriction that such a transfer could be considered on 'apple to apple' basis (UR including OBV to UR including OBC/SC to SC/ST to ST) applies by virtue of Annexure A-6 order. Thus, viewed from any angle, the action of the respondent is illegal.

10. Counsel for the official respondents argued that the applicant's request for mutual transfer contained an undertaking that he would not withdraw the mutual consent given. Thus, the applicant is precluded from making a request for withdrawal of his mutual transfer application, for the same is related not only to the applicant but also to the other who had given mutual consent for such a transfer. Annexure R-1 has also been heavily relied upon by the counsel for official respondents. As regards Annexure A-6, the counsel referred to the subsequent clarification which provided for a limited extent mutual transfer of SC and General Candidates if both of them belong to D.R.

A handwritten signature, possibly 'B.N.', is written in black ink in the bottom left corner of the page.

11. Counsel for private respondent submitted that Annexure R-4 provides sufficient latitude to accommodate mutual transfer of SC and General Candidates, and in this case, since both the individuals applied for mutual transfer in their post of Asst. Loco Pilot, which is a direct recruitment Post, there is absolutely no illegality in regard to such transfer. In so far as withdrawal of mutual consent, the counsel argued that since the application has been preferred jointly by the applicant and the private respondent, withdrawal also should be in the like fashion. In so far as the stand taken by the applicant, that he wanted to remain at Erode itself, vide Annexure A-3, as recently as in July, 2008 he has applied for transfer to a lower post at Raipur. Respondent No. 5 had already moved to Palghat Division in the wake of the transfer order. Further, vide M.A. 2 order dated 30-04-2008, the applicant was given an opportunity to participate in the test for a higher post than that he is holding and as such, no prejudice would have been caused to him by the transfer already ordered.

12. Arguments were heard and documents perused. Mutual Transfer amongst SC and General Candidate is not permissible. This is a general rule. However, when such a transfer is in the

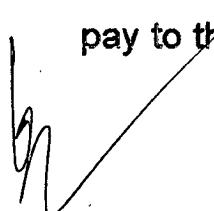
A handwritten signature in black ink, appearing to be a stylized 'H' or a similar character, is located at the bottom left of the page.

Direct Recruitment post, be it 100% direct Recruitment or partly by direct recruitment and partly by promotion, i.e. when both the individuals were appointed against the D.R. quota, the restriction be not applied. This is the purport of para 2 of order dated 22-10-2007 vide Annexure R-4. But in the instant case, this would have applied had there be no change in the position of the two mutual applicants. Whereas the private respondent is still functioning as Asst. Loco Pilot, the applicant has already moved to a higher post of Sr. Assistant Loco Pilot. With his move, he has entered into a different seniority zone and thus, he is not in a comparable post with reference to mutual transfer. The law on transfer is very clear.

In **V. Jagannadha Rao vs State of A.P. and Others (JT 2001 (9) SC 463)** the Apex Court has held as under:-

"Though definitions may differ and in many cases transfer is conceived in wider terms as a movement to any other place or branch of the organization, transfer essentially is to a similar post in the same cadre as observed by this Court in B. Varadha Rao v. State of Karnataka" (Emphasis supplied)

13. Though F.R. is not applicable to the case of Railway Employees, who are governed by a separate comprehensive set of rules, F.R. 15 does not permit transfer from a post carrying higher pay to that carrying a lower pay.

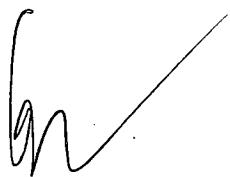
A handwritten signature in black ink, appearing to be a stylized 'H' or a similar character, is written over a diagonal line.

14. Thus, when the applicant stood promoted to the higher post, he cannot, against his willingness, be shifted to a lower post on mutual transfer on the basis of his application made by him at the time when he was holding a lower post.

15. That an undertaking to the effect that the person applying for mutual transfer would not withdraw his application certainly holds good so long as the applicant remains in that post and not when he stands promoted to a higher post.

16. In fact, even on unilateral inter divisional transfer or inter railway transfer accepting bottom seniority, where also, it takes time for such a transfer to materialize, before effecting transfer, the willingness or otherwise is being invariably asked for, the circumstances prevailing at the time when an individual who applied for such a transfer may not be subsisting to seek the transfer.

17. The so called undertaking to the effect that once applied, the application would not be withdrawn does not shut the doors of

A handwritten signature consisting of a stylized 'G' and a diagonal line.

such applicant to move application for withdrawal. In the case of ***Union of India v. Wing Commander T. Parthasarathy,(2001) 1 SCC 158***, the Apex Court has held as under:-

"9. The reliance placed upon the so-called policy decision which obligated the respondent to furnish a certificate to the extent that he was fully aware of the fact that he cannot later seek for cancellation of the application once made for premature retirement cannot, in our view, be destructive of the right of the respondent, in law, to withdraw his request for premature retirement before it ever became operative and effective and effected termination of his status and relation with the Department."

18. Again, it cannot be the case of the respondents that such a condition is inflexible, for, in an earlier case, they had accepted such an application for withdrawal and on the other individual being asked to go back to the parent Railways, the said individual moved the Tribunal but his application was rejected. On his further appeal before the High Court, the upheld the decision vide Judgment dated 30th January 2001 in OP No. 31697/2000 (S).

19. Counsel for the official respondents argued that the case of Wing Commander Parthasarathy is one of application for voluntary retirement and withdrawal of the same, and it did not affect any other individual, whereas, in the case of mutual transfer,



such a withdrawal affects the other individual. That may not be the case, for, if the mutual transfer is not agreed to, by the undertaking given, the individual would be prepared to accept transfer on request (bottom seniority transfer) vide the very pro-forma for mutual transfer. As such, not much of prejudice would cloud the other individual who had consented for mutual transfer.

20. Counsel for the private respondent submitted that there is a shift in stand by the applicant inasmuch as he has recently filed an application for transfer to Raipur to a low post. In fact it is highly doubtful whether such a request for transfer from a higher to a lower post would be permissible. For, an individual with higher pay scale, accustomed to a particular status should not even with his consent be permitted to take a lower post which would reduce his status.

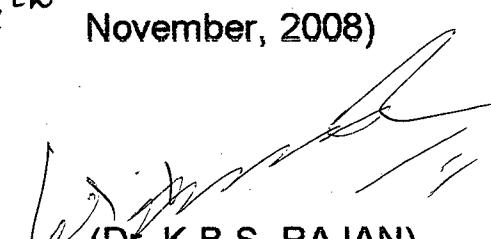
21. In view of the above, the O.A. is allowed. Impugned order at Annexure A-5 dated 15th May 2008 is quashed and set aside. It is declared that Annexure A-1 mutual transfer application has become infructuous. The applicant shall be allowed to continue to serve in the place where he is at present serving. Respondents

A handwritten signature in black ink, appearing to read 'G N'.

may consider retention of the private respondent at Palghat Division subject to his accepting the bottom seniority as on the date he had come and reported.

22. Under the circumstances, there shall be no orders as to costs.

(Dated, this the 7th November, 2008)


(Dr. K B S RAJAN)
JUDICIAL MEMBER

cvr.