

(L969)

IN THE CENTRAL ADMINISTRATIVE TRIBUNAL

NEW BOMBAY BENCH

O.A. No. 869/88
XXXXXX

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DATE OF DECISION 18.7.991

Shri J.L.Soni Petitioner

Smt. Indira Jaisingh with Mr.G.S.Walia.

Advocate for the Petitioner(s)

Versus

Union of India & Ors. Respondent

Shri M.S.Ramamurthy.

Advocate for the Respondent(s)

CORAM

The Hon'ble Mr. Justice U.C.Srivastava, Vice-Chairman,

The Hon'ble Mr. M.Y.Priolkar, Member(A).

1. Whether Reporters of local papers may be allowed to see the Judgement ? *Yes*
2. To be referred to the Reporter or not ? *No*
3. Whether their Lordships wish to see the fair copy of the Judgement ? *No*
4. Whether it needs to be circulated to other Benches of the Tribunal ? *No*

U.C. SRIVASTAVA
 VICE-CHAIRMAN.

BEFORE THE CENTRAL ADMINISTRATIVE TRIBUNAL
NEW BOMBAY BENCH, NEW BOMBAY.

Original Application No.869/88.

Shri J.L.Soni,
Flat No.3,
Janjira Chambers,
Wode House Road,
Colaba,
Bombay - 400 039.

... Applicant.

V/s.

1. Union of India
through Secretary,
Railway Board,
Rail Bhavan,
New Delhi.
2. The Secretary,
Railway Board,
Ministry of Railways,
Rail Bhavan,
New Delhi.
3. General Manager,
Western Railway,
Churchgate,
Bombay - 20.

... Respondents.

Coram: Hon'ble Shri Justice U.C.Srivastava, Vice-Chairman,
Hon'ble Shri M.Y.Priolkar, Member(A).

Appearances:

Smt. Indira Jaisingh with
Shri G.S.Walia, advocate
for the Applicant.

Shri M.S.Ramamurthy,
Counsel for the Respondents.

JUDGMENT:-

Dated: 18-7-1991.

(Per Shri Justice U.C.Srivastava, Vice-Chairman)

The applicant who has been in the service of the Western Railway from the very beginning was ultimately appointed as Additional General Manager (for short, AGM) vide order dt. 14.11.1986. Prior to that he was AGM (Operations) Southern Railway and was posted to Bombay by way of transfer. The applicant was appointed by the President as AGM in the grade of Rs.7,300-7,600 until further orders vide order dt. 18.11.1988. The applicant has already attained the age of superannuation in September, 1989 and some 11 months before retirement when the applicant says that he was in hospital the impugned transfer order

dt. 25th August, 1988 was issued transferring him from Western Railway to South Central Railway, Secunderabad as Chief Mechanical Engineer (for short, CME) which post was earlier held by him prior to his appointment as AGM.

According to the applicant the post of AGM is higher than that of CME as all the Heads of Department including CME have to report to the AGM (Operation). Against the transfer order applicant represented to the Chairman, Railway Board, New Delhi pointing out that his status was being reduced and that he was due to retire shortly and that it is the policy of the Government and the Railway Administration not to transfer an employee who is to retire within two years, which in his case was not being done. A fresh representation was again moved to the Chairman and as was done earlier, no reply to the same was given. After getting the transfer order he approached this Tribunal and filed the application on 27th October, 1988 on which date the instant application was filed by him.

2. The case of the respondents is that the applicant while working in the Senior Administrative Grade of IRSME was posted as AGM and he was paid in the Senior Administrative Grade which was revised w.e.f. 1.1.1986 and was further revised by the IVth Pay Commission. The appointment of the applicant as AGM made it clear that it was till further orders only and when the applicant was appointed as AGM of the Western Railway there were two AGMs and there were 17 posts of AGMs of different Railways. The Railway Board undertook the review of gazetted cadre with a view to restructure the posts of AGM and such posts were reduced from 17 to 9 i.e. one each on the 9 zonal Railways. In the context of this decision, instructions were issued to

define special role of the AGMs and the functions and responsibilities and powers located to the said office in the restructured set up. Thereafter the Government considered suitability of the persons to be posted as AGM on each of the 9 zonal Railways and accordingly 9 Officers were selected and an order dt. 25.8.1988 was issued by the Ministry of Railway Administration with the approval of the President posting the 8 selected Officers as AGM on different Railways, one having already been posted earlier. The applicant was transferred in the very same scale viz. Rs.7,300-7,600 as Principal Head of the Department and another person was selected as AGM who has now been impleaded as a party to the said application. The applicant got himself admitted on 24.8.1988 to hospital and on 12.9.1988 he submitted a sick certificate for five weeks. After 30th September, 1988 he was given the order stating that he was relieved to carry out the posting on the expiry of six weeks on 30th September, 1988. On that date he applied for five weeks further leave on medical grounds on the strength of certificate issued by the Superintendent St. George Hospital, Bombay. The applicant's representation was replied on 7th November, 1988 and he was told that his transfer was in public interest and the exigencies of services in the same grade as was enjoyed by him as AGM and that his transfer does not amount to demotion and is a simplicitor transfer order.

3. On 27th October, 1988 this Tribunal stayed the operation of the transfer order. The interim order was continued upto 10.11.1988. On 10.11.1988 the interim order was extended upto 18.11.1988. On 17.11.1988 after hearing the counsel for both sides taking into consideration the fact that the respondents were not satisfied with the

certificate submitted by the applicant he was asked to appear before the medical board vide letter dt. 4.10.1988, but the applicant did not appear before the Medical Board but appeared only on 15th November, 1988. The Tribunal by its interim order dt. 17.11.1988 taking into consideration also the case decided by Calcutta Bench of this Tribunal in Shanti Kumar Ghosh v. Union of India, A.T.R. 1987 (2) CAT 564, held that as far as possible an employee should be given the opportunity of spending last three years of his service in his home town as recommended in the IVth Pay Commission. It was observed that *prima facie* the transfer of the applicant from Bombay was not justified and accordingly it was directed that the respondents shall allow the applicant to work as AGM Western Railway till the disposal of this application. The matter came up for consideration again on 9.12.1988. Prior to that the respondents filed an application for implementing the order passed on 17.11.1988 as they intended to file a SLP before the Hon'ble Supreme Court of India, the reply was not filed on 30.11.1988. The respondents filed a Review Petition for reviewing the earlier order. At the close of arguments the learned counsel for the respondents suggested that the respondents are ready to keep the applicant as waiting for duty as per extant rules which were not produced. It was also clarified that the applicant shall be allowed to stay in Bombay in the same Railway Quarters in which he is residing and shall also be paid the same pay and allowances which he was drawing as AGM. Accordingly, the Tribunal passed the following order:

"The respondents are directed to treat the applicant as 'waiting for duty' from 28.10.1988. In other

words the respondents shall allow the applicant to stay in Bombay in the same Railway Quarters in which he is residing at present and shall also pay the same pay and allowances which he was drawing as Additional General Manager, Western Railway, Bombay. For the period from 26.8.1988 to 27.10.1988 the applicant has already been granted sick leave.

This order will be effective upto 31.1.1989."

The applicant in the meantime retired. On 3.1.1989 directions for production of record was given. Thereafter the case again came up for consideration on 17.1.1989 and then on 21.1.1989 certain hearings also took place. But it is clear that although the salary was paid to the applicant he was not placed on any duty. On 20.3.1989 the Tribunal after hearing the parties in its order also made the following observations:

"At the same time we desire to clarify, so that there would not be any mis-understanding that if the applicant finally fails, then the period spent on waiting for duty will be treated as leave of any kind due to the applicant."

The matter again came up for consideration on 14.3.1990 before another Bench of this Tribunal and the Tribunal after hearing the counsel of the applicant contending that the clarification mentioned above may prejudice the applicant's claim in the ultimate relief against the impugned order of reversion, held that any interim or interlocutory order including the clarification in question is capable of appropriate modification at the time of the hearing of the case on merits.

4. On the basis of the observations mentioned above given on the clarification it was contended on behalf of the applicant that the said clarification has been totally diluted and the said clarification given at that particular stage cannot now be taken into account while deciding the case finally and even if the applicant loses the period is not to be treated as leave. In view of the subsequent observation made by the Tribunal, the main question for consideration is as to whether the transfer order was valid

and the applicant was justified in not joining in pursuance of the Tribunal's Order to the post at the transferred place. From the appointment order it is clear that the applicant was appointed till further orders. It is as a result of restructuring he was made to lose the said post and was being sent to the post of CME as earlier when the applicant was appointed as AGM. Obviously, the position of AGM was considered higher than that of CME. It is true that the applicant has been transferred from the same grade and is transferred in the same grade and position which obviously carried the same salary is not equivalent in status and position to that of AGM and it does not carry the same responsibilities, or powers. His grievance was that he was wrongly being demoted. It appears that prior to the consideration of the applicant for the post of AGM after restructuring, the applicant was not aware of the fact that his suitability has also been considered and he was not considered suitable for the new AGMs post and that is why there was no AGMs post for him and that is why he was transferred to a post in the same grade and it seems that is why the applicant who all through has been stating that he was appointed by the President and after his appointment was approved by the Cabinet had the feeling that he was wrongly being deprived of higher post.

5. The applicant's grievance which he raised from the beginning was that he was due to retire and as a matter of a policy a decision has been taken that as far as possible a person who is to retire should not be transferred within a period of 2 years and should be allowed to stay at the place where he thus stayed and notwithstanding these

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instructions the applicant was transferred. According to him while transferring him complete go by to these instructions was given and he was not told anywhere as to how his retention at Bombay was not possible and for 11 months he is to go to Secunderabad. In B.Vardha Rao v. State of Karnataka and others AIR 1986 - S.C. 1955 the Court observed that the transfer is always understood and considered as an incident of service and that "it is well understood that transfer of a Government servant appointed to a particular cadre of transferable posts from one place to another is an ordinary incident of service and therefore does not result in any alteration of any of the conditions of service to his disadvantage. That a Government servant is liable to be transferred to a similar post in the same cadre is a normal feature and incident of Government service and no Government servant can claim to remain in a particular place or in a particular post unless, of course, his appointment itself is to a specified, non-transferable post." The case also mentioned the limited grounds on which a transfer order could be challenged. Regarding the guidelines in the matter of regulating transfer the Court observed that "the norms enunciated by Government for the guidance of its officers in the matter of regulating transfers are more in the nature of guidelines to the officers who order transfers in the exigencies of administration than vesting of any immunity from transfer in the Government servants."

6. In the case of Gujarat Electricity Board v. Atmaram Sungomal Poshani AIR 1989 S.C. 1433, the Court held as follows:

"Whenever, a public servant is transferred he

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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 the transfer order. If the order of transfer is not stayed, modified or cancelled the concerned public servant must carry out the order of transfer. In the absence of any stay of the transfer order a public servant has no justification to avoid or evade the transfer order merely on the ground of having made a representation, or on the ground of his difficulty in moving from one place to the other. If he fails to proceed on transfer in compliance to the transfer order, he would expose himself to disciplinary action under the relevant Rules."

In the instant case the applicant had made a representation and pointed out difficulties and also reminded that policy decision of non-transferring of an employee within the last two years. But the matter remained pending and representations have been decided after applicant had approached the Tribunal. It is true that applicant as such could not be said to be justified in not proceeding to the place of transfer but in the instant case the applicant's transfer came as a surprise to him and without previously appraising the fact that he has not been found suitable for the AGM's post and that second ground for him was that the post on which he was being sent was a position of lower status and position and this tantamounts to his reversion and that there was no justification for transferring him when he was about to retire within a period of 11 months. In this connection reference to be made to the observations made by the Supreme Court in P.K.Chinnasamy v. Govt. of Tamil Nadu and Others. A.I.R. 1988 S.C.78:

"It cannot be lost sight of that every public officer is a trustee and in respect of the office he holds and the salary and other benefits which he draws, he is obliged to render appropriate service to the State. The scheme postulates that every public officer has to be given some posting commensurate to his status and circumstances

should be so created that he would be functioning so as to render commensurate service in lieu of the benefits received by him from the State. If an Officer does not behave as required of him under the law he is certainly liable to be punished in accordance with law but it would ordinarily not be appropriate to continue an officer against a post and provide no work to him and yet pay him out of the Consolidated Fund."

Here in the case practically the same thing has been done and even the statement has been given that the applicant was treated to be waiting for duty, but no duty was given to him and salary was paid to him without doing any work.

8. Although the Tribunal granted interim order in his favour on 26th October, 1989 and the interim relief was not vacated, but he got licence for staying in Bombay and in the same Quarters because of the Railway Administration's decision to treat him for waiting for duty as was stated w.e.f. 20.10.1988. "Waiting for duty" which occurs in the Railway Establishment Code would only mean that a person who is in service may be by transferring him to a particular post or asking him to perform duty, but so long as duty or posting are not assigned to him will be treated as waiting on duty meaning thereby that he continues to be in service though he is waiting for assigning of duty. The applicant was thus so long as he did not continue to wait for duty meaning thereby continued as such till he attained the age of retirement, accordingly the applicant gets justification for getting the salary and not getting this period treated to be on leave without pay. But so far as the period prior to 20.10.1988 is concerned it appears medical leave for that period has already been granted to him. Thus the situation has been brought into existence by the respondents themselves who could have even

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disposed of the representation of the applicant earlier and could have given reply as to why in his case a policy decision regarding non-transfer of an employee in the last two years and allowing him to stay at the place where he has got his house as in the case of the applicant who has taken a flat in Bombay, the position would have been different.

9. Accordingly this application deserves to be allowed. As the applicant was granted leave and thereafter he was waiting for duty at Bombay and was allowed to stay in the Railway Quarter under the order of the Tribunal he will be deemed to be on duty and entitled to salary in accordance with the rules. The applicant may be entitled to full salary or part thereof during the period when he was on medical leave, but so far as the period which was consumed waiting for duty he will be entitled to full salary. If there is any period for which there was no leave, obviously, the applicant will not get salary for the said period. Let this payment be made to the applicant within a period of two months from the date of communication of this order.



(M.Y. PRIOLKAR)
MEMBER(A)



(U.C. SRIVASTAVA)
VICE-CHAIRMAN.