

IN THE CENTRAL ADMINISTRATIVE TRIBUNAL

NEW DELHI

O.A. No.
T.A. No.

328

1989

DATE OF DECISION

28/4/1989

Mr. S. Apparao

Petitioner

Mr. K.V. Suresh Menon

Advocate for the Petitioner(s)

Versus

DRM. SERI, Visithaparam

Respondent

M.N.R. Devanaj
Seri

Advocate for the Respondent(s)

CORAM

The Hon'ble Mr. B.N. Jayasinha, KC

(Sithi's Syle)

The Hon'ble Mr.

1. Whether Reporters of local papers may be allowed to see the Judgement?
2. To be referred to the Reporter or not?
3. Whether their Lordships wish to see the fair copy of the Judgement?
4. Whether it needs to be circulated to other Benches of the Tribunal?

for
BNT

ORIGINAL APPLICATION NO. 328 of 1989

(JUDGMENT OF THE BENCH DELIVERED BY HON'BLE B.N.JAYASIMHA)
VICE CHAIRMAN.

The applicant herein is a Shed Khalasi, Carriage & Wagon, Vizianagaram Shed, S.E. Railway, Vizianagaram. He has filed this application challenging the order No. WMG/07/2406 dated 9/10.4.1989 rejecting the appeal of the applicant for taking him to duty and dismissing his appeal dated 12.2.1989.

2. The case of the applicant is that he sought his transfer to Vizianagaram on loss of seniority by order dated 21/23.12.1974. He was transferred to Vizianagaram. During 1978 he was declared as surplus and transferred to Waltair in order to make room for those who were reverted from the post of Store Issuers. He was again transferred to Carriage & Wagon Shed, Vizianagaram with protection of his seniority by order dated 15.12.1980. Since then he has been working as Shed Khalasi in C & W Shed at Vizianagaram. The applicant was suspended by an order dated 19.11.1986 of the DME, Waltair in his proceedings dated 1/2.12.1986. Subsequently the suspension was revoked and disciplinary proceedings initiated through proceedings dated 11/16.12.1986. The disciplinary proceedings culminated by proceedings dated 16/19.12.1988 by imposition of punishment of stoppage of one set of his privilege pass for the year 1989. Simultaneously on 22.12.1988, the applicant was transferred to Kirundul. The applicant thereafter submitted

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a representation dated 28.12.1988 to the Senior DME, Waltair for cancellation of the transfer order issued. There was no reply to his representation till 12.2.1989. The applicant submitted another representation dated 12.2.1989 to the DRM, Waltair to which also there was no reply. Therefore, the applicant filed O.A.No.201 of 1989 in this Tribunal and the same was disposed of on 22.3.1989 with the orders to maintain status quo in regard to transfer of the applicant till the disposal of his representation dated 12.2.1989 by the DRM, Waltair. The order of the Tribunal was not implemented and the applicant was served with a Memo dated 10.4.1989 asking him to get the medical certificate counter-signed by the DMO, Vizianagaram. The applicant did so on 11.4.1989 and he was taken to duty on 11.4.1989. On the very same day the order of the DRM, Waltair No. WMG/07/2406 dated 9/10.4.1989 which is in reply to the applicant's representation dated 12.2.1989 was served on him. The applicant challenges the order dated 10.4.1989 of the DRM on the ground that the transfer order has been issued in conjunction with the disciplinary proceedings initiated in the year 1986 and ended in 1988.

3. I have heard Shri K.V.Subrahmanya Narsu, learned counsel for the applicant and Shri N.R.Devaraj, learned Standing Counsel for the Railways. Shri Subrahmanya Narsu challenges the order of transfer on two grounds: (1) that the order of transfer has been passed as a corollary to proceedings issued in 1986 and, therefore, it is punitive in nature and amounts to double jeopardy and (2) According to the impugned order itself, the transfer order has been issued because of the

undesirable activities of the applicant. This is, therefore, punitive in nature and the order could not have been passed without disciplinary proceedings. Both the learned counsel for the applicant and the Standing Counsel for the Railways have relied upon the decision of the Full Bench of this Tribunal reported in (1988) 7 ATC 253 (KAMLESH TRIVEDI vs. INDIAN COUNCIL OF AGRICULTURAL RESEARCH AND ANCTHER).

4. Point No.1: In the light of the ratio in Trivedi's case, the learned counsel for the applicant did not press this point. Point No.2: Before I consider this point it would be useful to quote below the relevant part of the impugned order:

" For sometime past your activities at Vizianagaram have been under watch and it is found that you are creating disaffection amongst the workers and causing obstruction to the normal work. Hence it is considered that your continued retention at Vizianagaram is causing harm to the interest of the Railway Administration. In these circumstances and after careful consideration of your appeal dated 12.2.1989, I have decided that the transfer order transferring you from Vizianagaram to Kirandul stands good in the interest of administration."

Shri Subrahmanya Narsu contends that the facts in the present case are similar to those in Jindal's case. He refers to para-14 of the judgment referred to above, wherein it is observed as follows :-

"The first portion of these observations, viz; "since the petitioner was occupying a sensitive post with public dealings, the respondents could perhaps have legitimately transferred him on administ-

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relative grounds on receipt of complaints" if often overlooked in placing reliance upon this judgment to challenge the order of transfer and only the latter portion of these observations is highlighted. All that this judgment declares is that a positive finding as to the misconduct cannot be given while ordering transfer and as any such finding would attach a stigma to the transferee, the transfer would in that sense be punitive. It would be further observed that the court did not lay down in that judgment that any order of transfer made consequent upon complaints should always be preceded by an inquiry. What the court observed was that a finding of misconduct which attaches a stigma to a public servant cannot be arrived at without enquiry 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:

The respondents in their counter have themselves come up with a specific allegation that he was indulging in "undesirable activities" and that he was not enjoying a "good reputation". It is thus clear that, but for these conclusions reached by the respondents in regard to the petitioner's conduct, they would not have transferred him. It is thus incontrovertible that the petitioner's transfer was not a routine administrative transfer to meet the exigencies of service. When the respondents themselves state that the petitioner was transferred because he was indulging in undesirable activities, that amounts to arriving at a positive conclusion as regards his conduct. Transfer ordered upon reaching such a conclusion cannot be said to be one made merely because of bad reputation but is one based on a finding as to the conduct of the petitioner which conclusion is not based on any enquiry conforming to Article 311(2) and the provisions governing disciplinary proceedings. Such a conclusion cannot be reached behind the back of the petitioner. 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."

Shri Subrahmanya Narsu points out that the transfer of the applicant is on the ground that he has been creating disaffection amongst the workers and causing obstruction to

normal work. This observation made in Jindal's case would in toto apply to the facts of the case. The learned Standing Counsel, however, submits that reliance should be placed on the observations made in the concluding part of the judgment which reads as follows :-

"In view of the above discussion, we hold that any order of transfer must be in public interest and in the exigency of service on administrative grounds. It must not be in colourable or mala fide exercise of power. It should not be arbitrary. It must be made by a competent authority in accordance with the rules and the instructions, if any, governing the transfer policy. But how far a transfer policy is mandatory, we express no opinion in this case. That must depend on the wording intendment of the instructions embodying the transfer policy. The transfer itself must be ordered by a competent authority in bona fide exercise of the power. It should not be a "fixed" transfer or for settling scores. However, merely because transfer is ordered on complaints or after an enquiry into the guilt of the employee, it cannot be said to be by way of punishment. The principle that "justice should not only be done but appear to be done" is not contravened if transfer is made without any further enquiry after a penalty is imposed in a proper disciplinary proceeding. It does not amount to a double jeopardy."

Shri Devraj states that viewed in the light of these observations, the contention that the impugned order is penal in nature nor that it carries any stigma, can be sustained. Merely because the order states that the applicant had been under watch and found creating disaffection amongst the workers and causing obstruction to the normal work, the order of transfer ipso facto does not become penal. The applicant cannot contend that he should not be transferred unless departmental inquiry is held for the purpose of proving

those observations. What is important is to see whether in the given facts and circumstances of the case and whether the order is punitive in nature the transfer is in public interest made purely in the exigencies of service. No allegation has been made that the DRM has passed the order out of ulterior motives or there has been colourable exercise of power.

5. I have given my careful consideration to these submissions. The Full Bench in para-15 of the judgment explained its decision in K.K.Jindal's case. It is stated that :

"It is clear that K.K.Jindal's case is not an authority for the proposition that when complaints are received and the exigencies of service require that a transfer be made, an enquiry must necessarily be held into the complaint before transfer is ordered. Nor did it lay down that if a transfer is made on receipt of a complaint, it would necessarily be deemed to be penal in nature. All that is laid down was that a finding as to misconduct and a finding which attaches a stigma to the employee not preceded by an enquiry and arrived at behind the back of the employee cannot form a valid basis for an order of transfer."

This has been further explained in paragraph-16 of the judgment where a reference was made to the decision of the Supreme Court in AMBICA QUARRY WORKS vs. STATE OF GUJARAT (AIR 1987 SC 1073):

" 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."

From the foregoing, it is clear that merely because there is some similarity between the present case and Jindal's case, the decision in Jindal's case would automatically apply.

The facts of the case have to be examined on its own merits and thereafter the principle laid down in Trivedi's case to be applied. It is true that the order states that the activities of the applicant have been under watch and it is found that he is creating disaffection amongst the workers and causing obstruction to normal work. This is the reason which prompted the DRM to order the transfer of the applicant. It is not the case of the applicant that the order had been issued out of malice^{or} to settle the scores. The main contention of the learned counsel for the applicant is that DRM ought to have initiated disciplinary action against him and not transferred him.

6. The Divisional Railway Manager has the responsibility for ensuring smooth running of the Railways within his jurisdiction. In the discharge of his managerial function, the DRM in exercise of his powers, is free to deploy persons working under his control in the best interest of the Organisation. If after observing the work and conduct of any employee, the DRM considers it appropriate to transfer a person from one place to another, he is only discharging the duty cast upon^{him}. I am unable to accept the contention that the applicant can only be proceeded with for disciplinary action and the transfer could not have been made. Nor can it be said that the order is a colourable or mala fide exercise of power by the DRM. Transfer is an instrument available to

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the authorities concerned to try and watch the performance of an erring employee at another place instead of resorting to disciplinary action. The contention that disciplinary action alone has to be initiated is not, therefore, tenable.

6. In the result, the application fails and is dismissed accordingly.

B. N. Jayasimha

(B. N. Jayasimha)
Vice Chairman

Dated ¹²28 day of April 1989

[Signature]
DEPUTY REGISTRAR (J)

24/4/89

TO,

1. Divisional Railway Manager,
South Eastern Railway, Visakapatnam.
2. Senior Divisional Mechanical Engineer,
(C&W) MDJ* S.E. Railway, Visakapatnam.
3. Divisional Mechanical Engineer,
S.E. Railway, Visakapatnam.
4. One copy to Mr. K.V. Subramanyam Naidu, Advocate,
H.No. 3-4-526/35, Barakatpura, Hyderabad.
5. One copy to Mr. N.R. Devaraj, Secy for Railways, Hyderabad.
6. ~~One spare copy.~~

10/12

[Signature]