

(2022) 11 CAT CK 0055
In the Central Administrative Tribunal
Case No : Original Application No. 159 Of 2019

Rohit Kumar

APPELLANT

Vs

Union Of India & Ors

RESPONDENT

Date of Decision : 25-11-2022

Acts Referred:

Administrative Tribunals Act, 1985 — Section 19

Citation : (2022) 11 CAT CK 0055

Hon'ble Judges : Om Prakash VII, Member (J)

Bench : Single Bench

Advocate : Shyamal Narain, Saurabh, A.D. Singh, L.S. Kushwaha

Final Decision : Dismissed

Judgement

Om Prakash VII, Member (J)

1. The present O.A. has been filed under Section 19 of the AT Act, with the following reliefs:-

i) Hold and declare that the application for mutual transfer moved jointly by the applicant and Sri Arvind Kumar Sahu/ respondent No. 6 in the year 2014 has become infructuous and not-est, and incapable of being acted upon being dehors the rules, order and policy on the subject of mutual transfers of non-gazetted Railway employees.

ii) Issue such other suitable orders or direction as might be found just and proper in the facts and circumstances of the present case.

iii) Award the costs of this Original Application in favour of the applicant throughout.

2. The brief facts emerges from the O.A. are that the applicant had entered into the Railway service on the post of Assistant Loco Pilot and he was posted on the Jhansi Division of the North Central Railway w.e.f. 10.4.2014. Applicant originally belongs from the Village Bihar Sharif, District Nalanda, Bihar. Accordingly, in the

year 2014, he moved an application, jointly with one Sri Arvind Kumar Sahu (respondent No.6) , who was then posted as Assistant Loco Pilot at Sagar and wanted to come to Jhanshi for transfer, on mutual exchange basis. It is further stated that earlier Shri Sahu had moved application for transfer to Jhanshi but had withdrawn his application for transfer and his application was cancelled by the competent authority on 5.10.2015. Applicant moved an application dated 18.8.2017 before the Divisional Railway Manager (Personnel)/NCR/ Jhanshi praying that his application for mutual transfer on exchange basis may be cancelled. Respondents vide letter dated 1.12.2017 (Annexure No. A-5 to the O.A.) conveyed that in view of the cancellation dated 5.10.2015 on the application moved by Sri Arvind Sahu, it was not possible to proceed upon any application for mutual transfer and Shri Sahu may be informed to move fresh application for mutual transfer.

3. Learned counsel appearing for the official respondents have filed Counter Affidavit, stating therein that withdrawal of application after 5 years is not permissible. It was further stated that earlier application moved by Sri Arund Sahu was cancelled on 5.10.2015 and he was advised to move fresh application. It is also stated that application dated 4.8.2017 has been forwarded for mutual transfer in triplicate by order dated 21.8.2017 and put up for approval to competent authority. It is further stated that competent authority accorded sanction for the same vide office letter dated 14.2.2019 about the acceptance of their application for mutual transfer. It is further stated that back tracking of application on mutual exchange arrangement will not be entertained as per railway Board letter dated 21.4.2006. It is further stated that in para 4(iv) of Railway Board letter dated 11.1.2019, it has been clearly mentioned "since mutual transfer are ordered with the consent of both the parties, it should be made clear at the time of forwarding application for mutual transfer that no request for back tracking from mutual exchange arrangement will be entertained under any circumstances.

4. Learned counsel for respondent No. 6 has also filed counter affidavit, in which it is stated that the present O.A. is wholly premature because regarding the mutual transfer which was processed by the official respondents vide letter dated 14.2.2019, no any final decision has been taken in the matter nor any final order has been passed. The applicant has filed the present O.A. merely on presumption that the mutual transfer of the applicant would be effected. It is further stated that no request for back tracking from the mutual exchange arrangement will be entertained.

5. Heard learned counsel for the parties.

6. Learned counsel appearing for the applicant argued that although the applicant had applied for mutual transfer with Sri Arvind Sahu, respondent No. 6 in the year 2014, yet no order was passed by the department concerned. It remain pending upto the year 2017. On 1.12.2017, an order was passed by the competent authority, directing respondent No. 6 to move a fresh application for

mutual transfer. Referring to the aforesaid order, it is next argued that this document itself reveals that prayer for mutual transfer has not been accepted by the department and it was treated as cancelled. It is further argued that in the meantime, respondent No. 6 was promoted. Thus, mutual transfer cannot be made unless respondent No. 6 gives an undertaking to absorb him on a lower post. It is next argued that the present O.A. has been filed with the apprehension that department concerned, in collusion with respondent No. 6, trying to obtain NOC and to give effect the mutual transfer, which was not in existence due to order passed by the respondents on 1.12.2017. It is further argued that mutual transfer order passed on 14.2.2019 (Annexure CA-4 to the Counter Affidavit), was not in the knowledge of the applicant. Present O.A. has been filed on 19.2.2019, hence there is no necessity to amend the prayer clause. To substantiate his arguments, learned counsel for the applicant referred to the prayer made in the present O.A. and argued that since entire circular/ guidelines annexed with the O.A. itself reveals that they were passed after moving the mutual transfer application. Thus, there is no question for back tracking, particularly when request for mutual transfer has been cancelled by the department itself. Referring to page 41(letter dated 1.12.2017 Annexure No. 5 to the O.A.), by which respondent No. 6 was directed to furnish a fresh application for mutual transfer and page 94 (letter dated 14.2.2019 (Annexure No. CA-4 to the Counter affidavit), by which it was informed that approval of the competent authority for the above mutual transfer has been obtained. It was next argued that both orders have been passed by the same authority. Therefore, respondents cannot back with his earlier order passed on 1.12.2017. Learned counsel for the applicant also referred to the documents annexed with the application and further argued that entire process adopted by the department concerned be quashed and declare the mutual transfer of the applicant as cancelled.

7. Learned counsel appearing for the private respondent No. 6 argued that since no cause of action has been arisen, no order has been passed at the end of the respondents on the date of filing of the O.A., the present O.A. is not maintainable. Order dated 1.12.2017 has no legal sanctity. Respondent No. 6 has no objection about the transfer order passed by the department concerned. He is ready and willing to obey the transfer order. Since the order dated 1.12.2017 has not been conveyed to the respondent No.6, therefore, no question arises to give undertaking. If the department directs to give undertaking as required under the guidelines, respondent No. 6 is ready to give undertaking. It was next argued that mutual transfer cannot be taken back, as the order of mutual transfer has been passed on the mutual consent of both the parties. Since the order passed on mutual transfer has not been challenged by the applicant in the present O.A., the O.A. is not maintainable. No relief can be extended to the applicant. Applicant has not withdrawn his application for mutual transfer. It is also argued that O.A. is time barred and no plausible explanation has been given by the applicant for delay. It is further argued that order passed on 1.12.2017 will not

affect the Board circular dated 22.9.2017. It is next argued that order passed on 1.12.2017 is not related to the competent authority. It is an irregular order and it has been rectified later on by the competent authority.

8. Sri Saurabh, learned counsel appearing for the official respondents referring to the written submission argued that irregularity caused by the department has been rectified and mutual transfer order has been passed. Since back tracking is not possible, therefore, plea taken by the applicant in the present O.A. is not liable to be allowed.

9. Referring to argument advanced by the learned counsel for respondents, learned counsel for applicant argued that no undertaking has been given by the respondent No. 6 in compliance of the circular/ guidelines. Therefore, transfer order is illegal. Mutual transfer application has already been cancelled. Therefore, no transfer order can be passed on the basis of such mutual transfer applications. There is no necessity to amend the prayer of the O.A., as the applicant has claimed relief for declaring the mutual transfer as cancelled. Due to this reason, Interim order has also been passed by this tribunal in favour of the applicant. Referring to C.A., it was argued that in written submission, some new facts has been made by the learned counsel for official respondents, although the same has not been mentioned in the O.A. There is general and vague denial of pleas taken by the applicant in para 4.13 and para 4.14 of the O.A. Both the orders have been passed by the same authority. No rectification order has been brought on record. Thus argued that argument advanced by the learned counsel for respondents is not tenable in the eyes of law. It is further argued that order issued in the year 2018 will not be applicable retrospectively as mutual transfer application has been made in the year 2014 itself. Guidelines/ Circulars have been issued in the year 2018. Thus, prayer was made to allow the application.

10. I have considered the rival submissions made by the learned counsel for the parties and gone through the entire record.

11. From perusal of record, it is admitted case that applicant and respondent No. 6 have given application for mutual transfer in the year 2014. His application was not considered till the year 2017. In the year 2017, vide order dated 1.12.2017, earlier request of respondent No. 6 for on request transfer was cancelled and he was directed to move a fresh application for mutual transfer. Again vide order dated 14.2.2019, competent authority has accepted the request of mutual transfer of applicant and respondent No. 6. However, the plea of the respondents is that back tracking of application on mutual transfer will not be entertained as per Railway Board letter dated 21.4.2006. It is further stated that in para 4(iv) of Railway Board letter dated 11.1.2019, it has been clearly mentioned "since mutual transfer are ordered with the consent of both the parties, it should be made clear at the time of forwarding application for mutual transfer that no request for back tracking from mutual exchange arrangement will be entertained under any circumstances." Learned counsel for respondents has also relied upon on the judgment passed by the coordinate bench of this Tribunal in O.A. No. 828

of 2018 decided on 26.4.2019, in which the Hon'ble Tribunal passed the following orders:-

"7. I) Applicant, an ST employee from South Central Railway has sought inter-railway transfer with an OBC employee of East Coast Railway. As the community of the two employees are different mutual transfer is impermissible as per Railway Board order 107/2007, which is reproduced as under:

"In the light of the above, Ministry of Railways have decided that in order to maintain the balance in the post-based rosters with reference to reservations prescribed for SC and ST staff and to avoid hardship to staff in the feeder grade in the matter of their promotion, transfers on mutual exchange basis should be allowed between employees belonging to the same category (i.e. General with General, SC with SC and ST with ST). However, transfers on bottom seniority in recruitment grades need not be restricted with reference to points in the post based rosters. The procedure being followed generally in this regard to adjust shortfall/excess in future may continue. But such transfers should be allowed only repeat only against vacant direct recruitment quota posts and not against promotion quota posts. The above instructions do not in any way alter the existing procedure as laid down by this Ministry regarding operation/maintenance of post-based rosters. {Board's letter No. E(NG)I-2004/TR/16 dated 14.08.2007(R.B.E. No.107 /2007) refers}."

The above order was issued to implement the judgment of Hon'ble High Court of Kerala in OP No.2150/02. The objective was to maintain a proper balance in the roster points and in order not to inconvenience the staff concerned. Applicant claims that since he is not eligible for further promotion he would not claim reservation henceforth. Applicant got selected in the respondents organisation and rose to the present grade based on policy of reservation. Applicant having made use of reservation till it served him and later discarding it when it does not suit him is not envisaged in any rule. Community based reservation is a National Policy. It has to be followed. Besides, the applicant has scope to be promoted as Asst. Divisional Engineer. Posting of officials of the 4 OA 828 /2018 reserved community nearer to their home towns has been envisaged by RBE 336/1985 to the extent practicable, implying other conditions have to be satisfied. The other condition in the present case is that the mutual transfer has to be between same communities. Besides, when the conditions of transfer are not satisfied forwarding the same to the competent authority would be an empty formality as the outcome is already known. It would be futile to pursue such empty formalities in the words of Hon'ble Apex Court in Haryana Financial Corpn. v. Kailash Chandra Ahuja,(2008) 9 SCC 31, the Apex Court has stated:-

40. In Aligarh Muslim University v. Mansoor Ali Khan (2000) 7 SCC 529 the relevant rule provided automatic termination of service of an employee on unauthorized absence for certain period. M remained absent for more than five years and, hence, the post was deemed to have been vacated by him. M challenged the order being violative of natural justice as no opportunity of

hearing was afforded before taking the action. Though the Court held that the rules of natural justice were violated, it refused to set aside the order on the ground that no prejudice was caused to M. Referring to several cases, considering the theory of "useless" or "empty" formality and noting "admitted or undisputed" facts, the Court held that the only conclusion which could be drawn was that had M been given a notice, it "would not have made any difference" and, hence, no prejudice had been caused to M."

II) Therefore, the plea of the applicant that an incompetent authority has rejected his application is invalid. Respondents have also stated that mutual transfer is permissible against direct recruit posts and not against promotional quota. Respondents have also explained in detail citing the educational qualifications of the direct recruit and as to why he is ineligible in para 3 of the reply statement with which we agree and requires no repetition. Applicant has also claimed that the East Coast Railway has approved the mutual transfer. The very nomenclature of the transfer is mutual. Unless it is approved by both the railways mutually the transfer cannot be termed as mutual transfer. Therefore both the parties have to agree to call it as an approved mutual transfer. Moreover, all 5 OA 828 /2018 zones of the Indian Railways will have to follow the same policy. It needs no reiteration that Indian Railway is a single entity and it follows one uniform policy laid down by the Railway Board. Hon'ble Supreme Court has made this emphatic in *Abid Hussain v. Union of India*, (1987) 1 SCC 532, which reads as under:-

"It is not disputed that the Air-conditioned Coach-In-Charges Attendants are being paid overtime allowances for extra duty hours exceeding 96 hours in two weeks in the Western Railway, Central Railway and Eastern Railway. There is no justification for denying overtime allowances on the same basis to the Air-conditioned Coach-In-Charges-Attendants in the Northern Railway. We accordingly direct the Union of India and the Railway Administration to pay with effect from July 1, 1984 the overtime allowances to the Air-conditioned Coach-In-Charges-Attendants working in the Northern Railway on the same basis on which the Air-conditioned Coach-In-Charges-Attendants in the other three Railways, referred to above, are paid. All arrears of such allowances up to date shall be paid as early as possible and in any event not later than four months from today. The benefit of this order shall be extended to all such employees including those who have retired and those who have not joined as petitioners herein."

Therefore the question of East Coast Railway following a different policy approving the mutual transfer against the Hon'ble Apex Court observation and the Railway Board order referred to does not arise. In addition is also noticed that the applicant has filed the OA without representing to the superior authorities, which he ought to have done.

III) Hence based on the aforesaid facts, as we find no merit to intervene on behalf of the applicant. Therefore the OA is dismissed with no order as to costs. MA 809/2018 stands disposed."

12. Learned counsel for the applicant has not challenged any order in the present O.A. and he has filed O.A. only on the presumption that respondents can pass any order on the mutual transfer application of the applicant and respondent No. 6 and seeking a direction to declare the mutual request application as non-est. The order dated 14.2.2019 (Annexure No. CA-4 to the Counter affidavit), by which it was informed that approval of the competent authority for the above mutual transfer has been obtained, has not been challenged by the applicant in the present O.A. by amending the O.A. The order dated 1.12.2017 by which respondents have informed the respondent No. 6 to file fresh application for mutual transfer has later on been rectified by the respondents issuing mutual transfer order dated 14.2.2019, accepting the mutual transfer of the applicant and respondent No.6. It is pertinent to mention here that order dated 1.12.2017 is an executive order, Back tracking has been banned as per railway Board letter dated 21.4.2006 and as per para 4(iv) of Railway Board letter dated 11.1.2019, it has been clearly mentioned "since mutual transfer are ordered with the consent of both the parties, it should be made clear at the time of forwarding application for mutual transfer that no request for back tracking from mutual exchange arrangement will be entertained under any circumstances." Thus, order dated 1.12.2017 will not have any overriding effect over the guidelines/ Railway Board circulars. Hence, no relief on presumption can be granted to the applicant.

13. Considering the facts and circumstances of the case and in the light of observation of order passed by CAT, Hyderabad Bench in O.A. No. 828/2018, since the mutual transfer of the applicant has been approved by the competent authority, thus back tracking is not possible. O.A. is liable to be dismissed.

14. Accordingly, the O.A. is dismissed.

15. There shall be no order as to costs.