
(2013) 04 CAL CK 0065
In the Calcutta High Court
Case No : W.P.C.T. No. 68 of 2013

Sukanta Mallick

APPELLANT

Vs

Union of India

RESPONDENT

Date of Decision : 09-04-2013

Acts Referred:

Citation : (2013) 3 CHN 49

Hon'ble Judges : Nishita Mhatre, J;Anindita Roy Saraswati, J

Bench : Division Bench

Advocate : Tapabrata Chakraborty, Ashok Chakraborty and Arpa Chakraborty, for the Appellant;Swapan Kumar Banerjee and Satparshi Roy, for the Respondent

Judgement

Nishita Mhatre, J.—These three petitions challenge a common order passed by the Central Administrative Tribunal, Kolkata Bench on 8th February 2013. The petitioners in these petitions are Sri Shyamal Sarkar, Sri Sukanta Mallick and Sri Ashish Kumar Mal who had respectively filed O.A. Nos. 712, 713 & 714 of 2012. Since a common order has been passed by the Tribunal and the facts involved in all these petitions are similar we have heard them together. All the petitioners were initially appointed as Khalasis. They were later employed as technician Grade-II and posted under the Central Divisional Mechanical Engineer in the Diesel Loco Shed Kharagpur, South Eastern Railway.

2. An office order was issued by the Senior Divisional Mechanical Engineer (D) Diesel Loco Shed Kharagpur indicating that the petitioners had been transferred and released with immediate effect. Instructions were issued to the petitioners to report to the Senior Divisional Personnel Officer C.K.P. for a further posting under the Senior Divisional Mechanical Engineer, Diesel Loco Shed BNDM.

3. The petitioners filed the aforesaid applications before the Central Administrative Tribunal, Kolkata Bench on 14th August 2012. They contended in their applications that they had been transferred from one division to another without following the due process of law. They further contended that the

Divisional Personnel Officer who had issued the transfer order was not authorised to issue the same in terms of the rules applicable to the petitioners. It was further contended that persons who were senior to the petitioners and who were working as technicians in KGP Division had been retained in the same division while transferring the petitioners. The petitioners, therefore, contended that the order of transfer was a punitive one which had been issued without holding a departmental inquiry.

4. The respondent filed a reply to the applications in which it was contended that the prime cause for the transfer order was the industrial unrest which was simmering in the Kharagpur division. It was further contended that a fact finding inquiry had been initiated and conducted by two experienced junior administrative grade officers. On receipt of their report the respondents had found it necessary to transfer the petitioners for administrative reasons to another division. It was further pleaded that the petitioners were trying to destabilize the entire atmosphere of the Diesel Loco Shed and their retention at KGP would have created a bad precedent for the administration and the workers of the Diesel Loco Shed. It was further pleaded that in order to maintain harmonious relations and industrial peace at the workplace, the competent authority found it necessary to transfer the petitioners. Thereafter it has been pleaded that the transfer and release orders issued to the petitioners were pasted on the notice board on the work premises on 10th August 2012 because there would have been an agitation and disruption in work had the orders been "server physically to them". It has also been contended that the transfers have been effected in accordance with Rules 226 and 227 of the Indian Railways Establishment Code.

5. The Tribunal has formulated four questions on the basis of the pleadings of the parties, namely:

(a) Did these applicants disclose all relevant information in the OA or have they concealed information? In other words did they approach the Tribunal with clean hands? Does this by itself disentitle them from any relief?

(b) Was the order of Principal HOD conveyed by CPO letter of 10.08.12 required to be challenged? Are transfer orders sham transactions?

(c) Have these applicants made out any case for interference with the orders of transfer?

(d) Are they entitled to any relief?

6. From the order impugned it appears that the Tribunal has perused the report of the fact finding inquiry submitted on 2nd August 2012 and the conclusions drawn by the fact finding committee. After noting the contents of the report the Tribunal has merely quoted paragraphs after paragraphs of judgments rendered by the Administrative Tribunal as well as the Supreme Court.

7. The Tribunal has then held that "there is presumption of validity of

Government action". It has then noted that the petitioners have not assailed the transfer order itself but merely a communication which is both a transfer order and a release order. By relying on Rule 226 of the IREC the Tribunal has held that the transfer was valid.

8. Mr. Chakraborty, the Learned Counsel appearing for the petitioners has criticized the judgement on the ground that there is no discussion regarding the validity of the transfer order. The learned counsel points out that besides paraphrasing the judgments of the Supreme Court, and quoting from them, whether they were relevant or not, the Tribunal has not applied the law correctly to the fact situation in the present case. He submitted further that although the transfer and release order which was issued on 10th August 2012 by the Assistant Divisional Mechanical Engineer and communicated to the Senior Divisional Officer/Mechanical/Administration, refers to another order of the same date, that order was never communicated to the petitioners. He pointed out that the order issued on 10th August 2012 to the Assistant Personnel Officer on behalf of the Senior Divisional Personnel Officer was disclosed to the petitioners only in the reply filed by the respondents before the Tribunal. He urged that although that order of transfer indicates that the transfers have been made in "administrative interest", the pleadings in the reply filed by the respondents leave no manner of doubt that the transfers were punitive in nature. The learned counsel submitted that such punitive action can be taken against the employees only after a departmental inquiry is held against them. Mr. Chakraborty then submitted that the Rules 226 and 227 of the IREC do not permit the competent authority to transfer a railway servant on account of misbehaviour which has been alleged against the petitioners. The counsel therefore, submitted that the transfer orders having been issued in the backdrop of the findings recorded by the fact finding committee, demonstrates the malice on the part of the respondents. The learned counsel pointed out that in the case of *Somesh Tiwari Vs. Union of India (UOI) and Others*, the Supreme Court has held that mala fides can be of two kinds, namely, malice in fact and malice in law. Relying on this decision He submitted that a transfer order cannot be passed by way of or in lieu of punishment, although it may be passed in administrative exigencies. The learned. counsel submitted that the very fact that the transfer orders were issued as a consequence of the inquiry held demonstrates that the orders were palpably mala fide. The Learned Counsel has also relied on the judgement in WPCT 71 of 2011 dated 4th May 2011 [*Union of India & Ors. vs. Dipak Kumar Majumdar & Ors.*] in support of his submissions.

9. Per contra, Mr. Banerjee appearing for the respondents submitted that a transfer order can be questioned only if it is actuated by mala fides. He submitted that transfer orders should not be challenged before the Court as transfer is an incident of service. The Learned Counsel pointed out that that the petitioners had not alleged in their application before the Tribunal that they had been transferred, mala fide. He submitted that the administration was left with no option but to transfer the petitioners in order to maintain industrial peace and

harmony. According to the Learned Counsel the misbehaviour of the petitioner was writ large in the incident which occurred in the Shed prior to their transfer. Mr. Banerjee then placed reliance on Rule 226 of the aforesaid rules and submitted that the power to transfer Group-C and Group-D railway servants has been delegated to the general manager under this rule. He also drew our attention to Rule 227 of the aforesaid rules which according to him permits the competent authority to transfer a railway servant from one post to another even on account of misbehaviour or inefficiency, apart from a transfer on his own request. The learned counsel then placed reliance on the report of the fact finding committee to submit that the misbehaviour of the petitioners had led to their transfer from one division to another. The learned counsel has placed reliance on the judgement of the Supreme Court in the case of Union of India (UOI) and Others Vs. Sri Janardhan Debanath and Another, He submitted that the Supreme Court has endorsed transfer orders which have been issued under the fundamental rules for acts of inefficiency and misbehaviour. He, therefore submitted that in the present cases when the transfers have been initiated because of the misbehaviour of the petitioners they cannot be questioned by them.

10. Considering the pleadings before us and the submissions of the learned counsel, indisputably the transfer orders have been issued because of certain incidents which occurred on 19th July 2012 in the Diesel Loco Shed at Kharagpur. The observation of the committee is that the Senior DME (D) of the Diesel Loco Shed had failed to manage the industrial unrest. A letter, signed by several employees including the petitioners has drawn the attention of the Railway Authorities to the fact that the employees were working in fear in the Diesel Loco Shed because of certain acts of the Senior DME (D). There cannot be any dispute, therefore, that the transfer orders were issued because of the alleged misbehaviour or misconduct on the part of the petitioners and other employees. The question is whether a transfer order can be issued against an employee because certain acts of his constitute misbehaviour according to the employer.

11. Rules 226 and 227 of the Indian Railways Establishment Code read as follows:

226. Transfers.--Ordinarily, a railway servant shall be employed throughout his service on the railway or railway establishment to which he is posted on first appointment and shall have no claim as of right for transfer to another railway or another establishment. In the exigencies of service, however, it shall be open to the President to transfer the railway servant to any other department or railway or railway establishment including a project in or out of India. In regard to Group C and Group D railway servants, the power of the President under this rule in respect of transfer, within India may be exercised by the General Manager or by a lower authority to whom the power may be re-delegated.

227. A competent authority may transfer a Railway servant from one post to another provided that, except:--

- (1) On account of inefficiency or misbehaviour, or
- (2) On his written request.

A Railway servant shall not be transferred to, or except in a case or dual charge, appointed to officiate in a post carrying less pay than the pay of the post on which he holds a lien.

12. Rule 226 empowers the Railway Establishment to transfer a railway servant from one railway to another or from one establishment to another, depending on the exigencies of service. A railway servant can also be transferred from one department to another or to a project within or out of India. Rule 227 is only clarificatory in nature as it stipulates that the pay of a transferred employee must be protected except when he is transferred due to inefficiency, misbehaviour or on his written request. Mr. Banerjee, wanted us to interpret this rule to mean that a competent authority may transfer the railway servant even on account of inefficiency or misbehaviour without holding a departmental enquiry. In our opinion the interpretation sought to be placed by Mr. Banerjee on this rule does not fit within the contours of the rule. Reading the rule as Mr. Banerjee suggests would violate the object behind this rule. The reason is obvious. A railway servant who is found misbehaving or committing acts of misconduct cannot be transferred merely in order to ensure that such acts do not recur. An act of misconduct cannot be a reason for transferring a person. If the employee has misconducted himself the railway authorities can always take action against him by instituting a departmental inquiry. If we accept Mr. Banerjee's argument that Rule 227 empowers the competent authority to transfer a railway servant on the ground of inefficiency or misbehaviour without holding a departmental enquiry, it would mean that unbridled power would be vested in the competent authority to transfer an employee. Such unfettered and untrammelled power cannot be vested in an officer of the railways so as to transfer an employee as this could be used as a weapon against an employee who does not find favour with his superior officer.

13. In the case of *Union of India, Appellant vs. Janardhan Debnath and Another* (supra) the Supreme Court considered whether a transfer order issued in exercise of powers under Rule 37 of the Posts & Telegraphs Manual Vol. IV and Fundamental Rule 15 was valid. The Court has held that where a person is transferred otherwise than for inefficiency or misbehaviour or on a written request made by the transferred employee, his pay must be protected. The Court further held that unless a transfer order involves any such adverse impact or visits the person concerned with any penal consequences, it is not required to be subjected to the same type of scrutiny, approach and assessment as in the case of dismissal, discharge, reversion or termination of service. The Court observed that utmost latitude should be left with the department concerned to enforce discipline, decency and decorum in public service and to meet untoward administrative exigencies to ensure smooth functioning of the administration.

14. In the present case it has been found by a fact finding committee that the industrial unrest which occurred on 19th July 2012 was because of the introduction of the new gate attendance system which was not functioning properly. Persons who were present on duty during the preceding months had been marked absent which led them to submit a representation to the authorities. It appears that their grievance fell on deaf ears and this resulted in the industrial strife. However, the fact finding committee did not recommend the transfer of the petitioners and instead it was of the view that the mishandling of the situation which had arisen on 19th July 2012 by the Senior D.M.E. (D) caused the state of affairs to worsen.

15. Mr. Banerjee has submitted that the transfer order itself was not challenged by the petitioners. This submission in our opinion is of no consequence as the petitioners have, in fact, challenged an order which is both a transfer order and a release order. Mr. Banerjee has also submitted that the Court cannot put the clock back as the transfer orders have already been given effect when the atmosphere was surcharged and vitiated by the petitioners who are union leaders.

16. This submission in our opinion leaves no manner of doubt that the transfer order was punitive and not arising out of administrative exigencies. In the case of Somesh Tiwari Vs. Union of India (UOI) and Others, , the Supreme Court has observed thus:

19. Indisputably an order of transfer is an administrative order. There cannot be any doubt whatsoever that transfer, which is ordinarily an incident of service should not be interfered with, save in cases where inter alia mala fide on the part of the authority is proved. Mala fide is of two kinds one malice in fact and the second malice in law.

20. The order in question would attract the principle of malice in law as it was not based on any factor germane for passing an order of transfer and based on an irrelevant ground i.e. on the allegations made against the appellant in the anonymous complaint. It is one thing to say that the employer is entitled to pass an order of transfer in administrative exigencies but it is another thing to say that the order of transfer is passed by way of or in lieu of punishment. When an order of transfer is passed in lieu of punishment, the same is liable to be set aside being wholly illegal.

17. It is apparent that the present transfer order has been issued in lieu of punishment, without holding a departmental inquiry. The respondents cannot seek to secure industrial peace by throwing the principles of natural justice to the winds. When the transfer orders are apparently punitive considering the backdrop in which they were issued, they have to be set aside. Rule 227 does not in any manner provide that the principles of natural justice need not be adhered to. The allegations of indiscipline against the petitioners contained in the reply filed before the Tribunal by the respondents indicate that the respondents

have unfairly and without reason avoided holding a departmental inquiry to prove that the petitioners had in fact caused the alleged industrial unrest on 19th July 2012.

18. In these circumstances the impugned order of the Tribunal is set aside.

19. The impugned order transferring the three petitioners is also quashed and set aside. Urgent certified photocopies of this order, if applied for, be given to the learned advocates for the parties upon compliance of all formalities.

Anindita Roy Saraswati, J.

I agree.