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* **IN THE HIGH COURT OF DELHI AT NEW DELHI**

+ W.P.(C) 6687/2015

% *Judgment dated 15th July, 2015*

NEW DELHI MUNICIPAL COUNCIL & ORS Petitioners

Through : Mr.Arun Bhardwaj, Adv.

versus

SHATRUGHAN PRASAD TIWARI

..... Respondent

Through

CORAM:

HON'BLE MR. JUSTICE G.S.SISTANI

HON'BLE MS. JUSTICE SANGITA DHINGRA SEHGAL

G.S.SISTANI, J (ORAL)

CM APPL. 12194/2015.

1. Exemption allowed subject to all just exceptions.
2. Application stands disposed of.

W.P.(C) 6687/2015.

3. Present writ petition has been filed by petitioners under Articles 226 and 227 of the Constitution of India for issuance of an appropriate writ, order or direction in the nature of certiorari thereby quashing and setting aside the Order dated 17.2.2015 passed by Central Administrative Tribunal, Principal Bench, in O.A.No.2125/2014, by which transfer order of the respondent dated 17.6.2014 has been stayed primarily on the ground that the transfer of the respondent is punitive in nature, as the order was passed while the disciplinary proceedings have been initiated against him.
4. Learned counsel for the petitioners submits that the Tribunal fell in serious error of law and failed to take into account that the transfer by

itself did not amount to a punishment as neither the status of the respondent nor his service conditions have changed. The transfer is an equitable post and on the same pay scale and no hardship could be caused to the respondent. It has also been contended that no Government servant has an indefeasible right to be posted on a particular post and it is the prerogative of the employer to decide on the issues of transfer. Counsel further submits that it is settled law that unless the transfer order is vitiated by *malafides* or violation of any statutory provision, the same is not to be interfered. Counsel also contends that the transfer order is not punitive and it has been issued pursuant to initiation of a major penalty proceedings.

5. We have heard learned counsel for the parties and carefully examined the judgment passed by the Central Administrative Tribunal.
6. The facts of the case, as noticed by the learned Tribunal, are that the respondent was appointed as a Peon on 17.3.1986 and thereafter he was promoted as Caretaker, Grade-II. Thereafter the said post of Caretaker, Grade-II, was re-designated as Deputy Manager on the same scale of pay of Junior Assistant. In the year 2007, the respondent was re-designated as Deputy Manager. At present the respondent is working in the pay scale of Rs.10900-Rs.34900/- with a Grade Pay of Rs.4,000/-.
7. Before the Tribunal, the respondent herein had complained that respondent no.4, Sh.O.P. Mishra, Director (Welfare), used to make illegal and undesirable demands from him, which were not met, and which resulted in his undue harassment by him.
8. As per the respondent, he had informed the petitioners herein about missing of one LED light in Barat Ghar, Sarojini Nagar.
9. It was further the case of the respondent before the Tribunal that the higher authorities were misled by Sh.O.P. Mishra due to which he was

issued a Memo on 18.10.2012 on the ground that the report of the missing LED was made late. The said report was made to the Junior Engineer (Electricals) Special Project and EE (C-II). Again another reminder was sent on 24.03.2012 to Junior Engineer (Electricals) Special Project and EE (C-III). However, the files revealed that those notes were received in the office of EE (C-III) (Electricals) vide No.R-409/EE(C-III)(E) dated 09.05.2012, R-408/EE(C-III) dated 09.05.2012 and R-410/EE(C-III)(E) dated 09.05.2012 respectively. The note dated 24.03.2012 was received vide R-408 and the note dated 02.03.2012 has been received vide No.R-409. Those notes were sent to the Electrical Department much later than the date of function and without intimation to the Welfare Department. The respondent was, therefore, directed to explain the position within three days. The respondent submitted a reply to the aforesaid memo on 25.10.2012 explaining that the LED box was stolen after its use by the party who reserved the Barat Ghar. He further explained that on 02.03.2012, when he came in the morning, he saw that the LED light was missing. Accordingly, a diary entry vide Diary No.1225 was made and it was submitted that on 01.03.2012, Shri O.P. Dhawan booked the Barat Ghar when the entire fittings were shown to him and his signature was obtained on the register. He has also tried to call him up but his phone was switched off. The respondent informed the NDMC on 02.03.2012 vide Diary No.1225 that his security amount of Rs.10,000/- may not be returned till the damage report is not obtained. The report was sent to Special Project Electric JE also, but he took time in making the report. Thereafter, he sent a reminder. Since the Barat Ghar was new and the damage report was delayed, he informed them that the damage report was prepared by Junior Engineer. He has, therefore, submitted that he has not been late in performing his duties. However, the Chairman, NDMC issued

an order dated 19.08.2013 warning him to be careful in future.

10. It was further submitted by the respondent herein before the Tribunal that Sh.O.P. Mishra (respondent no.4 before the Tribunal) was surprised that only a warning was issued to him, so he managed to get another complaint made through Sh.O.P. Dhawan, who had booked the Barat Ghar on 1.3.2012. Thereafter he was served with a major penalty charge sheet by referring the same issue of missing LED strip on the basis of CVC recommendations.
11. While the respondent herein denied the charges framed against him an Inquiry Officer was appointed on 12.6.2014 and thereafter he was transferred vide order dated 17.6.2014 to the post of Junior Assistant in a different cadre (Although the basic scale of pay was the same).
12. The case set up by the respondent herein before the Tribunal was that he belongs to the Welfare Department and had got promotion to the Post of Deputy Manager (CS), in the same department. Thus, he could not have been transferred to another Department to discharge the function of another cadre.
13. The submission of learned counsel for the petitioners did not find favour with the Central Administrative Tribunal and the Tribunal has held that the respondent herein could not have been transferred to a different cadre. Reliance was placed on ***Bhagwati Prasad G. Bhatt v. State of Gujarat and Ors***, reported at (1997) 1 GLR 562, wherein it has been held as under:

“21. Having examined the matter on principle, it is now necessary to look at some of the decided cases to which my attention was invited at the hearing of this petition. In *State of Mysore v. Papanna*, 1971(2) Service Law Reporter p. 48, a question arose whether the services of a person belonging to Mysore Civil Service would stand transferred to the University set up under the University of Agricultural Sciences Act, 1963. The answer was in the negative.

Mr. Takwani, however, urged that in that case on the transfer of services, the petitioners ceased to be in civil service of the State and that weighed with the Supreme Court. In the Present case, the petitioner has not ceased to be servant of the Gujarat State and that he holds lien on the post of Police Inspector. It is true that what weighed with the Supreme Court was that on the transfer of the services of the petitioner to the University he ceased to be civil servant of the State. That aspect does not arise for consideration in the matter before me and, therefore, the decision would not be of much help. Mrs. Mehta, however, drew my attention to Prem Parveen v. Union of India, (1973) 2 S.L.R. 659. That is a case more or less akin to the case before me. In that case the petitioner who was a confirmed upper division clerk under the Directorate of Extension, Ministry of Food and Agriculture, Community Development and Co-operation (Department of Agriculture) New Delhi was transferred to the regional station. He challenged the order of transfer. The Court posed a question thus : Has the Government right to transfer a confirmed permanent Government servant against the latter's will outside his cadre ? The answer was in the negative. On behalf of the Union of India reliance was placed on Fundamental Rule 15 which confers power on the proper authorities to transfer Government servants from any post to a post even outside the cadre. Rejecting this contention the Court held that it does not stand to reason that a person who is recruited to a particular cadre should be compelled against his wish to serve outside the cadre even when the permanent post to which he holds a lien exists within the cadre.

22. Thus on principle and authority, it appears clear that a person belonging to a cadre cannot be deputed or transferred outside the parent department and outside the cadre. He can be sent on deputation but that too with his consent. Deputation cannot be without the consent of the person to be deputed. Viewed from this angle, order Annexure "C" dated 9th January, 1973 posting the petitioner a Police Inspector in the Civil Defence Organisation is illegal and invalid. Similarly the resolution Annexure "D" dated 24th May, 1974 so far as it affects the petitioner deputing and continuing his deputation to the Civil Defence Organisation is illegal and invalid and they both must be quashed and struck down. In this view of the matter, it is not necessary to decide other points raised by Mrs. Mehta."

14. Reliance was also placed in the case of *Prem Parveen v. Union of India*, reported at (1973) 2 SLR 659, wherein it was held as under:

“Normally it is to be expected that the Government employees who join a particular cadre would have the range of their transferability determined within that cadre. Logically by it does not stand to reasons that a person who is recruited to a particular cadre should be compelled against his wishes to serve outside the cadre even when the permanent post to which he holds a lien exists within that cadre. At least F.R. 15 is not capable of this interpretation as suggested by Mr. Chadha. All that F.R. 15 means is that even if a government employee holds a lien on a particular post he has no vested right to continue to remain in one particular post all the time and could be transferred to another post, of course within the same cadre, because his lien is only the title to hold substantively a permanent post, to which he has been appointed substantively. In S.K. Srivastava v. Union of India and other (1971 S.L.R. 453), the employee who was working as a Director of Revenue Intelligence, New Delhi challenged the order by which he was transferred and posted as Collector of Customs, Calcutta, on the ground that the Director of Revenue Intelligence did not form part of the cadre of the Customs and Central Excise Department, and therefore the transfer was illegal. This plea was negatived by Division Bench of this court which held that the post of Director of Revenue Intelligence and Inspection including the post of Director of Revenue Intelligence was not an ex-cadre post in the sense that it was outside the ordinary range of transferability for an officer of Indian Customs and Central Excise Service Class I, and that the department of Revenue consisting of the three branches of the Income-tax, Customs, and Central Excise and the Chemical Service, Class I is itself a service or a cadre functioning as one department, and that the post of Director of Revenue Intelligence belongs to one unit of this department. Referring to F.R. 15 and the interpretation to be given to it the bench observed as:-

“We have therefore, to construe the authority of the Government to transfer a Government servant neither too widely as to do injustice to the Government servant concerned nor too narrowly as to fetter the administration of the government, but precisely to meet the object and the

work for which the petitioner was appointed and the extent to which he was transferable for the achievement of the said object and in the course of the said work.”

15. Reliance was also placed on *Prakash R. Brokar v. Union of India & Ors.*, reported at 1984 (1) Bom CR 95, wherein it was held as under:

“9. The importance of the concept of cadre arises on account of several reasons. A person when appointed in a particular post in a cadre has the future career before him charted in one sense. He knows what is the strength of the cadre in which he has been appointed; he knows the post to which he can reasonably aspire in due course of time and the prospects of the aforesaid vertical promotion on the basis of the list of seniority prepared from time to time. The Rules of appointment to the said cadre will also tell him as to how many people will be entering the cadre from different sources, if appointments from different sources are provided for in the Rules. If he is transferred from one department to another in the same cadre he is not deprived of the benefits which he has acquired till such transfer by service in the same cadre. He will also not lose his place in the seniority list which will invariably be prepared on the basis of the cadre. He will also not lose his place in the seniority list which will invariably be prepared on the basis of the cadre. A person cannot be transferred from one cadre to another because such a transfer will necessarily affect the other persons in the seniority list. Such an eventuality will necessarily arise when we bear in mind that seniority lists are necessarily prepared for different cadres. That this is borne out by the annexures to this petition. Annexure ‘F’, for example, shows the seniority list of the Lower Division Clerks in the Directorate of Civil Supplies and Price Control, Annexure ‘C’, on the other hand, shows the seniority list of the Lower Division Clerks in the Directorate of Transport. In this latter seniority list, the petitioner is at Serial No.19. This seniority list is dated 8th April, 1984. It has been mentioned by the petitioner in paragraph 9 of the petition that consequent to the promotion and appointment of Upper Division Clerks and Assistant

Motor Vehicle Inspectors in the Directorate of Transport, the petitioner has moved to the position at Serial No.5 in the seniority list of the Lower Division Clerks in the Directorate of Transport. If he is transferred to the Directorate of Civil Supplies and Price Control, then he will be practically at the end of the seniority list.”

16. The Tribunal was also persuaded to grant stay of the transfer of the respondent herein on the submission made that another charge sheet on the same allegations could not have been issued against him.
17. We may also notice that the petitioners in the reply filed before the Tribunal had admitted that transfer of the respondent herein was a punitive measure while the disciplinary proceedings were going on.
18. In the case of *Somesh Tiwari v. Union of India and Others*, reported at (2009) 2 SCC 592, it has been held as under:

“16. 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. 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.”

19. Having regard to the detail reasons set out by the Tribunal in the impugned order and in view of the admission made by the petitioners in

their reply before the Tribunal that transfer of the respondent herein was a punitive major while the disciplinary proceedings were going on, we find that there is no illegality and infirmity in the order passed by the Tribunal, which would require interference in the proceedings under Articles 226 and 227 of the Constitution of India. Resultantly, the present writ petition is without any merit and the same stands dismissed.

CM APPL. 12193/2015 (STAY)

20. Application stands dismissed in view of the order passed in the petition.

G.S.SISTANI, J

SANGITA DHINGRA SEHGAL, J

JULY 15, 2015

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