
(2011) 06 SHI CK 0038
In the High Court Of Himachal Pradesh
Case No : C.W.P. No. 3530 of 2011

Babita Thakur

APPELLANT

Vs

State of Himachal Pradesh and Others

RESPONDENT

Date of Decision : 18-06-2011

Acts Referred:

Citation : (2011) 2 ShimLC 283

Hon'ble Judges : Rajiv Sharma, J

Bench : Single Bench

Final Decision : Allowed

Judgement

Rajiv Sharma, J.—Petitioner was transferred from Government Primary School, Matha Nayur, Drang Mandi in March, 2010 to Government Primary School, Chadyara (Sadar). However, she has again been transferred from Government Primary School, Chadyara (Sadar) to Government Primary School, Khanyari (Chachiot-1) vide Annexure A-1 dated 12.5.2011.

2. Mr. Vikrant Thakur has strenuously argued that the petitioner has been transferred from Government Primary School, Chadyara (Sadar) to Government Primary School, Khanyari (Chachiot-1) to accommodate/adjust respondent No. 5, who was under transfer to Government Primary School, Khanyari (Chachiot-1) from Government Primary School, Khaliar.

3. Mr. Anil Jaswal, learned Deputy Advocate General has argued that since the petitioner remained posted in and around Chadyara (Sadar) throughout, there is no illegality in the impugned order dated 12.5.2011.

4. Mr. Dushyant Dadwal has strenuously argued that the transfer of his client has been made keeping in view her family circumstances.

5. I have heard the learned Counsel for the parties and have perused the pleadings carefully.

6. Petitioner joined her duties at Government Primary School, Chadyara (Sadar)

on 12.3.2010. She was working at Government Primary School, Matha Nayur before she was transferred to Government Primary School, Chadyara (Sadar). She has worked for about 1 year 2 months in Government Primary School, Chadyara and thereafter she was transferred to Government Primary School, Khanyari (Chachiot-1) vide office order dated 12.5.2011. Respondent No. 5, who was under transfer from Government Primary School, Khaliyar to Government Primary School, Khanyari (Chachiot-1) has been adjusted at Government Primary School, Chadyara (Sadar). Respondent-State has not chosen to file any reply.

7. The transfer of the petitioner has been justified on the ground that petitioner remained posted in and around Chadyara for a considerable long period. Respondent-State was aware of this situation at the time when she was transferred from Government Primary School, Matha Nayur to Government Primary School, Chadyara (Sadar). It is clear that the transfer of the petitioner has been made from Government Primary School, Chadyara (Sadar) to Government Primary School, Khanyari (Chachiot-I) to accommodate respondent No. 5. Respondent No. 5, as noticed above, has been transferred from Government Primary School, Khaliar to Government Primary School, Khanyari (Chachiot-1). She was working at Government Primary School, Ranghu before she was transferred to Government Primary School, Khaliar. The distance between Government Primary School, Khaliar and Government Primary School, Ranghu is about 6 kilometers.

8. Mr. Dushyant Dadwal has argued that his client has been accommodated since her father-in-law is deaf and dumb. This cannot be the ground to accommodate a person, who is public servant. The transfers have to be made only on administrative exigency. Petitioner has worked at the present place of posting only for 1 year and 2 months. There is no tangible evidence placed on record by the respondents to show why the petitioner has been transferred from Government Primary School, Chadyara (Sadar) to Government Primary School, Khanyari (Chachiot-I). Thus, the transfer of the petitioner from Government Primary School, Chadyara (Sadar) to Government Primary School, Khanyari (Chachiot-I) is colourable exercise of powers and is also arbitrary and unreasonable. What is arbitrary has been succinctly explained by their Lordships of the Hon"ble Supreme Court in East Coast Railway and Another Vs. Mahadev Appa Rao and Others, as under:

18. What then is meant for arbitrary/arbitrariness and how far can the decision of the competent authority in the present case be described as arbitrary?

19. Black"s Law Dictionary describes the term "arbitrary" in the following words:

1. Depending on individual discretion; specific, determined by a judge rather than by fixed rules, procedures, or law.

2. (Of a judicial decision) founded on prejudice or preference rather than on reason or fact. This type of decision is often termed arbitrary and capricious.

20. To the same effect is the meaning given to the expression "arbitrary" by Corpus Juris Secundum which explains the term in the following words:

ARBITRARY - Based alone upon one's will, and not upon any course of reasoning and exercise of judgment; bound by no law; capricious; exercised according to one's own will or caprice and therefore conveying a notion of a tendency to abuse possession of power; fixed or done capriciously or at pleasure, without adequate determining principle, nonrational, or not done or acting according to reason or judgment; not based upon actuality but beyond a reasonable extent; not founded in the nature of things; not governed by any fixed rules or standard; also, in a somewhat different sense, absolute in power, despotic, or tyrannical; harsh and unforbearing. When applied to acts, "arbitrary" has been held to connote a disregard of evidence or of the proper weight thereof; to express an idea opposed to administrative, executive, judicial, or legislative discretion; and to imply at least an element of bad faith, and has been compared with "willful."

21. There is no precise statutory or other definition of the term "arbitrary". In *Kumari Shrilekha Vidyarthi and Others Vs. State of U.P. and Others*, , this Court explained that the true import of the expression "arbitrariness" is more easily visualized than precisely stated or defined and that whether or not an act is arbitrary would be determined on the facts and circumstances of a given case. This Court observed:

The meaning and true import of arbitrariness is more easily visualized than precisely stated or defined. The question, whether an impugned act is arbitrary or not, is ultimately to be answered on the facts and in the circumstances of a given case. An obvious test to apply is to see whether there is any discernible principle emerging from the impugned act and if so, does it satisfy the test of reasonableness. Where a mode is prescribed for doing an act and there is no impediment in following that procedure, performance of the act otherwise and in a manner which does not disclose any discernible principle which is reasonable, may itself attract the vice of arbitrariness. Every State action must be informed by reason and it follows that an act uninformed by reason, is arbitrary. Rule of law contemplates governance by laws and not by humour, whims or caprices of the men to whom the governance is entrusted for the time being. It is trite that "be you ever so high, the laws are above you". This is what men in power must remember, always.

22. Dealing with the principle governing exercise of official power Prof. De Smith, Woolf & Jowell in their celebrated book on "Judicial Review of Administrative Action" emphasized how the decision-maker invested with the wide discretion is expected to exercise that discretion in accordance with the general principles governing exercise of power in a constitutional democracy unless of course the statute under which such power is exercisable indicates otherwise. One of the most fundamental principles of rule of law recognized in all democratic systems is that the power vested in any competent authority shall not be exercised arbitrarily and that the power is exercised that it does not lead to any unfair

discrimination. The following passage from the above is in this regard apposite:

We have seen in a number of situations how the scope of an official power cannot be interpreted in isolation from general principles governing the exercise of power in a constitutional democracy. The Courts presume that these principles apply to the exercise of all powers and that even where the decision-maker is invested with wide discretion, that discretion is to be exercised in accordance with those principles unless Parliament clearly indicates otherwise. One such principle, the rule of law, contains within it a number of requirements such as the right of the individual to access to the law and that power should not be arbitrarily exercised. The rule of law above all rests upon the principle of legal certainty, which will be considered here, along with a principle which is partly but not wholly contained within the rule of law, namely, the principle of equality, or equal treatment without unfair discrimination.

23. Arbitrariness in the making of an order by an authority can manifest itself in different forms. Non-application of mind by the authority making the order is only one of them. Every order passed by a public authority must disclose due and proper application of mind by the person making the order. This may be evident from the order itself or the record contemporaneously maintained. Application of mind is best demonstrated by disclosure of mind by the authority making the order. And disclosure is best done by recording the reasons that led the authority to pass the order in question. Absence of reasons either in the order passed by the authority or in the record contemporaneously maintained is clearly suggestive of the order being arbitrary hence legally unsustainable.

9. It is true that it is for the employer to see where the Government servant is to be posted. However, it is equally true that there is no arbitrariness in the action. The transfer cannot be used as an instrument to accommodate/ adjust the persons without there being any administrative exigency. The underline principle for transfer is public interest or administrative exigency. In the instant case, neither there was any public interest nor any administrative exigency necessitating the transfer of the petitioner from Government Primary School, Chadyara (Sadar) to Government Primary School, Khanyari (Chachoi-1).

10. Accordingly, in view of the observations and discussions made hereinabove, the petition is allowed. Annexure P-1 dated 12.5.2011, qua the petitioner, is quashed and set aside. Respondents No. 1 to 4 are directed to permit the petitioner to discharge her duties at Government Primary School, Chadyara (Sadar). Respondent No. 5 be relieved immediately to facilitate the joining of the petitioner at Government Primary School, Chadyara (Sadar). Pending application(s), if any, also stands disposed of. No costs.