

(2009) 12 CAL CK 0029
In the Calcutta High Court
Case No : Writ Petition No. 19376 (W) of 2009

Basanta Kumar Roy

APPELLANT

Vs

IDBI Bank Limited and Others

RESPONDENT

Date of Decision : 24-12-2009

Acts Referred:

Banking Regulation Act, 1949 — Section 5(c)

Citation : (2010) 2 CALLT 112

Hon'ble Judges : Aniruddha Bose, J

Bench : Single Bench

Advocate : P.S. Sengupta, Mr. Soumya Majumdar and Mr. S.M. Obaidullah, for the Appellant; S.N. Mukherjee, Dipak Ghosh and Mr. Ranjan De for Respondent Nos. 1 and 2, for the Respondent

Judgement

Aniruddha Bose, J.—The petitioner is an employee of IDBI Bank Ltd., which is a banking company within the meaning, of section 5(c) of the Banking Regulation Act 1949. At present the petitioner claims to be holding the post of Special Assistant in that bank. The petitioner is involved in trade union activities, concerning employees of the bank. He is the secretary of the Industrial Development Bank of India Employees" Association, which is a registered trade union, as well as of IDBI Bank Ltd. Contract Employees" Union. The petitioner is, also one of the secretaries of All India Industrial Development Bank Employees" Association. So far as this writ petition is concerned, the petitioner at the material point of time was posted in the Bansdrone branch of the bank. He challenges in this writ petition the legality of the action of the bank by which he is being transferred to Barasat branch of the bank. An order relieving him from the Bansdrone branch was issued on 30 October 2009, a copy of which has been made Annexure "P7" to the writ petition. The same order specifies that he has been transferred to the Barasat branch of the Bank and requires him to report to the Barasat branch on 31 October 2009. This memorandum has been issued by the Branch Head, Bansdrone in pursuance of an office order issued by Deputy General Manager, Human Resources of the Bank from its Mumbai office.

2. The petitioner's main complain is that this is a mala fide transfer issued in a vindictive manner because of his trade union activities. This order has been issued, according to the petitioner, to prevent him from carrying on his trade union activities, the hub of which in Kolkata is its main branch at Shakespeare Sarani, in the central part of the city. The petitioner attributes this order of transfer to his trade union activities which he claims brought him in conflict with the management of bank. He alleges that he had made complain to the Finance Minister of India about various luxury expenditures incurred and financial irregularities committed by the Chairman-cum Managing Director (CMD) of the Bank. Among the alleged misdeeds is availing of a house loan of rupees one crore and twenty five lacs by the CMD, as well as purchase of luxury vehicles on bank's funds for his personal use.

3. Mr. Partha Sarathi Sengupta learned Counsel appearing for the petitioner has assailed the order of transfer on the ground of mala fide. He has also argued that the order of transfer cannot be sustained as the order does not reflect same was done for administrative exigencies or in public interest.

4. This in fact is the second instance of transfer of the writ petitioner within a short period of time. He was earlier transferred to Bansdroni branch of the bank. At that point of time, the Union had raised an industrial dispute over the transfer, which was effected along with nine other office bearers and executive committee members of the union. The union had raised an industrial dispute and it appears that the said dispute was taken up in conciliation under the provisions of the Industrial Dispute Act 1947. The writ petitioner had also filed a writ petition being W.P. No. 1197 (W) of 2009 questioning the validity of the said transfer order. This petition was disposed of by an Hon'ble single Bench of this Court on 5th February, 2009 with the following observation:

The present petition has been filed praying, inter alia, the following reliefs:

(a) To allow the application under Rule 226 of the Appellate Side Rules for a writ of or in the nature of Mandamus directing the respondents to frame transfer policy guideline in accordance with law and practice prevailing in bank.

(c) A writ of or in the nature of prohibition prohibiting the respondents from issuing any order of transfer during the pendency of the conciliation proceeding and finalisation of transfer police guideline.

It is submitted by learned Counsel appearing for the petitioner that on an industrial dispute being raised, the concerned Tribunal has restrained the bank from effecting transfer.

In view thereof, nothing survives for decision on this writ petition. At this I stage, a grievance is raised that the order of the Tribunal is not being complied with by the bank. If that be so, it shall be open to the petitioner to take appropriate step in accordance with law as he may be advised.

The writ petitioner stands dismissed. There shall be no order as to costs.

Since no affidavit in opposition has been called for, the averments contained in the writ petition and the submission as advanced before this Court shall not be deemed to have been admitted by the bank.

5. The first order of transfer however, specified that the same was being issued for administrative requirement. The relevant part of the order provided:

In view of administrative requirements of the Bank, it has been decided to transfer the following Class III employees of Kolkata Branch Office, to the branches indicated against their names. Verticals/Departments are advised to relieve the transferred employees as at close of business on January 31, 2009, so as to enable them to report to their respective branches on February 2, 2009

6. The subsequent order of transfer, which is the subject of dispute in the present writ petition does not use the expressions "administrative exigency" or "public interest". The office order, to which I have referred to in the earlier part of the writ petition provides:

It has been decided to transfer Shri Basanta K Roy (EC-130710), Special Assistant, Bansdrone Branch (Sol ID-291) to Barasat Branch (Sol m-329) with effect from October 31, 2009. Branch Head is advised to relieve him as at close of business on October 30, 2009 to enable him to report to Barasat Branch on October 31, 2009.

7. After affidavits were exchanged and hearing of the case was at a substantially advanced stage, the Bank filed a Supplementary Affidavit by which certain memoranda issued from the head office of the bank was sought to be relied upon by learned Counsel for the bank. Relying on these memoranda, it was sought to be contended on behalf of the respondents that the actual decision to transfer the petitioner was taken in the head office of the bank in Mumbai and two memoranda issued by the Head Branch banking and the Deputy General Manager, Human Resource Department dated 29 and 30 October 2009 were intended to be brought on record by this proceeding. The memorandum issued by the Head Branch Banking dated 29 October 2009 specifies:

Our Bansdrone branch has five officers, three executives and one clerk. We have recently opened Barasat branch which has six officers and one executive excluding parked employee and one officer of Agri Business Group. Normally, Executive/Clerk is utilised as TSE or CSE in the branches keeping the officers for business development. As Barasat branch has got only one executive, at least one more officer has to be tied down for CSE job. It is, therefore, suggested that the clerk in Bansdrone branch can be posted to Barasat to enable appropriate utilisation of officers in business development.

HRD may please consider the same.

8. The memorandum issued by the Deputy General Manager on 30 October 2009 provides:

"HUMAN RESOURCES DEPARTMENT

(PAS-II)

Relocation of Shri Basanta K. Roy, Special Assistant attached to Bansdroni Branch, Kolkata

We have transferred some of the Class III employees main branch offices at Ahmedabad, Chennai, Kolkata & New Delhi to various branches/office within the respective cities to meet the administrative/business requirements. 10 Class III employees from Kolkata branch office were transferred to retail branches/ offices vide Office Order No. 4010 dated January 30, 2009.

Head PBG(KR) vide O/N dated October 29, 2009 has, while reviewing the strength of the Officers/Executives posted at Bansdroni branch as also recently opened Barasat branch, requested that the Clerk in Bansdroni branch can be posted to Barasat Branch so as to enable appropriate utilisation of officers in business development.

We may, therefore, relocate Shri Basanta K. Roy, Special Assistant which has been transferred to Bansdroni branch vide the aforesaid Order dated January 30, 2009 to Barasat branch as requested by the Head-PBG.

9. Mr. Sengupta strongly resisted the prayer for filing of this Supplementary affidavit. He argued, relying on a decision of the Hon"ble Supreme Court in the case of Bharat Singh v. State of Haryana (AIR 1988 SC 2181), that in a writ proceeding, the respondents ought to take up the points in defence in their counter-affidavit, and evidence ought to be adduced by way of annexures to such affidavit. If such points are not taken in the pleadings, then the respondents ought not to be allowed to raise the point midway through the hearing after completion of exchange of affidavits. Mr Sengupta contended that this was being done to fill up the lacuna in the respondents" case.

10. Mr. Mukherjee, learned senior counsel appearing for the Bank on the other hand submitted that the documents sought to be introduced were part of records. Since prayers of the petitioner included issuance of writ in the nature of certiorari it was the obligation of the respondents to produce the records, and in the present case, they were only meeting their obligation by producing the records by way of affidavit. Two Constitution Bench decisions of the Hon"ble Supreme Court being Hari Vishnu Kamath Vs. Syed Ahmad Ishaque and Others,) and Ghaio Mall and Sons Vs. The State of Delhi and Others,) were relied in support of this submission by him. Mr. Mukherjee further argued that mere raising of the allegation of mala fide was not enough, and onus was on the petitioner to establish the allegations of mala fide. He supported this submission with three decisions of the Hon"ble Supreme Court in the cases Chandra Prakash Singh and Others Vs. Chairman, Purvanchal Gramin Bank and Others,) and Medley Minerals Pvt Ltd. v. State of Orissa and Ors., AIR 2004 SCW 5565 and State of Haryana and Others Vs. Rajindra Sareen, . The other judgment relied on

this point by Mr. Mukherjee on the same point in the case of Pratap Singh v. State of Punjab, AIR 1964 SC 70.

11. I shall deal first with the question as to whether I can take cognizance of these two memoranda. In my view, under ordinary circumstances no new material ought to be permitted to be brought on record by the respondents subsequent to completion of filing of pleadings and midway through the argument to fill up a lacuna exposed by the learned Counsel appearing for the petitioner. The two Constitution Bench judgments of the Hon"ble Supreme Court on which reliance was placed by Mr. Mukherjee does not really assist him on this point. While it is the obligation of the respondents to produce records, they cannot claim right to adduce fresh evidence relying on this principle after the time for filing such evidence is over. But in a writ proceeding, a flexible approach is usually adopted. The object of the Writ Court is to dispense justice. In the event the materials sought to be introduced is altogether not foreign to the subject controversy, and is not manufactured or fabricated document, then for the purpose of effective adjudication of a dispute, adducing of evidence in course of hearing ought not to be shut out altogether. In such a situation however, the opposing party ought to be given chance to put up its own case in relation to such additional material. Under these circumstances, I choose to take cognizance of these materials, as these materials do not seek to assist the respondents to run an inconsistent case, contrary to the course they had adopted prior to the point of time when these materials were being introduced, and I have no reason to doubt the authenticity of these two memoranda.

12. There is another aspect of the dispute which also requires examination before I enter into the merits of the case. Mr. Sengupta has urged me not to accept the pleading in the affidavit-in-opposition because it has been affirmed by an assistant general manager of the bank, whereas decisions taken in this regard are by officers of a higher grade. I agree with Mr. Sengupta that when an affidavit is being affirmed on behalf of an institution, a person holding a Senior post who has full knowledge of the proceeding ought to swear such affidavit. But if an officer is otherwise competent, and has knowledge of the affairs of the company, Court may accept his affidavit unless the statements made in the affidavit are of such nature that he could not have had any access to the source of information disclosed therein. The information disclosed in the affidavit filed on behalf of the bank are mostly in relation to the administrative functions of the bank and no fact has been disclosed which may be treated to be otherwise secret in nature. It is possible for an officer holding a post like that of deponent of that affidavit to make himself acquainted with the facts of the case from the materials available in the office and these informations may become part of his knowledge, such knowledge having been acquired on perusal of documents which are ordinarily accessible. It would be well within the duty of an officer]- to make himself aware about such facts and swear affidavit disclosing these facts.

13. The main thrust of argument of Mr. Sengupta is that the impugned order of

transfer is tainted with malice. The authorities relied on in this point are the decisions of the Hon''ble Supreme Court in the cases of Mahabir Auto Stores and others Vs. Indian Oil Corporation and others, State of Pujab v. V. K. Khanna, reported in 2001(2) SCC 330 and State of Andhra Pradesh and Others Vs. Goverdhanlal Pitti, . He also relied on a decision of the Hon''ble Supreme Court in the case of Arvind Dattatraya Dhande Vs. State of Maharashtra and others, This authority was relied on to demonstrate that the Court can review an order of transfer and arrive a finding on the basis of surrounding circumstances that the transfer is no in public interest but for victimisation of an honest officer. In this case to Appellant had conducted a raid for searching adulterated toddi and sought permission of the competent authority to prosecute a licensee for producing the said item. Thereafter complain was made against the officer concerned who was subsequently transferred.

14. Mr. Sengupta has also pointed out inconsistencies in the memorandum, issued by the bank. He has submitted, referring to the two memorandum; disclosed in the supplementary affidavit that no decision was taken by the authorities to effect transfer. Submission of Mr. Sengupta is that the memorandum issued by the Head Branch Banking does not reflect any decision but only carries a suggestion that the clerk in Bansdroni branch can be posted to Barasat branch. As regards the memorandum issued by the Deputy Chief Manager, Human Resources Department, Mr. Sengupta argued that this again carries a suggestion but at no level actual decision to transfer the petitioner was taken. The case of Mr. Sengupta is that the Executive Director, Human Resource is the competent authority for issuing an order of transfer and not the Head Branch Banking.

15. Mr Sengupta had also argued that the impugned order does not disclose that the transfer was sought to be made in public interest, and relying on a decision of the Hon''ble Supreme Court in the case of Ramadhar Pandey v. State of U.P., (1993) 4 SLR 349, he submitted that there could be no presumption that the action was being taken in public interest.

16. Appearing for the bank, Mr. Mukherjee justified the transfer on the ground that this was necessary for administrative reason. In fact, in the affidavit-in-opposition filed by the bank it has been pleaded that the said transfer was necessary in view of the expanding activities of the bank According to Mr. Mukherjee, the bank found business potential greater at Barasat in comparison to Bansdroni and as such the petitioner being the senior most clerical staff was being transferred there. Mr. Mukherjee emphasised that transfer was incidence of service and the employer always has the choice to select which employee would be transferred where, as per their own assessment. The judgments cited on this point were decisions in the cases of K.B. Shukla and Others Vs. Union of India (UOI) and Others, The Management of the Syndicate Bank Ltd. Vs. The Workmen, Shanti Kumar v. Regional Deputy Director, Health Services Patna reported in AIR 1981 SC 1577 , Union of India and Others Vs. S.L. Abbas, State

of Punjab and others Vs. Joginder Singh Dhatt, . Mr. Mukherjee further submitted that there is a presumption of legality of official action, citing a judgment of the Hon"ble Supreme Court in the case of Kasturi Lal Lakshmi Reddy, Represented by its Partner Shri Kasturi Lal, Jammu and Others Vs. State of Jammu and Kashmir and Another, . In this judgment, it has been held:

.....there is always a presumption that the official action is reasonable and in public interest and it is for the party challenging its validity to show that it is wanting in reasonableness or is not in conformity with public interest. This burden is a heavy one and it has to be discharged to the satisfaction of the Court by proper and adequate material.....

17. On the argument of Mr. Mukherjee that transfer is an incidence of service and the employer has choice of deciding where they shall place a particular employee, Mr. Sengupta has not contested this basic proposition. Learned Counsel appearing for the parties have also not disputed that this general rule is subject to two limitations. Court can scrutinise an order of transfer and can quash it if it is found the transfer is mala fide or such transfer contrary to applicable rules. There is no allegation that the transfer is contrary to the rules. In view of this, I do not think there is any necessity to discuss individually the ratio of the judgments cited by Mr. Mukherjee on this point.

18. I shall next address the question as to whether there was any decision actually taken to transfer the petitioner. To these two memoranda carry only suggestions which takes their content into the domain of probability rather than any definite decision? The first document or memorandum has been issued by the Head Branch Banking. According to Mr. Sengupta this is not in accordance of law as such decision has to be taken by regional head. But in a banking company, the command structure in my view need not be scrutinised with that detail. Head Branch Banking is an officer superior to regional head. Accordingly, for this reason alone I think the decision ought not to fall, Mr. Sengupta also had emphasised on the expression "suggested", as used in the memorandum issued by the Head, branch banking and the expressions "...we may, therefore, relocate Sri Basanta Kumar Roy..." as used by the Deputy General Manager, Human Resource department in his memorandum. Referring to these expressions. Mr. Sengupta submitted that no specific decision was there for transferring the writ petitioner. In the administrative decision making process, a course of action described as "suggested" can also constitute an order or command. The said decision need not be specific in choice of words, like a judicial decree. So far it emanates from an authority competent to take such decision, the expressions "suggested" or "may" can constitute a decision in reality. The Deputy General Manager, Human Resource Department has observed that the petitioner "can be posted to Barasat branch so as to enable proper utilisation of officers in business development". Though the expression "can be" implies that somebody is being enabled to issue an order of posting, the fact that such posting is the directive of the deputy general manager is well reflected in that memorandum.

19. Next comes the question as to whether the decision to transfer the writ petitioner was mala fide or not. So far as absence of the use of expression in "public interest" or "administrative exigency", in the order of transfer, in the decision of the Hon'ble Division Bench of this Court in the case of Mukul Mitra v. Union of India, [(1982) 2 CHN 157] it has been held that these reasons can be disclosed by way of an affidavit also, In this case such disclosure has been made by filing an affidavit. In the case of Ramadhar Pandey (supra), the Hon'ble Supreme Court came to the conclusion that there was no public interest involved as there was no counter-affidavit and the records also did not reveal the subject of transfer in that case was in public interest. Moreover, in the two memoranda issued by the Head Branch Banking and Deputy General Manager, Human Resources Department, the reason as to why the petitioner is being transferred to Barasat has been explained. Thus, I do not think the ratio of the judgments in the cases of Ramadhar Pandey (supra) or Mukul Mitra (supra) is applicable in the present case. In the present case, the Bank has filed an affidavit and has come forward with a case that there was administrative necessity in effecting transfer of the petitioner.

20. On the allegation of mala fide Mr. Mukherjee had argued that since Chairman of the Bank was not a party in the proceeding, and most of the allegations were made against him, arguments "on this point ought not to be entertained. I am, however, to accept the argument of Mr. Mukherjee on this count. The order of transfer is being effected by the Bank in this case, which operates through different officers at different levels of decision making. Even if allegations are made against the Chairman, the employer of the petitioner is the Bank and the Chairman also acts in this matter acts as executive head of the Bank. A similar issue was examined by the Hon'ble Supreme Court in the case of State of Punjab v. Ramji Lai (AIR SC 1228) and the Hon'ble Supreme Court held in that case:

9. Counsel for the State of Punjab contended that the Plea that the action of State was not bona fide cannot be said to be established, unless the party alleging that case names the officer or officers guilty of conduct which justifies an inference that the official act was done for a collateral purpose, and since no such attempt was made and the High Court did not find that any named officer or officers was or were responsible for that official act the plea that it was not bonafide must fail. We do not think that the law casts any such burden upon the party challenging the validity of the action taken by the State Government. The State Government has undoubtedly to act through its officers. What matters were considered, what matters were placed before the final authority, and who acted on behalf the State Government in issuing the order in the name of the Governor, are all within the knowledge of the State Government and it would be placing an intolerable burden in proof of a just claims to require a party alleging mala fides of State action to aver in his petition and to prove by positive evidence that a particular officer was responsible for misusing the authority of the State by taking action for a collateral purpose.

I think the same principle ought to apply in the case of a large institution like the respondent Bank also, and in my opinion the allegations of mala fide could be examined by this Court even if the Chairman has not been directly as a party respondent.

21. Submission of Mr. Sengupta is that the Court can scrutinise as to whether an order has been made in public interest or for administrative exigency or not, by examining the surrounding circumstances, as an order passed mala fide is to be captioned as a "mala fide order" by the issuing authority. The decisions of the Hon'ble Supreme Court in the case of Smt. S.R. Venkataraman Vs. Union of India (UOI) and Another, and State of Punjab v. Vijay (supra) and State of Andhra Pradesh v. Pitta (supra) are authorities on this point on which reliance was placed by him. In the case of Arvind Dattatraya Dhandekar (supra), the Hon'ble Supreme Court came to its finding by making inference from the factual circumstances. Now I am to test what are the surrounding circumstances in the case of transfer of the writ petitioner from which inference is to be made as to whether his transfer is mala fide or not. He was transferred last only on 30 January, 2009 to Bansdroni branch. Thereafter he was transferred to Barasat branch, within ten months. There was an element of haste in issuing the order of transfer. It appears that on 29 October he was asked to be released from his duty and report to Barasat from 31 October 2009. It is the petitioner's case that his trade union activities had compelled the bank to pay minimum wages to certain section of workmen and he has complained against the CMD over excessive spending for his personal comfort. All these factors taken together are capable of causing disturbance in the mind of the CMD or the higher authorities of the bank and may result in initiation of action against him in bad faith. But would such probability of harbouring of bad faith lead to an inevitable conclusion that the transfer order was actually issued in bad faith? It could, if otherwise the order of transfer was without any justification.

22. In the present case the respondents have come forward with justification as to why he has been transferred to Barasat branch. Of course any employer would like to disguise their malafide act in a cloak of legality. In such a situation, in my view, the Court has to look at two factors. First, whether the justification is a reasonable justification or not, that is whether the act complained against could be held to be valid under normal circumstances, if there was no allegation of mala fide. If the justification given by the employer is unreasonable, then a strong presumption that the act complained against is mala fide would arise, and if such presumption goes un rebutted, then of course the impugned action could be quashed on the ground of mala fide. Court can also examine as to whether the dominant motive for effecting such purpose was to victimise an incumbent, even if such act was otherwise projected as a valid act. Pratap Singh v. State of Punjab (supra)]. But in such a situation, the onus on the person who would allege mala fide would be very heavy and on this point the ratio of the four authorities relied on by Mr. Mukherjee would become applicable.

23. Court would also have to make an assessment as to the degree of prejudice the act assailed against is intended to cause to the complainant of the inconvenience caused to the complainant is minimal, then there could be a presumption that the alleged action would be in normal course. The principle laid down in the case of Kasturi Lal (supra) would be applicable in such a situation. It is of course true that in the case of Kasturi Lal (supra), presumption of regularity has been postulated for governmental action. So far as agencies or instrumentalities of State are concerned, I do not think an absolutely contrary approach is called for, unless the complainant come with strong rebuttable material. But in a case where the reason for transfer per se appears justified, and the nature of transfer causes minimum inconvenience to the aggrieved employee, the inference would that the act of transfer is legitimate to meet administrative requirement.

24. In the present case, apart from the fact that the petitioner will have to travel a reasonably long distance from his residence, his only complain is that his transfer to Barasat would prevent him from carrying on his trade union activities. So far as the question of transfer is concerned, there is no special privilege for a trade unionist. At least no such circular or rule has been brought to my notice. Thus when a question of transfer is to be examined, the concerned employee should be viewed as a regular employer only. In such a situation, in my opinion such a high degree of prejudice is not being caused to the writ petitioner which would automatically lead to an inference that the act complained against has been mala fide. The justification of the Bank for effecting such transfer also appears to me to be valid. The petitioner, in the present case, at best has been able to demonstrate that there could be possibility of mala fide. But having regard to the explanation given by the Bank justifying their action, I do not think the petitioner has been able to discharge the burden of proving mala fide. Under these circumstances, I do not find any reason to interfere with the order of transfer in this writ petition.

25. In the event, however, the writ petitioner has not joined or attended his transferred posting as yet, since this matter was pending before this Court let this period of absence be treated as leave and no penal action on departmental action shall be taken against him for this absence.

26. The writ petition stands disposed of in the above terms.

27. There shall be no order as to costs.

28. Let an urgent Photostat certified copy if applied for be given to the learned Advocate for the parties with necessary formalities as expeditiously as possible.