
(2018) 10 GAU CK 0030
In the Gauhati High Court
Case No : Civil Writ Petition No.2533 Of 2018

Bhaba Kumar Hazarika @APPELLANT@Hash State Of Assam And 3 Ors

Date of Decision : 11-10-2018

Acts Referred:

Citation : (2018) 10 GAU CK 0030

Hon'ble Judges : Nelson Sailo, J

Bench : Single Bench

Advocate : I.H. Saikia, Dr. B. Ahmed, M.R. Adhikari

Final Decision : Disposed Off

Judgement

1. Heard Mr. I.H. Saikia, the learned counsel for the petitioner and Dr. B. Ahmed, the learned Standing Counsel, Industries and Commerce

Department for the respondent Nos. 1 to 3. Also heard Mr. M.R. Adhikari, the learned Government Advocate, Assam, for the respondent No.4.

2. This is a second round litigation initiated by the writ petitioner. The earlier round of writ petition was registered and numbered as WP(C) no.2144 of 2018 and the same was disposed of vide order dated 09.04.2018.

3. Brief facts leading to filing of the first writ petition may be noticed at the outset. The petitioner entered into service under the Directorate of

Industries and Commerce, Assam, on 05.02.1987. Vide notification dated 15.02.2014, the petitioner was transferred and posted as General Manager,

District Industries and Commission Centre (DICC in short), from Lakhimpur to Dhemaji. Thereafter, vide notification dated 08.05.2017, he was

transferred in the same capacity to the DICC, NC Hills. Notification dated 08.05.2017 was modified vide notification dated 24.05.2017 posting the

petitioner to DICC, Dibrugarh in the same capacity. The petitioner, therefore, joined as General Manager at DICC, Dibrugarh on 05.06.2017 and he

was given the charge against the same post on 08.06.2017.

4. However, after about 10 months from his joining to the post, he was transferred and posted in the same capacity to DICC, Hailakandi vide the

impugned notification dated 03.04.2018 (Annexure-6). As per the impugned notification, the petitioner was asked to handover the charge of General

Manager, DICC Dibrugarh to Sri Debajit Deuri, Functional Manager, DICC, Dibrugarh immediately. Being aggrieved, the petitioner filed WP(C)

No.2144 of 2018. The writ petition was, however, disposed of vide order dated 09.04.2018 by granting liberty to the petitioner to file a representation

before the Secretary to the Government of Assam, Industries and Commerce Department i.e. the respondent No.2 within a period of 7 days.

Thereafter, the respondent No.2 was directed to consider his representation on merit for his retention at Dibrugarh till he superannuates on 31.01.2019

and particularly with reference to guidelines on transfer and posting issued by the State Government vide Office Memorandum dated 06.08.2013

(Annexure-8) and thereafter, pass a speaking order. It was further directed that until the speaking order was passed, the impugned notification dated

03.04.2018 should not be enforced against the petitioner.

5. Following the said direction, the petitioner filed his representation before the respondent No.2 and thereafter, the representation of the petitioner

was disposed of vide the impugned order dated 19.04.2018 (Annexure-10) rejecting his representation. By the said impugned order, the petitioner was

asked to immediately relinquish his charge as General Manager, DICC, Dibrugarh and move to the place of his posting at DICC, Hailakandi.

6. Aggrieved with the order of rejection dated 19.04.2018, the petitioner is again before this Court through the present writ petition.

7. Mr. I.H. Saikia, the learned counsel for the petitioner, submits that the petitioner was initially transferred to DICC, NC Hills, in the same capacity

vide notification dated 08.05.2017. However, within a few days of his transfer and without there being any request from him, the said transfer order

was modified vide notification dated 24.05.2017 transferring him in the same capacity to DICC Dibrugarh instead. The petitioner joined his place of

posting at Dibrugarh and to his surprise, within a span of 11 months, he was transferred again to DICC, Hailakandi in the same capacity vide the

impugned notification dated 03.04.2018. He submits that the impugned transfer

notification dated 03.04.2018 cannot be sustained in view of the fact that approval of the Chief Minister was not obtained before issuance of the impugned transfer order as provided by the guidelines issued by the State Government in the Department of Personnel (B) Department vide notification dated 06.08.2013 (Annexure-8). By referring to the said Office Memorandum, the learned counsel submits that if an officer who has not completed 2 years of tenure in a particular place of posting, is required to be transferred elsewhere, prior approval of the Chief Minister is required to be taken. In the instant case, prior to issuance of the impugned transfer notification on 03.04.2018, the approval of the Chief Minister was not taken and therefore, the same is unsustainable.

8. Mr. I.H. Saikia, the learned counsel, by further referring to the order dated 09.04.2018 passed in WP(C) No.2144 of 2018 submits that the respondent No.2 was directed by the Court to consider his retention at the DICC, Dibrugarh also in view of the fact that he is due to superannuate from service on 31.01.2019. However, without considering the same, the respondent No.1 rejected the representation of the petitioner vide the impugned order dated 19.04.2018 and further directed him to join the DICC, at Hailakandi immediately. The learned counsel submits that the respondent No.1 at the time of considering the representation of the petitioner did not apply his independent mind but relied upon the report given by the Additional Director (FP,) Office of the Commissioner of Industries and Commerce, Assam, at Guwahati, made on 05.04.2018. He submits that the said communication is annexed by the respondent No.3 in his affidavit-in-opposition dated 20.07.2018 as Annexure-H. Referring to the said communication dated 05.04.2018 as well as the impugned order dated 19.04.2018, Mr. I. H Saikia, the learned counsel submits that the impugned order of transfer issued vide notification dated 03.04.2018 by the respondent authority concerned is only by way of a punishment, inasmuch as, pursuant to certain allegation/complaint made by one organization, namely, Dibrugarh Nagarik Mancha, the respondent authorities conducted an inquiry and when it was found that the behavior and the conduct of the petitioner with the public was not good, he was transferred from DICC Dibrugarh to the DICC at Hailakandi in the same capacity. Therefore, the findings of the Departmental Authorities behind the back of the petitioner

being punitive in nature, the impugned transfer notification issued by way of a punishment cannot be sustained and should be set aside.

9 Mr. I. H. Saikia, the learned counsel, by referring to the impugned order dated 19.04.2018 submits that the respondent No.1 at the time of disposing

the writ petitioner's representation came to a finding that the petitioner made no attempt to deny the allegations of bad behavior, absenteeism and

inefficiency that was complained against him and that his transfer was found to be wholly justified in the backdrop of the allegations made against him

to establish the Government's position of having a zero tolerance towards corruption. The learned counsel submits that such finding of the

respondent No.1 is most illegal and arbitrary since the petitioner was not even given a chance to confront the complaint made against him by the

organization concerned. Moreover, there is no allegation of corruption against the petitioner which is known to him and therefore, the finding of the

respondent No.1 vide the impugned order dated 19.04.2018 is wholly unsustainable and therefore should be set aside. In support of his submissions

Mr. I.H. Saikia, the learned counsel places his reliance upon the following decisions:

(i) Nurul Islam vs. State of Assam & Ors. 1993 (2) GLR 164

(ii) Narayan Chowdhury vs. State of Tripura & Ors. 1999 (2) GLT 360

(iii) Union of India & Anr. Vs. Narendra Singh 2008 (2) SCC 750

(iv) Jyoti Kumar Das vs. Rubul Sarmah 2004 (1) GLR 596

(v) State of Uttar Pradesh vs. Jagdeo Singh 1984 (Supp.1) SCC 413

(vi) Somesh Tiwari vs. Union of India & Ors. 2009 (2) SCC 592

10. Dr. B. Ahmed, the learned Standing Counsel, Commerce and Industries Department, submits that a complaint was received from Dibrugarh

Nagarik Mancha by the Chief Secretary, to the Government of Assam, to the effect that Industrialization as well as the opportunity for self

employment for many unemployed youths was greatly affected in the district of Dibrugarh on account of the petitioner. He misbehaved with the

entrepreneurs of the District and even with the common public who visited his office. He also remained absent from his office very often and engaged

himself in his private works. Therefore, on receiving the complaint, a report was call from the Commissioner, Industries and Commerce, Assam, on

the performance of the petitioner. A report was, therefore, prepared by the respondent No.3 and forwarded to the respondent No.1 vide

communication dated 27.03.2018, wherein, it was stated that due to the inefficiency of the petitioner, various schemes under the Industries and

Commerce in the District of Dibrugarh suffered a great set back and his continuance as General Manager, DICC Dibrugarh, would further effect the

overall implementation of the schemes and projects of Industrialisation in Dibrugarh. The Additional Director, Industries and Commerce Department

under the Establishment of the respondent No.3 was also given the task of enquiring into the complaints made by the Dibrugarh Nagarik Mancha. The

Additional Director then went to Dibrugarh on 26.12.2017 and interacted with the complainants. On such interaction, he found that the complainants

confirmed that they submit a complaint on 09.08.2017. They also claimed that the behavior of the petitioner towards the people visiting the office was

completely dissatisfactory. However, they do not desire any severe action to be taken against the petitioner since he was due to retire shortly.

Therefore, the respondent authorities upon considering the findings against the petitioner was of the view that his further detention as General

Manager, DICC, Dibrugarh was not desirable and therefore, he should be transferred to the DICC at Hailakandi. The decision of transfer of the

petitioner is not by way of a punishment or a penalty but purely in the interest of the public.

11. Dr. B. Ahmed, the learned Standing Counsel further submits that the inquiry was conducted by the respondent authorities only to find out the

veracity of the complaint made against him and despite the findings, no punitive action was taken against the petitioner. Therefore, the petitioner

cannot have any grievance against his transfer to DICC, Hailakandi. He further submits that in so far as the grounds taken by the petitioner in his

representation is concerned, the respondent authorities found that the medical attention required by his wife can easily be taken from Silchar Medical

College and Hospital which was located near to the DICC, Hailakandi. Therefore, there was no ground to reconsider his posting at DICC, Hailakandi.

In so far as the approval of the Chief Minister was concerned, Dr. B. Ahmed, the learned Standing Counsel, submits that this Court vide order dated

25.04.2018 while staying the impugned order observed that the petitioner should not be forced to move to Hailakandi without obtaining prior approval

of the Chief Minister as mandated in the transfer policy notified through Office Memorandum dated 06.08.2013 and therefore, an ex-post facto

approval of the Chief Minister was obtained on 07.05.2018. With the ex-post-facto approval given by the Chief Minister, the petitioner can no longer

have any grievance on his transfer to DICC, Hailakandi and he should comply with the same.

12. Dr. B. Ahmed, the learned Standing Counsel further submits that the petitioner was transferred from Dibrugarh to Hailakandi purely in public

interest and therefore, there are no grounds to interfere with the same. The performance of the petitioner was looked into by the respondent

authorities since a complaint was received against him. The inquiry that was conducted was only to find out as to whether there was any substance in

the complaint. Pursuant to the inquiry it was found that the petitioner was a non-performing Officer of the Department who did not maintain cordial

relation with the public who were associated with the DICC at Dibrugarh and accordingly, it was decided that he should be transferred to the

Hailakandi. He submits that transfer and posting being purely in the domain of the Executive, there is hardly any scope for interference by the Court

and the same should be left upon the wisdom of the State administration who are well conversant with the conduct and performance of their

employees. Therefore, the transfer of the petitioner having been made in the interest of the public, Court may not interfere with the same and instead

dismiss the writ petition. In support of his submission, Dr. B. Ahmed, the learned Standing Counsel relies upon the following decisions:

(i) Union of India vs. Janardhan Debnath 2004 (4) SCC 245

(ii) State of Uttar Pradesh vs. Gobardhan Lal 2004 (11) SCC 402

(iii) Mozibur Rahman vs. State of Assam (2004) 2 GLT 421

(iv) Rajendra Singh vs. The State of U.P. & Ors. 2009 (15) SCC 178

(v) Islam Uddin Laskar vs. The State of Assam 2015 (1) GLR 210

13. I have heard the submissions advanced by the learned counsel for the rival parties and I have also perused the materials available on record

including the respective authorities relied upon by the parties.

14. Facts which are not in dispute is that the petitioner was transferred from Lakhimpur to Dhemaji as General Manager, DICC vide Notification

dated 15.02.2014. Thereafter, he was transferred to DICC, NC Hills in the same capacity vide Notification dated 08.05.2017, which however was modified vide Notification dated 24.05.2017 posting him to DICC at Dibrugarh. The petitioner proceeded to DICC at Dibrugarh and joined his transferred post on 05.06.2017 and took over the charge of the post of General Manager, DICC at Dibrugarh on 08.06.2017. After about 10 months of his joining to the post, the impugned Notification 03.04.2018 posting him to DICC, Hailakandi was issued. Being aggrieved, he approached this Court by filing WP (C) No. 2144 of 2018 which was disposed of on 09.04.2018 by granting him liberty to submit his representation before the Secretary to the Government of Assam, Industries and Commerce Department. On filing his representation before the said authority, the same came to be rejected vide order dated 19.04.2018.

15. It is also further not in dispute that the guidelines of transfer and posting currently in vogue provides that the tenure of posting of an employee of the State Government in a particular post will be for two years. In case, an employee is to be transferred before completion of two years of tenureship in a post, prior approval of the Chief Minister is to be obtained. The guidelines on transfer and posting has been notified by the State Government vide Office Memorandum dated 06.08.2013. Admittedly, the petitioner having joined DICC, Dibrugarh on 05.06.2017 did not complete the tenure of two years at Dibrugarh when the impugned Notification dated 03.04.2018 was issued and therefore, in terms of the guidelines on transfer and posting, prior approval of the Chief Minister was to be obtained. As may be noticed, after the issuance of the impugned Notification dated 03.04.2018 transferring the petitioner from DICC Dibrugarh to DICC Hailakandi, an ex-post facto approval of the Chief Minister was obtained on 07.05.2018. Therefore, technically prior approval of the Chief Minister before transferring the petitioner to DICC Hailakandi having not been obtained, the guidelines on transfer and posting notified through Office Memorandum dated 06.08.2013 was not adhered to. The Apex Court in the case of Union of India âvs- S L Abbas reported in (1993) 4 SCC 357 has held that the guidelines on transfer and posting are not legally enforceable. This decision was also followed by this Court in Abdur Rahim Sk âvs- State of Assam & Ors reported in 20178 (2) GLT 20. Be that as it may, the further issue in the

present case is that the retention of the petitioner at DICC, Dibrugarh was not found to be conducive in view of the complaints received from the

public who visited the establishment of DICC at Dibrugarh. What may be noticed is that the complaint submitted against the petitioner, more

particularly, by the organization for Dibrugarh Nagarik Mancha appears to be the compelling reason for transferring the petitioner to DICC at

Hailakandi. The petitioner admittedly was not given an opportunity to respond to the complaint before a decision was taken to transfer him out from

DICC Dibrugarh. It may further be noticed that in the impugned order dated 19.04.2018 by which the representation of the petitioner was rejected, the

finding of the authority concerned was that the petitioner did not make any attempt to deny the allegation of bad behavior, absenteeism and

inefficiency that was complained against him. Also the policy of the Government of having a zero tolerance on corruption was also one of the factors

warranting his transfer. Therefore, it became necessary to transfer him out of DICC Dibrugarh. It may however be noticed that there are no

allegations of corrupt practices or corruption against the petitioner from the materials available on record. Therefore, the finding or observation made

in the impugned order dated 19.04.2018 appears to be mis-placed.

16. The Apex Court in the case of Janadharn Debnath (supra) held that for the purpose of affecting a transfer, the question of holding enquiry to find

out whether there was mis-behaviour of conduct unbecoming of an employee is unnecessary and what is needed is *prima facie* satisfaction of the

authority concerned on the contemporary reports about the occurrence of complaint. If an elaborate enquiry is to be insisted upon, the very purpose of

transferring an employee in public interest or exigencies or administration to enforce decorum and ensure probity would get frustrated. It is a settled

law that Court has a limited role in interfering with an order of transfer and posting unless it is satisfied that there are cogent materials to show

malafide action on the part of the employer directing such transfer. In other words, the employer should ordinarily be considered to be the best judge

to decide what and how an employee should be transferred and posted.

17. With the above position in law, it will therefore, be difficult to persuade this Court that the impugned order of transfer and posting under the facts

and circumstances should not have been issued. However, one aspect of the

matter to which the authorities concerned could not have been unmindful of is that the petitioner is due to superannuate from service on 31.01.2019 and which means that he has hardly over 3(three) months left to be in active service. Although the petitioner was transferred to the DICC, Hailakandi vide the impugned Notification dated 03.04.2018, an interim order was passed by this Court on 25.04.2018 staying his transfer. Admittedly, the petitioner continues to remain on DICC Dibrugarh as on date. This Court in Narayan Choudhury (supra) after having regard to the fact that the petitioner therein was due to retire from service within the next one year and six months, allowed him to remain in his place of posting till his retirement. The same ratio was also applied by this Court in the case of Kabul Chandra Saikia (Dr & Ors) â?"vs- State of Assam & Ors reported in 2015 (5) GLT 75. The only difference was that the petitionerâ??s case was directed to be re-considered by the authorities concerned keeping in mind the fact that he was approaching his retirement.

18. In the present case, as already noticed herein above, the petitioner hardly has over 3 (three) months left to be in active service before he superannuates and therefore, I am of the considered opinion that he should be permitted to remain in his current place of posting DICC Dibrugarh till he superannuates on 31.01.2019. Since, the respondent authorities concerned have already taken a call on his representation, I am no inclined to relegate the issue to the respondent authorities for a fresh reconsideration. Having taken such a view, I do not find the necessity to dwell upon the other authorities relied upon by the parties.

19. In the result, I am of the considered opinion that ends of justice will be served if the respondent authorities are directed not to disturb the petitioner from his posting at DICC Dibrugarh till he superannuates from his service on 31.01.2019.

20. It is ordered accordingly.

21. With the above observations and directions, the writ petition is accordingly disposed of. No cost.