
(1991) 05 PAT CK 0022

In the Patna High Court

Case No : Civil Writ Jurisdiction Case Nos. 235 and 445 of 1991

Bindu Shekhar Singh and Others

APPELLANT

Vs

The State of Bihar and Others

RESPONDENT

Date of Decision : 23-05-1991

Acts Referred:

Citation : (1991) 05 PAT CK 0022

Final Decision : Dismissed

Judgement

U.P. Singh, J.—In these writ applications under Articles 226 and 227 of the Constitution of India, the petitioners have prayed for a writ of mandamus commanding the respondents to desist themselves from enforcing notification No. 1490 (2) dated 13-6-1990 contained in Annexure-1. Another prayer is to quash the notification No. 2552 (2) dated 29-10-1990 contained in Annexure-3. Identical questions and the grievances being common both the applications have been heard together and are disposed of by this common judgment.

2. The petitioners are members of the Bihar State Health Services. By notification No. 1490(2) dated 30-6-1990 (Annexure-1) issued by the Joint Secretary to the Government in the Department of Health, the petitioners were transferred to other places. Before any one could be posted in place of the petitioners the State Government in the Health Department vide notification No. 2027 (2) dated 31-7-1990 (Annexure-2) cancelled Annexure-1 (notification No. 1490(2) and it was effective only against those Medical Officers to whom the notification transferring them was not implemented. By another notification No. 2552 (2) dated 22-10-1990 (Annexure-3). the State Government recalled Annexure-2 (notification No. 2027 (2)1. Consequently, all those Medical Officers who were transferred and whose transfer had earlier been stayed, now after lifting the order staying the transfer, necessary orders were directed to be issued that they must join the new place of posting within one week failing which they would be suspended A fresh communique to this effect was also issued and published in the daily newspapers that those Medical Officers, who would not join

within one week, would be suspended. The communication to the Health Commissioner on 31-12-1990 by the Additional Health Commissioner has been annexed marked Annexure-4.

3. The petitioner's contention is that the impugned notification contained in Annexure-3 suffers from the vice of arbitrariness and is violative of Articles 14 and 16 of the Constitution. The State and the concerned respondents had no jurisdiction and competence to revive the earlier notification No. 1490 (2) contained in Annexure-1 which had been cancelled by Annexure-2. Further, it had no authority to recall Annexure-2 by subsequent notification No. 2552(2) dated 29-10-1990 (Annexure-3). It was further contended that before recalling the order contained in Annexure-2, the petitioners were entitled to a notice.

4. Notification No, 2552 (2) contained in Annexure-3 has been challenged primarily on the ground that it was issued without placing the matter before the Establishment Committee and further that it seeks to make the order of transfer retrospective. It is asserted that the earlier notification transferring the doctors was non est and could not be revived.

5. On consideration of these facts emerging from the writ applications, the counter-affidavit and the reply thereto, it appears that the transfer of such doctors who were in one Division for more than six years was considered and placed before the Establishment Committee. The Establishment Committee recommended the transfer and, thereafter, under the orders of the Minister, Department of Health, various notifications were issued transferring 885 and "odd doctors. However, the Minister, Department of Health, Government of Bihar, by his order dated 28-7-1990, on his own, directed to cancel the transfers contained in five notifications, i.e. Nos. 1489 (2), 1490 (2) 1491 (2), 1492 (2) and 1493 (2) all dated 30-6-1990. In insurance thereof notification No. 2027 (2) dated 31-7-1990 contained in Annexure-2 was issued. The matter was then placed before the Chief Minister stating that the transfer of 885 doctors was based on the recommendation of the Establishment Committee but, on his own, the same was cancelled by the then Minister in the Department of Health. The Chief Minister then by his order dated 25-9-1990 directed that the order of transfer on the "basis of the recommendation of the Establishment Committee should be implemented. Accordingly, notification No. 2552 (2) dated 29-10-1990 (Annexure-3) was issued recalling the notification contained in Annexure-2.

6. The order of transfer is not retrospective and it was to operate from the prospective dates of the orders passed by the respective controlling officers relieving the doctors in pursuance of the notification contained in Annexure-3, As such, I find no illegality in the order of transfer and there is no arbitrariness. It may be noticed that the impugned order of transfer contained in Annexure-1 is not challenged because they were all matured transfers in respect of those doctors who had been continuing continuously for over six years. By the impugned order contained in Annexure-3, the order of transfer contained in Annexure-1 was only partially modified and the transfer which was cancelled by

Annexure-3 was only in respect of those doctors against whom it had not been implemented. Therefore, it cannot be accepted that Annexure-1 was non est and it could not be revived by Annexure-3. The procedure adopted in issuing the notification was in the like manner as contemplated by Section 21 of the General Clauses Act, which, in pari materia the same as Section 24, of the Bihar and Orissa General Clauses Act 1917, which reads:-

24. Power to make will include power to add to, amend, vary or rescind orders, rules or bye-laws.

Thus, the administrative order could be reviewed or rescinded in accordance with Section 24 of the Act by the authority conferred with the power to pass that order. Of course, it does not confer the power to rescind notification with retrospective effect. In the present case, the order was not retrospective in effect.

7. In the present context, Section 16 of the Bihar and Orissa General Clauses Act, which in pari materia the same as Section 14 of the General Clauses Act may be noticed.

16. When powers and duties to be exercised and performed:

When Bihar and Orissa Act 2 (or Bihar Act) confers a power or imposes a duty then the power may be exercised and the duty shall be performed from time to time as occasion requires.

In the present case, therefore, it could not be contended that the State was not competent to pass orders of transfer from time to time. It has already been noticed above that Section 21 of the General Clauses Act gives power to the Government to issue or to rescind notification which can have effect from the date of its publication in the Gazette. Of course, this power does not include a power to rescind notification with retrospective effect. In the present case, the order was not retrospective in effect.

8. In the case of Gujarat Electricity Board and Another Vs. Atmaram Sungomal Poshani, the Supreme Court held:-

...Transfer of a Government servant appointed to a particular cadre of transferable post from one place to another is an incident of service. No Government servant or employee of Public Undertaking has legal right for being posted at any particular place. Transfer from one place to another is generally a condition of service and the employee has no choice in the matter. Transfer from one place to another is necessary in the public interest and efficiency in public administration. Whenever a public servant is transferred he must comply with the order but if there be any genuine difficulty in proceeding on transfer it is open to him to make representation to the competent authority for stay, modification of the transfer order. If the order of transfer is not stayed, modified or cancelled, the concerned public servant must carry out the order of transfer. In absence of any stay of the transfer order, a public servant has no justification to avoid or evade the transfer order merely on the ground of having made a

representation or on the ground of his difficulty in moving from one place to the other. If he fails to proceed on transfer in compliance to the transfer order, he would expose himself to disciplinary action.

9. There is no dispute that the petitioners were holding transferable posts and under conditions of service applicable to them, they were liable to be transferred and posted at any place within the State. The petitioners had no legal or statutory right to insist for being posted at one particular place. They were transferred when they were holding the posts for long six, years.

10. In the case of *B. Varadha Rao Vs. State of Karnataka and Others*, , the Supreme Court held:-

...It is well understood that the transfer of a Government servant who is appointed to a particular cadre of transferable post from one place to another is an ordinary incident of service and, therefore, does not result in any alteration of any of the conditions of service to his disadvantage. That a Government servant is liable to be transferred to a similar post in the same cadre is a normal feature and incident of Government service and no Government servant can claim to remain in a particular place or in a particular post unless, of course, his appointment itself is to a specified, non-transferable post. The norms enunciated by the Government for the guidance of its officers in the matter of regulating transfers are more in the nature of guidelines to the officers who order transfers in the exigencies of administration than vesting of any immunity from transfer in the Government servants.

It is no doubt true that, if the power of transfer is abused, the exercise of the power is vitiated but it is one thing to say that an order of transfer which is not made in the public interest but for collateral purposes and with oblique motives is vitiated by abuse of powers, and altogether different thing to say that such an order per se made in the exigencies of the services varies any condition of service, express or implied, to the disadvantage of the concerned Government servant.

In the case of *E.P. Royappa Vs. State of Tamil Nadu and Another*, , it was observed:

...The Government is the best Judge to decide how to distribute and utilise the services of its employees. However, this power must be exercised honestly, bona fide and reasonably. It should be exercised in public interest. If the exercise of power is based on extraneous considerations or for achieving an alien purpose or an oblique motive it would amount to mala fide and colorable exercise of power. Frequent transfers without sufficient reasons to justify such transfers, cannot, but be held as mala fide. A transfer is mala fide when it is made not for professed purpose, such as in normal course or in public or administrative interest or in the exigencies of service but for other purpose, that is illegible to accommodate another person for undisclosed reasons. It is the basic principle of law and good administration, that even administrative actions should be just and

fair.

11. It should be kept in mind that, in so far as superior or more responsible posts are concerned, continued posting at one station or in one department of the Government is not conducive to good administration. It creates vested interest.

12. The present order of transfer of a large number of doctors who were holding superior and responsible posts and were continuing at one station or in one department of the Government, for long six years was certainly not conducive to good administration. The Government, therefore, rightly decided to distribute and utilize the services of these doctors. It was exercised in the normal course and in public interest, Therefore, the impugned order of transfer is not vitiated.

13. It is also a settled principle of law that this Court, while exercising extraordinary jurisdiction under Articles 226 and 227 of the Constitution will not issue in fructuous writ or writs which can be nullified by the respondents by issuing another notification. In the present case, even if the writ petitions are accepted, the State Government can nullify the effect thereof by issuing appropriate notification.

14. For the reasons enumerated above, these writ applications are dismissed but there shall be no order as to cost.

S. Hoda, J.

15. I agree.