

(2003) 08 AHC CK 0142

In the Allahabad High Court

Case No : Civil Miscellaneous Writ Petition No. 38008 of 2000

Brij Lal Maurya

APPELLANT

Vs

U.P. Rajkiya Nirman Nigam Limited and Others

RESPONDENT

Date of Decision : 27-08-2003

Acts Referred:

Constitution of India, 1950 — Article 311

Citation : (2003) 6 AWC 5304 : (2004) 1 UPLBEC 716

Hon'ble Judges : Rakesh Tiwari, J

Bench : Single Bench

Advocate : K.P. Agrawal and Suman Sirohi, for the Appellant; None, for the Respondent

Final Decision : Allowed

Judgement

Rakesh Tiwari, J.—Heard Counsel for the parties and perused the records.

2. The petitioner has challenged validity and correctness of the orders dated 19.7.2000 and 8.8.2000, by which he has been transferred from Allahabad to Delhi. The petitioner has claimed himself to be Trade Union worker and President of U.P. Rajkiya Nirman Nigam Limited, Allahabad Unit of the Trade Union.

3. It is submitted that the General Manager of the Nigam addressed a letter to Joint Managing Director on 8.8.2000 stating therein that in view of order dated 30.3.1993 the petitioner cannot be transferred from Allahabad. The order dated 30.3.93, provides that the Government Servants, who are office bearers in recognized Trade Union such as the President or the Secretary, will not be transferred for a period of two years from the date of appointment on the post; and in case of necessity, approval may be taken by the authority higher by one rank than the transferring authority.

4. It is submitted that according to the aforesaid Government Order dated 30.3.1993, the respondents cannot transfer the office bearers of the employees of the Union for at least two years.

5. The contention of the petitioner is that transfer of the petitioner by order dated 19.7.2000 is illegal, unwarranted and suffers from voice of mala fide as local officers of the Nigam wanted to get rid-off him by transferring him from out of Allahabad against the provisions of G.O. dated 30.3.93. Reliance has been placed by the petitioner on Para 6 of the judgment of Apex Court in *The Management of the Syndicate Bank Ltd. Vs. The Workmen*, which is as under :--

"It is true that if an order of transfer is made mala fide or for some ulterior purpose like punishing an employee for his Trade Union activities the Industrial Tribunal should interfere and set-aside such an order of transfer because the mala fides exercise of power is not considered to be the legal exercise of the power given by law but the finding of mala fides should be reached by Industrial Tribunal only if there is sufficient and proper evidence in support of the findings."

6. The second point that has been raised by the petitioner before this Court that there is no source of power for transfer of the petitioner from Allahabad to Delhi as the activities of the Nigam are confined to the State of U.P. and its registered office being situated in Lucknow and employees of corporation are not Government Servant, hence the respondents cannot transfer the employees from the State of U.P. to other States.

7. The Counsel for the petitioner has also cited 1960 SC 650, *Kundan Sugar Mills v. Zia Uddin and Ors.*, in which it has been held that no employer had the inherent right to transfer an employee. Relying on Para 7 of the aforesaid case (supra) it is contended that power to transfer can be derived either from statute or from contract. The relevant observations are contained in Paragraph 7 of the said judgment which is as under :

"None of these cases holds, as it is suggested by the learned Counsel for the appellant that every employer has the inherent right to transfer his employee to another place where he choses to start a business subsequent to the date of the employment. We therefore, hold that it was not a condition of service of employment of the respondents either express or implied that the employer has the right to transfer them. New concerned started by him subsequent to the date of their employment."

8. It is contended by the Counsel for the petitioner, that the rules made by the Rajkiya Nirman Nigam are contained in Paragraph 1132 of its manual and a perusal of these rules would show that there is no power with the respondent Nigam by which it can transfer anyone of its employee from one place to another and in any case to a place which is outside the area of its operation.

9. The Standing Counsel submits that the transfer is an incident of service and it does not require consent of employees. According to New Oxford English Dictionary, the term transfer means "if you transfer or are transferred to a different place or job you move to a different place or job within the same organization."

10. The instant case is different from those cases where Courts have observed that in case of State Government employees or the employees of the Union of India the power of transfer is inherent. In fact the rules relating to service conditions statutorily provide that the State Government or the Central Government has the power to transfer. Even otherwise an employee of the State Government is statutorily and even impliedly is subject to transfer for the reason that the State of the Union Government are one unit and the employment in the State or with the Union of India is not for any particular place Town or City but is employment of the State or the Union of India, so it becomes even an implied condition of service in the case of State Government or the Union of India. By and large in all those industrial establishments or industries which work throughout the country, there is always a stipulation in the service rules that the employee will be subject to transfer throughout the country or throughout the State. In *Manager, Pyarchand Kesarimal Ponwal Bidi Factory Vs. Omkar Laxman Thange and Others*, , the Apex Court in Paragraph 8 has observed as under :--

"Such being the position in law it was of the utmost important in the present case, that the appellant has no time took the plea that contract of employment with the factory was ever terminated or that the respondent gave his consent expressed or implied to a contract of service being transferred to the Head Office or there was a fresh contract of employment so brought about it. Unless therefore, it is held that from the circumstances relied upon Mr. Phadke that there was a transfer of the consent of service or the respondent No. 1 gave his consent express or implied to such a transfer that respondent No. 1 would be continue to be the servant of the factory."

11. This Court followed the same principle in its judgment in *Obeetee (P) Ltd., Mirzapur v. State of U.P.* 1996 LIC 629. The same view had been taken by a Division Bench of Delhi High Court in *Jasbir Singh and Ors. v. Food Corporation of India* 1991 (62) FLR 489.

12. The transfer order challenged by Trade Union is on the ground of mala fides and is subject to judicial review as any other administrative action.

13. Some of the principles laid down by the Apex Court in respect of judicial review of transfer cases are as under :--

(a) An order of transfer is an incident of Government Service. Who should be transferred and where, is a matter for the appropriate authority to decide. Unless the order of transfer is vitiated by mala fides or is made in violation of any statutory provisions, the Court can not interfere with it.

(b) It may not be always possible to establish malice in fact in a straight cut manner. In an appropriate case, it is possible to draw reasonable inference or mala fides action from the pleadings and antecedent facts and circumstances. But for such inference there must be firm foundation of facts pleaded and established. Such inference cannot be drawn on the basis of insinuation and vague suggestions.

(c) Assessment of work must be left to the bona fide decision of the superiors in service and their honest assessment must be accepted as a part of service discipline. Transfer of a Government Servant in a transferable service is a necessary incident of the service career. Assessment of the quality of men is to be made by the superiors taking into account several factors including suitability of the person for a particular post and exigencies of administration. Several imponderables requiring formation of a subjective opinion in that sphere may be involved times. The only realistic approach is to leave it to the wisdom of the hierarchical superiors to make that decision, unless the decision is vitiated by mala fides or infraction of any professed norm or principle governing the transfer, which alone can be scrutinized judicially.

(d) There are no judicially manageable standards for scrutinizing all transfers and the Courts lack the necessary expertise for personnel management of all Government Departments. This must be left in public interest to the departmental heads subject to the limited judicial scrutiny as indicated above. Challenge of a transfer order, when the career prospectus remain unaffected and also there is no detriment to the Government Servant must be eschewed and interference by Courts should be rare. Such interference may be made only when a judicially manageable and permissible ground is made out.

14. It is settled law that a transfer which is an incident of service may not be interfered with by the Courts unless it is shown to be clearly arbitrary or vitiated by mala fides or infraction of any professed norm or principle governing the transfer. It is needless to emphasize that a Government employee or any servant of a public undertaking has no legal right to insist for being posted at any particular place. It cannot be disputed that concerned employee holds a transferable post and unless specifically provided in his service conditions, he has no choice in the matter of posting.

15. To be proved in the judicial review of the order of transfer, the Courts should be slow in interfering with the transfer and come down with heavy hands where they found that the transfer was not bona fide.

16. Neither Article 311 of the Constitution of India, nor the Fundamental Rules are applicable. Temporary employees of U.P. Rajkiya Nirman Nigam Ltd. are not the Government servants. There is no express provision of transfer in the Manual of orders governing the service conditions of the employees. Whatever powers of transfer are there, have been given in Paragraphs 887 and 888 of the Manual. A perusal of the paragraphs show that there was no power vested in U.P. Rajkiya Nirman Nigam to transfer the petitioner. Paragraphs 887 and 888 only provide for transfer of employees in the same cadre from one post to another in limited circumstances. These circumstances are enumerated in Paragraph 888 of the Manual. For ready reference Paragraphs 887 and 888 of the Manual are quoted below :--

Para 887.--Subject to the provisions in the Para 888 below, the Nigam may

transfer to another regular post in the same cadre, the lien of an employee, who is not performing the duties of the post to which the lien has been suspended.

Para 888.--(a) An employee may be transferred from one post to another, provide that; except--

(i) on account of inefficiency or misbehaviour;

(ii) on his written request,

an employee shall not be transferred on regular basis to, or, except in case where an employee is appointed to hold on an regular basis as temporary measure or to officiate in two or more independent posts at one time, appointed to officiate in a post carrying less pay than the pay of the regular post on which he holds a lien or would hold a lien had his lien not been suspended.

(b) Nothing contained in Clause (a) of this rule shall operate to prevent the retransfer of an employee to the post on which he would holding lien had it not been suspended in accordance with the provisions of Para 885(a).

17. The rules applicable to the petitioner do not provide for transfer of an employee from Allahabad to any other State or Union Territory. Due to lack of provisions of transfer, there is no source of powers under which an employee could be transferred outside the State. There is already an interim order passed by this Court on 29.8.2000 by which the order of transfer has been stayed and since then the petitioner is working in Allahabad Unit. For these reasons this writ petition, deserves to be allowed.

18. The writ petition is allowed. The transfer dated 19.7.2000, is set-aside, no order as to costs.