
(1968) 06 CAL CK 0013

In the Calcutta High Court

Case No : C.R. No's. 1009 (W) and 1177 (W) of 1964

Chirajit Pal

APPELLANT

Vs

West Bengal Khadi and Village Industries Board and Another

RESPONDENT

Date of Decision : 25-06-1968

Acts Referred:

West Bengal Khadi and Village Industries Board Act, 1959 — Section 33(2), 33(3)
West Bengal Khadi and Village Industries Regulations, 1961 — Section 9

Citation : AIR 1969 Cal 152 : (1969) 2 ILR (Cal) 411

Hon'ble Judges : A.K. Sinha, J

Bench : Single Bench

Advocate : Ramendra Nath Banerjee, for the Appellant; Bankim Chandra Dutta, for the Respondent

Judgement

A.K. Sinha, J.—These two rules are taken up together for hearing as they are issued at the instance of the petitioner against successive orders of his transfer while working under the West Bengal Khadi and Village Industries Board the respondent No. 1 (hereinafter referred to as the Board).

2. The case of the petitioner briefly is that the Board is a body corporate established u/s 3 of the West Bengal Khadi and Village Industries Board Act (West Bengal Act XIV of 1959, hereinafter referred to as the Act) having its Head-Office at Calcutta and certain Regional Offices at several places including Tamluk in the district of Midnapore and Coochbehar. The petitioner was appointed by an appointment letter dated 25th February, 1961, to the post of "Marketing Assistant" under the Board on terms and conditions mentioned in the letter and since then continued to serve in that post diligently. This post was created by a resolution of the Board passed at its meeting held on 10/15th October, 1960, as a post attached to the Trading and Publicity Section of the Head-Office at Calcutta. By the same resolution the respondent No. 1 also created several posts in Regional Offices, namely, (I) Circle Inspector, (II) Area Inspector, (III) Clerk typist, (IV) Orderly peons. These resolutions, it is stated, were passed u/s 5 of

the West Bengal Khadi and Village Industries Board Regulations, 1961 (hereinafter referred to as the Regulation) by the respondent No. 1 in exercise of the powers conferred by Section 33 of the Act and by virtue of Section 9 of the aforesaid Regulations called "Recruitment Regulations for the Officers and Staff of the West Bengal Khadi and Village Industries Board". The provisions as regards the nature of duties in the post of Marketing Assistant were also laid down which are as follows:

I. To assist the Marketing Surveyor and the Officer-in-charge (Trading) in marketing of Khadi and Village Industries Products.

II. Inspection of Bhandars and Reports.

III. To obtain market quotations.

3. The aforesaid recruitment regulations further laid down that the method of recruitment to the post of Marketing Surveyor a higher post drawing a bigger salary would be by promotion or selection from the post of Marketing Assistant. So the petitioner who held the only post of Marketing Assistant was in the direct line of promotion to the post of Marketing Surveyor.

4. While working in the post of Marketing Assistant the petitioner was transferred by an order dated 3rd September, 1964, signed by its Executive Officer to Tamluk as an "Assistant to the Circle Inspector, Midnapore East, the respondent No. 2". In spite of several representations the petitioner was asked to carry on the duties with which he was entrusted. By such transfer, it is stated, the petitioner has been deprived of his house allowance and in fact has been demoted to a lower post and several employees have been promoted to higher posts although they are not entitled to supersede the petitioner. That is how the petitioner felt aggrieved and come up to this Court, and obtained the Rule. After the issue of the said Rule, the respondent No. 1 again transferred the petitioner to Coochbehar to assist the Circle Inspector in the district and study the position and possibilities of marketing in the area. Against this order, the petitioner again moved this Court in its Writ Jurisdiction and obtained another Rule.

5. Upon these facts, it was contended by Mr. Ramendra Nath Banerjee, learned Advocate for the petitioner that the order of transfer was entirely illegal as the petitioner was transferred to post not created in accordance with Clause 5 of Regulation. His argument was that the petitioner was appointed in the post of Marketing Assistant under letter of appointment dated 25th February, 1961, by the Executive Officer of the Board which is a post created by means of a resolution passed under Clause 5 of the Regulation. But by the order of transfer (Annexure "B" to the petition in C. R. 1009 (W) of 1964) to Tamluk he was given the post of an "Assistant to the Circle Inspector of Midnapore East". This post, according to him, was not created by the Board by passing resolution as required under Clause 5 of the Regulation. Therefore, this post must be deemed to be nonest and necessarily the order to transfer to such a post was entirely void. In order to appreciate the correctness of this contention, it is necessary to look into

the provisions of Clause 5 of the Regulation which provides as follows:

"5. Creation of posts: All posts shall be created by the Board by passing resolutions to that effect. All orders regarding creation of posts of honorary workers shall be issued by the Secretary and of all posts other than those of honorary workers by the Executive Officer."

6. The Board is a statutory body and is empowered to make regulations sanctioned by the State Government not inconsistent with the provision of the Act or with the rules made thereunder for enabling to discharge its function under the Act. Such regulation made u/s 33 (2) of the Act may provide amongst other things, the terms and conditions of appointment and services, salaries and allowances of Officers and servants of the Board other than the Secretary and Executive Officer of the Board. By virtue of this power this regulation was framed by the Board and the above clause lays down the manner and circumstances under which posts may be created by the Board. It appears from the above provision that all posts excepting the posts of Secretary and Executive Officer of the Board as contained in Section 33 (2) of the Act shall be created by the Board by passing resolution to that effect but at the same time it is also provided that all orders regarding creation of posts of honorary workers shall be issued by the Secretary and all posts other than those of honorary workers by the Executive Officer. Though the latter part in this clause may appear at the first reading to be little bit anomalous, yet on a true and correct interpretation of the provision of the entire clause as a whole, it appears that there is no such anomaly. The orders that are contemplated, to be issued by the Secretary or the Executive Officer as may be will only mean those orders that will be made by them respectively after the posts are created by the Board by passing the resolution to that effect. Unless such a resolution is passed by the Board, the Secretary or the Executive Officer is not competent to issue the orders regarding the creation of posts. In other words these Officers are not empowered to create posts but only to issue orders regarding creation of posts which is to be made by the Board alone by means of resolution only and in no other way. It is well settled that "when a power is given to do a certain thing in a certain way, the thing must be done in that way or not at all." This is the view taken by the Judicial Committee in AIR 1936 253 (Privy Council) .

7. Now, that being the correct position in law, it is to be seen as to whether the post of Assistant to the Circle Inspector was ever created in the manner prescribed under Clause 5 of the Regulation by the Board by a resolution. In paragraph 5 of the petition in C. R, 1009 (W) of 1964 it is specifically stated by the petitioner that the post of Marketing Assistant which the petitioner held at all relevant times was created by the respondent No. 1 viz., the Board by passing resolution at its meeting held on 10/15th October, 1960, as a post attached to the trading and publicity section of the respondents' Head-Office at Calcutta. It is also stated that by the same resolution the respondent No. 1 created various posts to be attached to the Regional Office, namely (I) Circle Inspector. (II) Area

Inspector. (III) Clerk Typist, (IV) Orderly peon. These statements were not denied in the affidavit-in-opposition on behalf of the respondents Nos. 1 and 2 but the deponent only wanted to refer to the resolution of the Board, a true copy of which was also annexed to the Affidavit. This resolution as annexed does not appear to be a complete resolution but it only relates to agenda No. 3. Nothing is decipherable from this resolution excepting that certain posts created by the Board will be filled up as and when required in proportion to the volume of work. No material was placed before this Court to show that the post of an Assistant to the Circle Inspector of Regional Office was created by means of resolution of the Board. In fact, Mr. B. C. Dutta, learned Advocate for the respondents, never suggested that such a resolution was there. What was contended by him was that the Assistant to the Circle Inspector either at Midnapore or at Cooch Behar Regional Office was not a separate post at all. His argument was that the petitioner was on transfer merely asked to assist the Circle Inspector in matters of enquiries and investigations into the working of different institutions for his work and also in matters of studying the market at the place which were clarified in the letter of the Executive Officer dated 1st February, 1964, (Annexure "D" to the petition). I am afraid, I cannot accept the argument. This matter containing the purported order of the Executive Officer is written only in continuation of the previous office order dated 3-1-64 and not in modification or variation of such order. In the affidavit-in-opposition it is stated in para 10 also that the post of an Assistant to the Circle Inspector is not inferior to the post of the Marketing Assistant. Considering all these, it cannot be said that the petitioner who was posted as Marketing Assistant to the Trading Section of the Board's Head-Office was not transferred to a different post viz., the post of an Assistant to the Circle Inspector in the Regional Office at Tamluk or at Cooch Behar by subsequent order. The duties involved in such posts were merely defined in the subsequent order. Since such post as already seen was not validly created by the Board by means of resolution it cannot be deemed to have been in existence and consequently the order of transfer to such post must be held to be equally illegal and invalid. It is sufficient to dispose of the present rule on the view I have taken but even so I shall consider the matter from the other aspects.

8. One is, even assuming, that such post was validly created, whether in absence of any provision in the Act or under its regulations or in absence of any contract express or implied the Board has any inherent power to transfer its employees. Now there is no provision of transfer of employees either in the Act or Regulation, but since there is no provision it may be said that this power of transfer may be a matter of contract either express or implied. From the letter of appointment which is the only document embodying the terms of the contract, it is quite clear, there is no such express contract. Next, in order to ascertain whether there was implied contract, surrounding circumstances, course of dealing or conduct of parties have got to be looked into. From the letter of appointment and the duties involved in the post of Marketing Assistant even according to the respondents' own document viz., the draft regulation. It does

not appear that this post was not exclusively post for the Head Office at Calcutta or the duties involved could also be effectively discharged elsewhere. On the other hand from the successive letters given to the petitioner directing his transfer and clarifying the duties to be discharged by him, it becomes significant that the post of Marketing Assistant was exclusively post of Calcutta Head-Office and that is why the petitioner was not transferred as "Marketing Assistant" but as an "Assistant to the Circle Inspector" with quite a different type of duties mentioned by the Executive Officer. No materials have been placed before me to show that at the time of appointment the petitioner had the knowledge that the Board had many Regional Offices in Mofussil areas and if necessary he would be required to work there in different capacities or to effectively discharge his duties in the present post. Considering all these it cannot be said that there was Implied contract.

9. That being the position, it now remains to be seen whether the Board has any inherent power to transfer its employees. The Board is a statutory body and can only move within the four corners of the statute in the manner and under the circumstances prescribed therein or under rules and regulations not inconsistent with the provisions of the Act for enabling it to discharge its function under the Act. In other words, the powers in furtherance of the objects of the Act or to discharge its function Under the Act must be expressly conferred upon the Board under the statute. Even so, there may be cases where such a power may be derived by reasonable implication from the provisions of the particular Act. This implied power is, however, limited to cases where an effective execution of powers of discharge of duty expressly conferred would be rendered ineffective in absence of such implied powers. In the instant case, the only express power given upon the Board relating to terms and conditions of appointments of Officers, servants etc., is the power conferred u/s 33 (2) to be exercised in the manner that may be provided in the Regulations which it may make with previous sanction of the State Government. In this regulation as already noticed earlier there is no express power of the Board for transfer of its Officers and Servants The question is whether the power of appointment of the Board's Officers and Servants would be ineffective if the power of transfer is not implied. In my view, the power of transfer is neither incidental nor indispensable for the effective execution of the power of appointment. For it cannot be denied that ordinarily persons appointed in different establishments or institutions are exclusively attached to or meant for the particular office or locality in which they are created or exist. Transfer is not an ordinary incidence of such posts in which they are employed. To put it differently, the power of appointment does not carry with it also the power of transfer. That being so, it cannot be said that there is any inherent or implied power of the Board to transfer the petitioner.

10. Apart from the case of statutory body the Supreme Court while dealing with the question relating to power of transfer of employees has held in Kundan Sugar Mills Vs. Ziyauddin and Others, that an employer has no inherent right to transfer his employee in absence of contract either express or implied. It is true that in

this case the employer wanted to start a business subsequent to the date of employment of the aggrieved employee but nonetheless the principle indicated is the same. For in this case Supreme Court took notice of the decision of the Judicial Committee reported in AIR 1930 PC 118 *Alexandre Bouzourou v. The Ottoman Bank* and several other decisions but they were distinguished on the view that they were limited to their own facts. It is also true that Judicial Committee in its above decision upheld the impugned transfer on the view that employer was carrying on banking business as one unit and the employee was transferred on higher emoluments to one of its branches but this case has no application to the facts of the present case. Firstly because, although the Board is also functioning through its regional offices there is nothing on record to show that for purpose of office administration it is working as one unit: on the other hand separate exclusive posts for the Head-Office and of the Regional Offices have been created and from these posts, nature of duties mentioned therein, it appears that system of working in the Head-Office or Regional Offices is not same Secondly, the post to which the petitioner was transferred was not higher and this involved also loss of his total emoluments- So on the principles laid down in the above decision of the Supreme Court I am inclined to hold that the Board apart from being a statutory body even as an ordinary employer has no inherent power to pass the impugned orders of transfer,

11. Although I take the above view. I shall consider the instant case from the other aspect which is that in the present case it remained still to be seen whether such a power was exercised bona fide. It is stated in the petition that the impugned order of transfer was not issued in the interest of the business of the Board but only to enable the respondent to promote another of its employees Nagendra Nath Maity, who was working in an Inferior post. This Nagendra Nath Maity according to the petitioner who was holding the post of Technical Assistant under the respondent No, 1 and whose total period of service was less than that of the petitioner was promoted to the post of Bhandar Inspector, a post carrying a higher salary than that of the post of the Marketing Assistant and he was also allotted the duties of the Marketing Assistant, that is the post held by the petitioner. In paragraph 13 of the affidavit-in-opposition in C. R. No. 1009 (W) of 1964 which deals with the statement regarding the promotion of Nagendra Nath Maity it was not denied that he was not promoted. What was stated was that the post of technical Assistant was not inferior to that of the Marketing Assistant and that the petitioner being a temporary employee had no right to claim such promotion nor he was considered for such appointment or promotion. It was also not denied that the post of an "Assistant to the Circle Inspector" was not a separate post or that by such transfer the petitioner did not remain as Marketing Assistant. On the other hand, it appears from the affidavit of the respondents that this Nagendra Nath Maity was allotted the duties of the Marketing Assistant. So from these facts it may be taken that the Board gave the post of Bhandar Inspector as also of the Marketing Assistant to this Nagendra Nath Maity and transferred the petitioner to another post, namely, the Assistant to the Circle

Inspector which according to him is a lower post than the post of the Marketing Assistant. Then again after receiving the order of transfer the petitioner made several representations in writing against the order of transfer setting out his grievances but no reply was given to his earlier representation. It appears that the Executive Officer by his letter dated 21/22nd February, 1964 (marked as Annexure "J" to the affidavit-in-opposition) merely informed him with reference to his representation dated 10th February, 1964, that the Chairman was pleased to order that he must carry on with his duties with which he had been entrusted. This reply together with other facts as seen above which are not denied by the respondent create a reasonable apprehension that the Authorities in power were inimically disposed towards the petitioner or at any rate were not fairly dealing with him. This apprehension should be more fortified by course of subsequent events that followed resulting in a further order of transfer of the petitioner to Cooch-Behar.

12. The petitioner in obedience to the order went to Midnapore East but from there made representation by way of appeal to the Chairman of the Board but not being satisfied with the reply contained in the above letter of 21/22nd February, 1964, ultimately moved this Court on 21st August, 1964, against his order of transfer to Midnapore East and obtained a Rule. After the issue of the above Rule the respondent No. 1 by another order dated 2nd September, 1964, transferred the petitioner to a far more distant place, viz., Cooch-Behar to assist the Circle Inspector in his day to day work, In addition to his work in studying the position and possibilities of marketing in the area. After this order the petitioner by his letter dated 7th September, 1964 addressed to the Executive Officer of the Board in which he complained amongst other things, that the present transfer order was made with full knowledge of the said Rule issued by this Court for the purpose of making this Rule infructuous. It was also stated that the petitioner's T. A. for transfer from Calcutta to Tamluk and tour allowance in June, 1964 and July, 1964, half average pay for the period of medical leave in April and May, 1964, routine increment due in March, 1964, were not paid to him in spite of repeated requests but in spite of injustice shown to him he was not disagreeable to proceed to Cooch-Behar, It was also pointed out that a poorly paid employee could not move from Headquarters meeting all expenses and obligations if his T. A., part of salary and increment etc., remained unpaid for a considerable period. He showed his readiness to proceed to Cooch-Behar also on receipt of the said T. A., half average pay, routine increment etc., and requested the Board to issue necessary instructions for payment of these dues (this letter in C. R. 1177 (W) is marked as Annexure "G"). But to this no reply was given. The petitioner was thus again compelled to move this Court and obtained a Rule. The receipt of this letter has also not been denied. It is merely stated in the affidavit-in-opposition that the previous rule was not served till 3rd December, 1964, but nevertheless the petitioner long before the alleged service brought it to the notice of the Board that such a rule was issued. Even thereafter, the attitude adopted by the Board only reveals its mala fide intention. The Board did

not pay the arrears nor made any arrangements to enable the petitioner to proceed to Cooch-Behar. I cannot imagine a case where an employee can be directed to move from office to office or in distant places in such a quick succession of time and that too at his own costs when he was certainly not taken as a touring employee. Even the touring employees must be given their travelling allowances before they may be asked to discharge their duties effectively. No materials have been placed before this Court to show that such was not the case or that such transfer or successive transfers within the course of one month were necessary in the interest of the business. It is true that an order of transfer is an administrative order and it is not for the Court but for the administration to judge whether the interest of the business demands such transfers but nevertheless if it could be shown that no grounds at all existed for the satisfaction of the authorities requiring such transfers, the Court might infer that the authorities did not act honestly or did not apply their mind at all for ordering such transfers.

13. This view finds support in one of the latest decisions of the Supreme Court reported in *The Barium Chemicals Ltd. and Another Vs. The Company Law Board and Others*, . While dealing with the question as to whether an administrative order would be justiciable or not, Shelat, J., observed at page 323 of the report on reviewing a long line of cases as follows:

"Though an order passed in exercise of power under a statute cannot be challenged on the ground of propriety or sufficiency, it is liable to be quashed on the ground of mala fides, dishonesty or corrupt purpose. Even if it is passed in good faith and with the best of intention to further the purpose of the legislation which confers the powers, since the Authority has to act in accordance with and within the limits of that legislation, its order can also be challenged if it is beyond those limits or is passed on grounds extraneous to the legislation or if there are no grounds at all for passing it or if the grounds are such that no one can reasonably arrive at the opinion or satisfaction requisite under the legislation. In any one of these situations it can well be said that the authority did not honestly form its opinion or that in forming it, it did not apply its mind to the relevant facts."

14. Apart from the above principles, In a decision reported in (1963) 1 Lab LJ 282 (SC), *National Radio Corporation v. Their Workmen*, the Supreme Court has held that the order of transfer is liable to be struck down as invalid if it is not made bona fide. I respectfully follow the said decision.

15. For the reasons given, I have no doubt that the impugned orders of transfer are also not bona fide and consequently must be struck down as invalid.

16. The result is, the petitions succeed. The impugned orders of transfers are quashed. The rules are made absolute but there will be no order as to costs.

17. Let a writ in the nature of mandamus issue accordingly in each of the two cases.