
(2014) 09 MAD CK 0334

In the Madras High Court

Case No : Writ Appeal No. 961 of 2014 and M.P. No. 1 of 2014

D. Ramkumar

APPELLANT

Vs

Pondicherry Society for Higher Education

RESPONDENT

Date of Decision : 10-09-2014

Acts Referred:

Persons with Disabilities (Equal Opportunities, Protection of Rights and Full Participation) Act, 1995 — Section 38, 38(1)(d), 66, 66(2), 66(3)

Citation : (2014) 5 CTC 849 : (2015) 144 FLR 168 : (2014) LabIC 4475 : (2014) 4 LLN 229 : (2014) 5 LW 571 : (2014) 6 MLJ 641 : (2014) WritLR 1042

Hon'ble Judges : N. Paul Vasantha Kumar, J;K. Ravichandra Babu, J

Bench : Division Bench

Judgement

N. Paul Vasanatha Kumar, J.—This writ appeal is preferred against the order made in W.P. No. 33715 of 2013 dated 27.6.2014 wherein the learned single Judge upheld the order of transfer dated 25.11.2013, transferring the appellant, who is 100% blind person, from the third respondent/Kasthurba College for Women, Villianur, Puducherry to the fourth respondent/Rajiv Gandhi Arts & Science College, Thavalakuppam, Puducherry. The appellant, who is a Doctorate degree-holder in English, is a 100% visually challenged person and he is working as Assistant Professor and Head of the Department of English Department in the third respondent/Kasthurba College for Women, Villianur, Puducherry, from the date of his appointment on 6.2.2009. The Pondicherry Society for Higher Education, Puducherry, is the appointing authority of the appellant, which has established and is administering six colleges in Puducherry, including 3rd and 4th respondent Colleges. The said Society is controlled by the Government of Puducherry. Initially appellant was appointed as Lecturer in English and subsequently re-designated as Assistant Professor and after declaring his probation on 28.8.2011, the appellant was given the status of Head of the Department (HOD) in English Department. The third respondent College, where the appellant was employed is situated 9 kms away from the place of his residence and the appellant used to go to the College with the help of his

colleague, who is staying close to his residence at No. 12, Kulathu Mettu Street, Puducherry.

2. By order dated 25.11.2013 the second respondent Member-Secretary of the Society transferred the appellant from the 3rd respondent/Kasthurba College for Women, Villianur, Puducherry to 4th respondent/Rajiv Gandhi Arts and Science College, Thavalakuppam, Puducherry, which is located 18 Kms away from his residence. On 27.11.2013 the appellant sent a representation requesting the first respondent to cancel the transfer order considering his 100% visual disability by following the official memorandum dated 10.5.1990 issued by the DOPT, Government of India, which states that visually challenged persons should be posted close-by. According to the appellant, the second respondent has transferred the appellant to the 4th respondent College under the impression that he was instrumental in giving complaint of sexual harassment by one K.T. Anju, Lecturer working in the third respondent College against one Shaji, Lecturer, but he has nothing to do with the said complaint said to have been given by the said K.T. Anju.

3. The learned single Judge treating the transfer as an administrative order, dismissed the writ petition believing the version stated in the counter affidavit stating that the appellant is owning a car and he has also engaged a driver, and he used to attend the college in his car by travelling 9 kms, and similarly he can attend the 4th respondent college also. The learned single Judge dismissed the writ petition on the ground that transfer being an incidence of service, appellant is not entitled to challenge the same, and dismissed the writ petition. Aggrieved by the said order this writ appeal is preferred.

4. Mr. N.G.R. Prasad, learned counsel appearing for the appellant submitted that the appellant is not owning a car as contended in the counter affidavit filed by the second respondent and the appellant used to attend the third respondent College by travelling in a car of his friend along with him, who is also serving in the third respondent College. The learned counsel also submitted that the distance between the appellant's house to the third respondent College is only 9 kms, whereas the distance to the fourth respondent College is 18 kms and the appellant being a 100% visually challenged person, is entitled to get special protection in terms of the provisions of the Persons with Disabilities (Equal Opportunities, Protection of Rights and Full Participation) Act, 1995 (Act 1/1996). The learned counsel also submitted that the Principal of the third respondent College has certified about the performance of the appellant stating that the appellant is highly competent with other non-handicapped counterparts and his relationship with fellow-employees and superiors are smooth and the appellant is highly independent in his works and he deserves the award based on his meritorious work efficiency, academic achievements, and he has also done outstanding/extra-ordinary special nature of work. The learned counsel therefore submitted that the appellant is entitled to continue in the third respondent College as his performance is appreciated none other than the Principal of the

College on 14.10.2013, i.e., just one month prior to the order of transfer. The learned counsel further submitted that the learned single Judge ought not to have dismissed the writ petition applying the general orders of transfer, without considering the plight of the appellant, who has 100% visual impairment.

5. Mr. T.P. Manoharan, learned Counsel appearing for the management on the other hand submitted that the appellant having been appointed in a transferable post, is bound to accept the transfer, as the terms of the appointment clearly stipulates that the appellant is liable for transfer. The learned counsel also submitted that the third respondent College being a Women's college, the male staff members are to be transferred to other colleges and the appellant was transferred on that ground, and therefore no interference is called for in the order of the learned single Judge.

6. In reply to the said submission, the learned counsel for the petitioner argued that several other male members are still allowed to serve in the third respondent college and the appellant cannot be discriminated on the guise of transferring male staff members from the third respondent College to other College, namely the fourth respondent College.

7. We have considered the rival submissions with reference to the relevant papers and material documents relied on by both the learned counsels.

8. It is not in dispute that the appellant is a 100% visually challenged person. The appellant was issued with a meritorious State Award by the Government of Puducherry, Social Welfare Department for the year 2013-2014, certifying that he is the most outstanding best Government Employee. The Principal of the College certified on 14.10.2013 that the appellant is highly competent; that he maintains smooth relationship with fellow employees and superiors; that he is highly independent; and that he deserves the award based on merit, work efficiency and academic qualifications. Thus, it is evident that the appellant is an excellent Professor and HOD in the third respondent College.

9. The Management has produced the list of male staff members working in the third respondent College. Even now six male staff members (Teaching faculty) are working in the third respondent Women's College. Thus, the contention of the management that the appellant being a male staff member has been transferred to the 4th respondent College holds no ground.

10. The learned counsel appearing for the Management heavily relied on the Office Memorandum issued by DOPT, Government of India dated 10.5.1990 directing posting of physically handicapped candidate near to their native place within the region, as far as possible, subject to administrative constraints, which means due to administrative reasons, even the physically challenged person can be transferred to other college/nearby college.

11. It is true that in the appointment order issued to the appellant it is stated that the appellant was appointed as Lecturer in English in the third respondent

College and he is subject to transfer. The same is an usual clause contained or incorporated in all the appointment orders, for both physically challenged as well as normal persons. There is no dispute regarding the power of the authority to transfer an officer from one place to another place, or from one college to another college on administrative exigency. However, having regard to the State Award conferred on the appellant, as well as the assessment of the appellant's performance recorded by the Principal of the third respondent College, it is beyond doubt that the appellant is an asset to the third respondent College, which is also a Women's college. It is not in dispute that other male Lecturers/ Assistant Professors are allowed to serve in the third respondent College even as on date. Thus, there is no justification on the part of the management/ respondents to contend that the third respondent College being a Women's college, appellant has no right to continue in the said college and he is to be necessarily transferred to the 4th respondent College, which is 18 Kms away from his residence.

12. Admittedly the third respondent College is located within 9 Kms from the appellant's residence, whereas, 4th respondent College, where he is now transferred is 18 kms from the place of his residence. The appellant has denied the fact of owning a car. The said version is not disproved by the counsel for the respondents by producing the RC Book containing the name of the appellant. Even otherwise in according to the learned counsel for the appellant, 4th respondent College is having several staircases and not conducive to the blind person to move about freely, when compared to the third respondent College. Thus, on facts, the appellant is entitled to challenge the order of transfer.

13. The 5th respondent, who is transferred and posted in the place of appellant in third respondent College was impleaded as 5th respondent, in spite of service of notice on 28.7.2014 and proof of service was also filed by the appellant on 8.8.2014, she has not chosen to oppose the writ appeal claiming that she alone can function as Assistant Professor in English in the third respondent College. The action of the 5th respondent in not opposing the claim of the appellant in spite of service of notice shows that she is also sympathetic towards the appellant due to his 100% visual impairment.

14. The Persons with Disabilities (Equal opportunities, Protection of Rights and Full Participation) Act, 1995 (Act 1 of 1996) was enacted with an object to improve the living conditions of people in large number with disabilities, which is specifically stated in the objects and reasons of the Act. It is further stated therein that the Act was enacted to create barrier free environment for persons with disabilities; to lay down a strategies for comprehensive development of programmes and services and equalisation of opportunities for persons with disabilities; and to make special provision for the integration of persons with disabilities into the social mainstream. The purpose of the Act was to enact a comprehensive legislation as per the proclamation in the meeting held by the Economic and Social Commission for Asian and Pacific Region held at Beijing

during December, 1992, in which India was a signatory.

15. Section 66 of the Act 1/1996 mandates the appropriate Government and Local Authorities to undertake rehabilitation. Section 66(2) reads as follows:

"Sec. 66(2) For the purpose of sub-section (1), the appropriate Governments and local authorities shall grant financial assistance to non-Governmental Organisations."

As per Section 66(3), Appropriate Government and Local Authorities, while formulating rehabilitation policies were directed to consult the non-governmental organisations working for the cause of persons with disabilities. Section 72 of the Act states that the provisions of the Act as well as the Rules framed thereunder shall be in addition to and not in derogation of any other law for the time being in force or any rules, order or any instructions issued thereunder, enacted or issued for the benefit of persons with disabilities. Section 38(1)(d) of the Act mandates the appropriate Government and Local Authorities to frame schemes for health and safety measures and creation of a non-handicapping environment in places where persons with disabilities are employed. Thus, it is evident that the appropriate Government as well as Local Authorities are bound to frame regulation/schemes for protecting the safety measures and creation of environment in place of employment of the physically challenged persons.

16. The learned counsel for the respondent has heavily relied on the circular dated 10.5.1990 issued by the GOPT, Government of India. The said official memorandum, even though gives preference to the physically challenged persons in the place of employment during transfer, after the enactment of Act 1/1996, the physically challenged persons got statutory right to work in a healthy and safe place and the same can be insisted by the physically challenged persons as a matter of right under Section 38 of the Act. Thus, there is a statutory violation committed by the first respondent while transferring the appellant from the third respondent College, where he was serving in a safe manner, to the 4th respondent College, which is 18 kms away from the appellant's residence.

17. It is a well settled principle of law that transfer order can be challenged on the ground of mala fides as well as violation of any statutory rule/provision. The first respondent having violated the statutory provision as enshrined in Section 38 of the Act, the same is liable to be set aside. It is not the case of the first respondent that in the third respondent college there is no vacancy and the post held by the appellant is surplus. Even assuming that one post has become surplus in English department, only the junior-most in the Department can be deployed to other needy college. The only contention of the first respondent before this Court was that the third respondent College being a women's college, the male faculty members are to be transferred to other colleges. As already stated six Lecturers/Assistant Professors are serving in the third respondent College even now and transferring the appellant alone to the 4th respondent

college is a discriminatory treatment and arbitrary action exercised by the first respondent.

18. The appellant being 100% visually challenged person was managing his assignments as Assistant Professor/HOD of English Department in third respondent College in a healthy and friendly atmosphere and by transferring him to the 4th respondent College his normal way of functioning as physically challenged person is very much affected. In a welfare State, the persons vested with responsibilities are bound to protect the welfare of physically challenged persons, as they got disability by birth or by some accident and the said duty is recognised not only under Act 1/2006, but also as a human right. The inaction on the part of the second respondent in not considering the representation of the appellant seeking re-transfer to the third respondent college shows the defiant and insensitive attitude of the second respondent. Hence this Court is inclined to interfere with the order of transfer dated 25.11.2013, which was upheld by the learned single Judge by order dated 27.6.2014.

19. The learned counsel appearing for respondents 1 and 2 tried to justify the order of transfer, which was upheld by the learned single Judge by relying on the judgments of the Honourable Supreme Court reported in Union of India and Others Vs. H.N. Kirtania, ; S.C. Saxena v. Union of India (2006) 9 SCC 583; and Tushar D. Bhatt Vs. State of Gujarat and Another, and argued that in the light of the said judgments no interference is called for in the order passed by the learned single Judge. As we have rendered our findings with regard to the applicability of the Persons with Disabilities (Equal opportunities, Protection of Rights and Full Participation) Act, 1995, which gives statutory right to the appellant, who is a 100% visually challenged person, and in the light of the Official Memorandum dated 31.3.2014 issued by the Ministry of Personnel, Public Grievances and Pensions Department of Personnel and Training, Government of India, which states that the practice of considering choice of place of posting in case of persons with disabilities may be continued and to the extent feasible, they may be retained in the same job, where their services could be optimally utilised, the above cited decisions relied on by the learned counsel for respondents 1 and 2 have no application to the facts and circumstances of this case. In fine, the order of transfer dated 25.11.2013 passed by the second respondent transferring the appellant as HOD of English Department from the third respondent Kasthurba College for Women, Villianur, Puducherry to the 4th respondent Rajiv Gandhi Arts and Science College, Thavalakuppam, Puducherry, as well as the order passed by the learned single Judge in W.P. No. 33715 of 2013 dated 27.6.2014 are set aside and the writ petition filed by the appellant is allowed. No costs. Connected miscellaneous petition is closed.