

(1999) 03 OHC CK 0044

In the Orissa High Court

Case No : Original Jurisdiction Case No. 16945 of 1998

Damodar Mishra

APPELLANT

Vs

State of Orissa and Others

RESPONDENT

Date of Decision : 30-03-1999

Acts Referred:

Constitution of India, 1950 — Article 226, 227

Citation : (1999) 1 OLR 642

Hon'ble Judges : R.K. Patra, J; R.K. Dash, J

Bench : Division Bench

Advocate : B.S. Mishra-II, M.N. Mishra, N. Chakravarty and A.P. Dhirsamanta, for the Appellant; S.C. Satapathy, A.S.C. for Opp. parties 1 to 3 and 5, R.K. Rath, R.N. Mishra-II, S.K. Dash and M.R. Mishra for Opp. party No. 4, for the Respondent

Final Decision : Allowed

Judgement

R.K. Patra, J.—The petitioner-Damodar Mishra in this application made under Articles 226 and 227 of the Constitution of India seeks quashing of the order dated 30.11.1998 at Annexure-12 by which the Orissa Administrative Tribunal has directed the State Government Decided on 30th March, 1999. to "retain" Ganesh Chandra Barai (opp. party No. 4) at Cuttack as Inspector of Schools till the end of May, 1999.

2. BACK-GROUND FACTS :

By the notification dated 10.9.1998 at Annexure-1, the Government in the Department of School and Mass Education transferred three Inspectors of Schools. The petitioner was transferred from Jajpur Circle, Jajpur to Cuttack Circle, Cuttack vide the opp. party No. 4 who was transferred from-Cuttack Circle, Cuttack to Puri Circle, Puri. Jagabandhu Patra (opp. party No. 5) was transferred from Puri Circle, Puri to Jajpur Circle, Jajpur who has already joined at Jajpur. The controversy is confined to the petitioner and opp. party No. 4 only. Being aggrieved by the aforesaid order of transfer, opp. party No. 4 moved the

Orissa Administrative Tribunal, Bhubaneswar by filing Original Application No. 1673 of 1998. He took the following grounds in support of his application at Annexure-3 :

(i) the order of transfer was "arbitrary" and "mala fide" because it was made to accommodate the petitioner and opp. party No. 6 in their home districts;

(ii) the order of transfer would cause inconvenience since his daughter Minatilata Barai would be appearing in the First M.A. (Oriya) examination in Ravenshaw College, Cuttack. It would also affect her study having been made in mid-academic session;

(iii) his wife has been suffering from disease relating to her spinal cord. She is under the treatment of Dr. Brahmanand Acharya, retired Professor of Neuro Surgery, Cuttack and is not in a position to move from Cuttack; and

(iv) there was no administrative reason or exigency of public service for his transfer from Cuttack.

The learned Member (Judicial) without interfering with the order of transfer disposed of the matter at the admission stage on 15.9.1988 (Annexure-4) by giving liberty to the opp.party No. 4 to make a representation to the State Government in the matter. The State Government was required to consider and dispose of the representation, if made. The learned Member in his order further observed that if the successor had not joined at Cuttack, opp. party No. 4 might be allowed to continue in his post till communication of the order by the State Government on his representation. Pursuant to the aforesaid order, the Government considered the representation made by opposite party No. 4 and passed order dated 17.10.1998 (Annexure-5) permitting him to continue at Cuttack up to 30.11.1998 with a direction to get himself relieved on 1.12.1998. The Government order is extracted hereunder :

"Representation of Shri Ganesh Chandra Barai, Inspector of Schools, Cuttack, was taken up today for hearing in pursuance of direction of Hon"ble OAT on 15.9.1998 in OA No. 1673/98.

2. Heard the applicant/representationist and perused relevant documents. He contended that his daughter is appearing M.A.final examination in Oriya under Utkal University. Notification issued by the Controller of Examinations. Utkal University and published in Oriya news daily was produced. This indicates that this examination has already started from 12.10.1998 and will continue up to 21.11.1998. The applicant has filed a certificate from Principal. Ravenshaw College that Kumari Minatilata Barai is a candidate for final M.A.Examination, 1998. Besides he has also filed a copy of the Admit Card issued by the University in her favour.

3. As the examination has already commenced and will continue up to 21.11.1998, shifting of Shri Barai at this time would no doubt cause inconvenience to the student as well as parents.

4. In view of this Shri Barai is allowed to continue in his present post up to 30.11.1998 and shall get himself relieved on 1.12.1998 without any plea whatsoever. Director, Secondary Education to ensure his relief on 1.12.1998.

All concerned be informed accordingly."

The opp. party No. 4 thereafter on 27.11.1998 filed another application (O.A.No. 2192 of 1998) before the Orissa Administrative Tribunal questioning the validity of the very order of transfer dated 10.9.1998 (which was challenged by him earlier in O.A.No. 1673 of 1998). His allegation in the application (Annexure-11) was that the State Government while permitting him to continue at Cuttack up to 30.11.1998 failed to consider the illness of his wife who had been advised by the treating doctor to go for an operation in April, 1999. The matter came to be disposed of by the Orissa Administrative Tribunal by the impugned order dated 30.11.1998 (Annexure-12). We may quote paragraphs 2 to 5 of the impugned order :

"2. In the present application the grievance of applicant is that he would be put to undue hardship, if he is transferred in the mid-academic session and in view of the fact that his wife is suffering from serious ailment of spinal cord which cannot be operated upon elsewhere, which is scheduled to be operated in the month of April, 1999 at Cuttack.

3. Heard the learned counsel for the applicant and the learned Standing Counsel.

4. The fact that his wife is seriously suffering from spinal cord ailment for the operation of which she has to stay at Cuttack, since no such facility is available elsewhere in Orissa is not disputed. It is a vital ground for consideration by respondents for continuance of the applicant at present place of posting. This fact was not considered in Annexure-5. Moreover, it was not pointed out in Annexure-2 as to whether he was transferred on administrative ground or otherwise. His transfer within a period of only one and half years, without any administrative reasons, cannot also be said to have been done reasonably.

5. For the reasons stated above, we direct respondent No. I to retain the applicant till the end of May, 1999 at the present station and thereafter the applicant may be transferred to a suitable place".

It may be stated that pursuant to the impugned order, the Government in notification No. 38226 dated 16.12.1998 at Annexure-16-A cancelled opp. party No. 4's transfer to Puri.

3. Shri B.S. Mishra, learned counsel for petitioner, submitted that opp. party No. 4 misled the Tribunal by stating that :

(i) Minatilata who is his daughter was to appear at her M.A.Examination; and

(ii) He was at Cuttack for about one and half years only.

Shri Mishra stated that Minatilata is not opp. party No. 4's daughter and by the

time he moved the Tribunal on 27.11.1998, her examination was already over and opp. party No. 4 had been at Cuttack for about seven years in different capacities including as Inspector of Schools for the last one and half years. The learned counsel further submitted that opp. party No. 4 had not taken the plea of his wife's illness when he moved the Tribunal first in O.A.No. 1673 of 1998. There was no material placed before the Tribunal in support of the illness of his wife and, as such, the impugned order is vulnerable being based on mere surmises.

4. Shri Rath, learned counsel appearing for opp. party No. 4 submitted that Minatilata is none other than his (opp. party No. 4's) younger brother's daughter who has been brought up by him since her childhood and has been prosecuting her study staying with him. He further stated that opp. party No. 4's wife is suffering from the disease relating to her spinal cord and the doctor has advised her to go for operation by April, 1999 and the medical facility for her treatment is only available at Cuttack in Orissa. In this connection, Shri Rath referred to the representation of opp. party No. 4 dated 29.11.1998 made to the Secretary to the Government wherein he stated that his wife was under the treatment of Dr. Brahmanand Acharya, Ex-Professor and Head of the Department of Neuro Surgery, who advised her for an operation. Learned counsel also referred to the Medical Certificate granted by MBI Centre, Calcutta on 31.8.1996 which indicates the State of her lumbosacral spine and the certificate dated 18.9.1998 at Annexure-A/4 series suggesting that she should be operated upon by April, 1999. Shri Rath further contended that opp. party No. 4 never misled any one and particularly referred to the affidavit dated 13.10.1998 filed by him before the Government in support of his case that the transfer made in the mid-academic session would dislocate Minatilata's study particularly when she was to appear at the M.A.Final Examination in Ravenshaw College, Cuttack.

5. Judicial power of review of an order of transfer is now well settled. Transfer is an incidence of service. The order of transfer might cause difficulties and disturb the family set up of the concerned employee but on that ground the Court cannot strike it down unless such order is actuated by mala fides or is made on collateral considerations other than the interest of the administration. The Court can interfere where the transfer order is made in violation of mandatory statutory rules or is made arbitrarily. Personal problems or difficulties of a transferred employee cannot be a valid ground to upset a transfer order. Such matters, if pleaded, should be left to the concerned departmental authority for due consideration.

6. Let us now turn to the facts of the case. As already indicated, the opp. party No. 4 assailed the order of transfer dated 10.9.1998 at Annexure-1 by filing Original Application No. 1673 of 1998. The learned Member (Judicial) did not interfere with the order but gave liberty to him to make a representation to the State Government for consideration. On a representation being made, the Government in its order dated 17.10.1998 (Annexure-5) permitted him to

continue at Cuttack up to 30.11.1998 only. It means that the order of transfer dated 10.9.1998 (Annexure-1) stood modified by the subsequent order of the Government dated 17.10.1998 (Annexure-5). This being the factual position there was no scope for him to approach again the Tribunal by filing Original Application No. 2192 of 1998 challenging the very order of transfer which was the subject-matter of challenge in Original Application No. 1673 of 1998. That the opp. party No. 4 challenged the order of transfer dated 10.9.1998 for the second time is evident from his application (Annexure-1 1) wherein he stated as follows :

"..... The application is against the following order :

(i) Order No. 27529

(ii) Date : 10.9.1998....."

In the prayer portion of the application, he stated as follows :

"..... To quash the order of transfer of the applicant under Annexure-2....."

(Annexure-2 was the order dated 10.9.1998).

If the opp. party No. 4 was under the impression that the State Government failed to take note of his wife's illness while considering the representation made by him pursuant to the order of the Tribunal dated 15.9.1998, he could have moved the Government for reconsideration of its order dated 17.10.1998. The order of transfer relating to him having been modified by the subsequent order dated 17.10.1998, there was no occasion for him to challenge the pre-modified order of transfer by filing a second application before the Tribunal. The second application filed by him before the Orissa Administrative Tribunal is thus clearly a misconceived one.

7. Sri Mishra, learned counsel for the petitioner seriously contended that there was no material available before the Tribunal to record a finding about the illness of opp. party No. 4's wife. It may be stated that the Tribunal in the impugned order has observed as follows :

".....The fact that his wife is seriously suffering from spinal cord ailment, for the operation of which, she has to stay at Cuttack, since no such facility is available elsewhere in Orissa, is not disputed. It is a vital ground for consideration by respondents for continuance of the applicant at the present place of posting. This fact was not considered in Annexure-5".

The submission of Sri Mishra that there was no material before the Tribunal to come to hold about her illness does not appear to be correct. From the records of the Original Application No. 21-92 of 1998 we find that the opp. party No. 4 in his application had enclosed the certificate of Dr. B.N.Acharya as Annexure-6 from which it appears that he had advised for an operation in April. 1 999. Be that as it may, the illness of a family member may constitute a ground for reconsideration of the order of transfer by the Government, but the Court or

Tribunal in exercise of its power of judicial review cannot vary or strike down the order of transfer on such ground.

Mr. Mishra's further submission is that Minatilata is not the daughter of opp. party No. 4. He also contended that opp. party No. 4 is at Cuttack for more than seven years in different official capacities including as Inspector of Schools at Cuttack. According to him, had the Tribunal issued notice to the parties, relevant facts in support of the aforesaid aspects could have been brought to its notice for proper adjudication of the matter. We however need not examine these factual aspects because the Tribunal in the impugned order has not expressed its opinion on any of them.

8. The Tribunal has held that the order of transfer does not show "as to whether he was transferred on administrative ground or otherwise. His transfer within a period of only one and half years, without any administrative reasons, cannot also be said to have been done reasonably." May it be stated that the Tribunal disposed of the matter at the stage of admission upon hearing the counsel for the opp. party No. 4 and the State. Merely because the order does not state the reason for transfer, from that it cannot be assumed that there was no "administrative ground" for transfer. The reasons of transfer may be found in the relevant file which could have been called for or the State Government could have been asked to file an affidavit indicating the reasons for transfer.

9. For the reasons stated above, we are of the considered opinion that the impugned order of the Tribunal directing the State Government to allow opp. party No. 4 to continue at Cuttack till May, 1999 is unsustainable in law.

10. In the result, the impugned order at Annexure-12 and the consequential order of the State Government dated 16.12.1998 at Annexure- 16/A relating to opp. party No. 4 are hereby quashed.

The writ application is allowed.

The records which had been called for from the Orissa Administrative Tribunal may be sent back forthwith.

R.K. Dash, J.

I Agree