

(1997) 12 RAJ CK 0012

In the Rajasthan High Court

Case No : Civil Special Appeal No. 1221 of 1997

Dr. Archana Patni

APPELLANT

Vs

The State of Rajasthan and Another

RESPONDENT

Date of Decision : 11-12-1997

Acts Referred:

Constitution of India, 1950 — Article 141, 21, 226

Citation : (1998) 2 RLW 1280 : (1998) 2 WLC 1 : (1998) 1 WLN 467

Hon'ble Judges : V.S. Kokje, J;B.S. Chauhan, J

Bench : Division Bench

Final Decision : Dismissed

Judgement

B.S. Chauhan, J.—The instant appeal has been filed u/s 18 of the Rajasthan High Court Ordinance against the judgment and order of the learned single Judge dated 10.11.1997 passed in S.B. Civil Writ Petition No. 3753/1997 by which the prayer of the appellant against the transfer order dated 23.9.1997 has been rejected.

2. The facts and circumstances giving rise to this case reveal that the appellant, who is an Ayurvedic Doctor and serving with the respondents, has been posted in Sri Ganganagar, where her husband is also posted as Psychic Consultant in Govt. General Hospital. She has been transferred from Sri Ganganagar to Jodhpur vide order dated 23rd Sept., 1997 contained in Annex. 1. Being aggrieved and dissatisfied, the appellant challenged the said transfer order in the said writ petition on various grounds inter alia that her transfer was in contravention of the Govt. policy, which provided for posting of both the spouses together. Transfer to a distance of five hundred Kms. from Sri Ganga "Nagar would cause her great hardship and it would affect the education of her children, who are studying in Class X and VIII at Sri Ganganagar, Moreover, allegations of malafide were also alleged. However, the said writ petition has been dismissed vide judgment and order dt. 10.11.1997. Hence this appeal.

3. The issue of transfer and posting has been considered time and again by the Apex Court and entire law has been settled by catena of decisions. It is entirely upto the competent authority to decide when, where and at what point of time, a public servant is to be transferred from his present posting. Union of India and Others Vs. S.L. Abbas, ; Mrs. Shilpi Bose and others Vs. State of Bihar and others, "; State of Orissa and another Vs. Radheshyam Nanda, ; Chief General Manager (Telecom), N.E. Telecom Circle and another Vs. Rajendra Ch. Bhattacharjee and others, ; State of Uttar Pradesh v. Dr. D.N. Prasad Balwant Singh and another Vs. State of Punjab, N.K. Singh Vs. Union of India and others, and Abani Kanta Ray Vs. State of Orissa and Others,

4. An employee holding a transferable post cannot claim any vested right to work on a particular place as the transfer order does not affect any of his legal rights and Court cannot interfere with a transfer posting which is made in public interest or on administrative exigency. In Gujarat Electricity Board and Another Vs. Atmaram Sungomal Poshani, , the Hon"ble Supreme Court has observed as under:

Transfer of a Govt. servant appointed to a particular cadre of transferable posts from one place to the other is an incident of service. No. Govt. servant or employee of Public Undertaking has legal right for being posted at any particular place. Transfer from one place to other is generally a condition of service and the employee has no choice in the matter. Transfer from one place to other is necessary in public interest and efficiency in the public administration.

5. Similar view has been taken by the Apex Court in Chief General Manager (Telecom), N.E. Telecom Circle and another Vs. Rajendra Ch. Bhattacharjee and others,

6. In Union of India and Others Vs. H.N. Kirtania, , the Hon"ble Apex Court observed as under:

Transfer of a public servant made on administrative grounds or in public interest should not be interfered with unless there are strong and pressing grounds rendering the transfer order illegal on the ground of violation of statutory rules or on ground of malafide.

7. The issue of "modus animus" was considered in Tara Chand Khatri Vs. Municipal Corporation of Delhi and Others, wherein the Supreme Court has held as under:

It has been held time and again by this court that the High Court would be justified in refusing to carry on investigation into the allegation of malafides, if necessary particulars of the charge making out a prima facie case are not given in the writ petition. Keeping in view the well established rule that the burden of establishing malafide lies very heavily on the person who alleges it and considering all the allegations made by the appellant in regard thereto, we do not think that they could be considered as sufficient to established malus animus.

8. Similarly in *E.P. Royappa Vs. State of Tamil Nadu and Another*, the Supreme Court observed as under:

Secondly, we must not also over look that the burden of establishing malafides is very heavy on the person who alleges it. The allegations of malafides are often more easily made than proved and the very seriousness of such allegations demands proof of a high order of credibility.... In this context it may be noted that top administrators are often required to act which affect others adversely but which are necessary in the execution of their duties. These acts may land themselves to mis-constructions and suspicion as to the bonafide of their author when the full facts and surrounding circumstances are not known. The Court would, therefore, be slow to draw dubious inferences from incomplete facts placed before it by a party, particularly when the imputations are grave and they are made against the holder of an office which has a high responsibility in the administration. Such is the judicial perspective in evaluating charges of unworthy conduct against ministers and other, not because of any special status which they are supposed to enjoy, not because they are highly placed in social life or administrative set-up...these considerations are wholly irrelevant in judicial approach...but because otherwise, functioning effectively would become difficult in a democracy.

9. The Supreme Court in *Sukhwinder Pal Bipan Kumar and Others Vs. State of Punjab and Others*, observed as under:

The court would be justified in refusing to carry out investigation into allegations of malafides. If necessary particulars of the charge making out a prima facie case are not given in the petition. The burden of establishing malafides lies very heavily on the person who alleges it. The petitioners who seek to invalidate the impugned order...must establish the charge of bad faith or bias of misuse by the Govt. of its powers.

10. In *Shivajirao Nilangekar Patil Vs. Dr Mahesh Madhav Gosavi and Others*, the Supreme Court observed as under:

That it was somewhat unfortunate that allegations of malafide which could have no foundation in fact were made and several cases which had come up before this court and other courts and it had been found that these were made merely with a view to cause prejudice or in the hope that whether they have basis in fact or not some of which might at least stick. It is, therefore, the duty of the Courts,...to scrutinize these allegations with care so as to avoid being in any manner influenced by them in cases where they have no foundation in fact.... Therefore, while the court should be conscious to deal with the allegations of malafide caste aspersions on holders of high office and power, the court cannot ignore the probabilities arising from proved circumstances.

11. In *M. Sankaranarayanan, IAS Vs. State of Karnataka and others*, , the Supreme Court observed as under:

It may be permissible in an appropriate case to draw a reasonable inference of malafide from the facts pleaded and established. But such inference must be based on factual matrix and such factual matrix cannot remain in the realm of institution, surmise or conjecture.

12. In N.K. Singh Vs. Union of India and others, , the Supreme Court has held as under:

The inference of malafides should be drawn by reading in between the lines and taking into account the attendant circumstances.... No other suspicious circumstance is made out to permit the contrary inference. No roving inquiry into the matter is called for or justified within the scope of judicial review of a transfer scrutinised with reference to the private rights of an individual.... Unless the decision is vitiated by malafides or infraction of any professed norm or principle governing the transfer, which along can be scrutinised judicially, there are not judicially manageable standards for scrutinising transfers and the courts lack the necessary expertise for personnel management of all Govt. departments. This must be left in public interest to the departmental heads subject to be limited judicial scrutiny indicated.

13. There has to be very strong and convincing evidence to establish the allegations of malafides. The presumption is in favour of the bonafides of the order unless contradicted by acceptable material. State of Uttar Pradesh v. Dr. D.N. Prasad and " Arvind Dattatraya Dhande Vs. State of Maharashtra and others,

14. In view of the above, the petitioner in the instant petition has not made any firm foundation for urging that her posting/transfer is contrary to any statutory provisions or has been actuated by any malice. Vague and mellow allegations of malafides without material to substantiate the same do not warrant any interference by this Court. Moreover, the authority to which malafide was imputed has not been impleaded as a party by name, thus, the issue of malafide cannot be considered, (vide State of Bihar and Another Vs. P.P. Sharma, IAS and Another, Banaualikar J.N. Dr. v. Municipal Corporation of Delhi AIR 1996 SC 326 ; All India State Bank Officers' Federation and Others Vs. Union of India (UOI) and Others, ; and I.K. Mishra Vs. Union of India and Others,

15. Mr. Jain has vehemently argued that the transfer policy issued by respondents is binding on them and, they are bound to transfer/post the petitioner and her husband at the same place.

16. In Union of India v. S.L. Abbas (supra) the Apex Court has observed that the Govt. instructions on transfer are mere guidelines without any statutory force and the Court or Tribunal cannot interfere with the order of transfer unless the said order is alleged to have been passed by malice or where it is made in violation of the statutory provisions.

17. Similarly the Supreme Court in Bank of India Vs. Jagjit Singh Mehta, , has observed as under:

There can be no doubt that ordinarily and as far as practicable the husband and wife who are both employed should be posted at the same station even if their employers be different. Desirability of such a course is obvious. However, this does not mean that their place of posting should invariably be one of their choice. Even though their preference may be taken into account while making the decision in accordance with administrative needs. In case of All India Services, the hardship resulting from the two being posted at different stations may be unavoidable at times particularly when they belong to different services and one of them cannot be transferred to the place of other's posting. While choosing the career and a particular service, the couple have to bear in mind this factor and be prepared to face such a hardship, if the administrative needs and transfer policy do not permit the posting of both at one place without sacrifice of the requirements of the administration and needs of other employees. In such a case, the couple have to make their choice at the threshold between career prospects and family life. After giving preference to the career prospects by accepting such a promotion and any appointment in the All India Services with the incident of transfer to any place in India, subordinating the need of the couple living together at one station, they cannot as of right claim to be relieved of the ordinary incident of All India Service and avoid transfer to a different place on the ground that the spouses thereby would be posted at different places....

No doubt the guidelines require the two spouses to be posted at one place as far as practicable but that does not enable any spouse to claim such a posting as of right if the departmental authorities do not consider it feasible. The only thing required is that the departmental authorities should consider this aspect alongwith the exigencies of administration and enable the two spouses to live together at one station if it is possible without any detriment to the administrative needs and claims of other employees.

(emphasis added)

18. Thus, it is clear that the transfer policy does not create any legal right in favour of the appellant. It is settled law that writ petitioner under Article 226 of the Constitution is maintainable for enforcing the statutory or legal right or when there is a complaint by the petitioner that there is a breach of the statutory duty on the part of the respondent. Therefore, there must be judicially enforceable right for the enforcement of which the writ jurisdiction can be resorted to. The court can enforce the performance of a statutory duty by public bodies through its writ jurisdiction at the behest of a person, provided such person satisfies the court that he has a legal right to insist on such performance. The existence of the said right is the condition precedent to invoke the writ jurisdiction. *State of Kerala and Others Vs. K.G. Madhavan Pillai and Others*, ; *State of Kerala Vs. Smt. A. Lakshmikutty and others*, ; *Mani Subrat Jain and Others Vs. State of Haryana and Others*, ; and *The Calcutta Gas Company (Proprietary) Ltd. Vs. The State of West Bengal and Others*,

19. In *Shilpi Bose's case (supra)*, the Apex Court has held that order of transfer/

posting "issued by the competent authority did not violate any of her legal right". The employee holding a transferable post cannot claim any vested right for his posting at a particular place.

20. In support of his contention, Mr. Jain referred to and relied upon the judgment of this court in John John Virendra Kumar Vs. State of Raj. and Another, wherein this court has held that the competent authority is bound to decide the representation of an employee against transfer order considering that "living of the husband and wife together if both of them are employed as far as possible is an essential ingredient of dignified life as enshrined under Article 21 of the Constitution of India. Right to life means livable life by husband and wife even if they are in service of State or its instrumentality and they cannot be deprived of their livable life at the whim and fancy of transferring authority without following a fair procedure.

21. We had given serious consideration to this proposition of law and we are of the opinion that the aforesaid observations made by the learned Single Judge in the aforesaid case are per incuriam as the judgments of the Hon"ble Supreme Court referred to above were not brought to the notice of the learned Judge. The concept of doctrine of per incuriam has been explained by the Supreme Court in Punjab Land Development and Reclamation Corporation Ltd., Chandigarh Vs. Presiding Officer, Labour Court, Chandigarh and Others, wherein the Apex Court has observed as under:

The Latin expression per incuriam means through inadvertence. A decision can be said generally to be given per incuriam when this Court has acted in ignorance of a previous decision of its own or when a High Court has acted in ignorance of a decision of this court, it cannot be doubted that Article 141 embodies, as a rule of law, the doctrine of precedents on which our judicial system is based.

22. Similarly in the case of State of U.P. and Another Vs. Synthetics and Chemicals Ltd. and Another, , The Apex Court has observed as under:

Incuria literally means carelessness. In practice per incuriam appears to mean per ignoratium. English courts have developed this principle in relaxation of the rule of state decisis. The "quotable in law" is avoided and ignored if it rendered, in ignoratium of a statute or other binding authority". (Young v. Bristol Aeroplane Co. Ltd.). Same has been accepted, approved and adopted by this court while interpreting Article 141 of the Constitution which empalles the should the of present as a mailed of law...any declaration of conometion arrived without application of mind or preceded without any reason cannot be deemed to be declaration of law or authority of a general nature binding as a precedent. Restraint in dissenting or overruling is for sake of stability and uniformity but rigidity beyond reasonable limits is inimical to the growth of law.

23. Therefore, no reliance can be placed on the judgment in John "Virednra Kumar (supra) and the submission is devoid of any substance.

24. The next submission made by Mr Jain is that appellant's transfer from Shi Ganganagar to Jodhpur at a distance of about 500 kms. would cause great hardship to her and she would be forced to have a second establishment at a far distant place. This aspect was also considered by the Apex Court in State of Madhya Pradesh, and Another Vs. S.S. Kourav and Others, wherein it has been held that it is not permissible for the court to go into the relative hardship. It is for the administration to consider the facts of a given case and mitigate the real hardship in the interest of good and efficient administration. Thus, we are not inclined to consider this submission at all.

25. It is further submitted by Mr. Jain that transfer in mid academic session would adversely affect the education of her children. In Director of School Education v. O. Karuppa Thevan the issue of mid-academic transfer was considered by the Supreme Court and observed that the competent authority is to give "due weight" to the fact and to consider as to whether mid-academic transfer can be avoided, if it was going to affect the education of the children of an employee. However, the consideration of this aspect would also be subject to administrative exigency.

26. In Union of India (UOI) and Others Vs. D. Mohan and Others, , the Hon'ble Supreme Court has held that where service of an employee is transferable even though within a limited area, in special circumstances, he can be transferred outside that area. This view has been approved and followed in Punjab National Bank and others Vs. All India New Bank of India Employees Federation and others, It is also settled law that an employee must ensure compliance of the transfer order and if there is no justification for non-compliance, the employee runs the risk of exposing himself to disciplinary proceedings. [Vide Gujrat Electricity Board (supra)].

27. Thus, transfer may be made considering "suitability of the employee, administrative exigencies and manpower requirement. If transfer order is challenged on the ground of discrimination, arbitrariness or to accommodate a particular person, employee making such allegations has to prove by furnishing sufficient details as to when and under what circumstances, the other employee was transferred. Fairness in action is an established test to judge the validity of actions of the State or State instrumentalities.

28. Thus, in view of the above, we find no ground which may warrant the interference by this court in this appeal. Hence dismissed. If the appellant is aggrieved by impugned transfer order, she may prefer a representation before the competent authority ventilating all her grievances. However, it is clarified that if such a representation is made, the authority will consider it expeditiously and will not brush aside the grievances of the appellant being personal in nature.