
(2011) 03 OHC CK 0009

In the Orissa High Court

Case No : Writ Petition (C) No. 13912 of 2010

Dr. Nihar Ranjan Samal and Others

APPELLANT

Vs

Commissioner-Cum-Secretary and Others

RESPONDENT

Date of Decision : 15-03-2011

Acts Referred:

Constitution of India, 1950 — Article 14, 16

Citation : (2011) 2 ILR (Ori) 107

Hon'ble Judges : S.K. Mishra, J;L. Mohapatra, J

Bench : Division Bench

Final Decision : Dismissed

Judgement

S.K. Mishra, J.—These batch of writ applications involve common questions of fact and law and, therefore, are disposed of by this common judgment. In all three writ petitions, the petitioners have assailed the orders passed by the learned Chairman, Orissa State Administrative Tribunal on 08.04.2010 in O.A. Nos. 360, 359 and 357 of 2010 rejecting the prayer of the petitioners to quash their transfer orders.

2. W.P.(C) No. 13912 of 2010 In this writ application, Dr. Nihar Ranjan Samal, the petitioner, who happens to be the Editor of OMSA Voice, inter alia, pleads that he entered to Government service as a doctor on 26.06.1991 and was posted at Sankara Additional P.H.C. under Binika Block of Sonepur district. He continued there up to March, 1992. Thereafter, he underwent P.G. studies in Radiotherapy at S.C.B. Medical College and Hospital, Cuttack. He was then posted at Kalyansinghpur P.H.C. in the district of Rayagada, where he served for four years. Then he was posted at B.M.C. Hospital, Bhubaneswar from 1999 to March, 2004 and from September, 2004 he was posted as Medical Officer, Post Partum Centre, Capital Hospital, Bhubaneswar.

It is pleaded by the petitioner that the State Government in General Administration Department issued letter No. 16326/Gen. dated 10.06.1992

clarifying that the office bearers of the recognized Service Association should not be disturbed from the respective stations during 1991-92. It is further pleaded that now the Government have decided that if an officer is the office bearer of the recognized Service Association, he can continue in the station beyond three years and up to six years or till completion of his current term of office, whichever is later. He further pleads that the petitioner is holding post of Editor, OSMA Voice from 17.12.2009 to March, 2011 and the said office is functioning at Bhubaneswar.

The petitioner further claims that he has been transferred from Capital Hospital, Bhubaneswar to Sub-Divisional Hospital, Bonei in the district of Sundergarh as Medical Officer and nobody has been posted in place of the petitioner. He further pleads that in the transfer order specific direction was given to the Chief Medical Officer, Capital Hospital, Bhubaneswar (opp. party no. 3) to relieve the petitioner forthwith without posting his substitute and the petitioner has been directed to join immediately without giving any transit, which shows vindictive attitude of the opposite parties.

The petitioner further pleads that his mother is aged about 70 years and is a chronic patient suffering Ostioarthritic with Ostiotorosis and Ostiomalacia and recurrent UTI complicated with the obstructive Nephropathy. His son has appeared the Matriculation examination and is now appearing in various tests to take admission in the B.J.B. College and other colleges in Bhubaneswar. He is a brilliant student and the transfer of the petitioner to Bonei will affect his career which cannot be compensated in any manner.

The petitioner further pleads that the Capital Hospital is the Headquarters hospital of the State Capital catering to three thousand patients daily. Nearly 120 doctors have been posted at the Capital Hospital. Petitioner further pleads that nearly 30% of the doctors, who have been posted at Bhubaneswar have been transferred in a single order, which is prohibited under law.

3. The petitioner thereafter gives names of certain doctors, who have been working at Bhubaneswar for 10 to 15 years either in the Capital Hospital or nearby hospitals and alleged that they have not been transferred and instead the transfer of the present petitioner has been made which is discriminatory, arbitrary and violative of Articles 14 and 16 of the Constitution of India. On such ground, the petitioners pray that the order of transfer dated 08.04.2010 be quashed.

W.P.(C) No. 13714 of 2010:-In this case, the petitioner Dr. Narayan Rout happens to be Secretary-cum-Treasurer of Orjssa Medical Service Association, hereinafter referred as "OMSA". The petitioner pleads that he entered to the Government service in the year 1991 and at present working as Medical Officer at Capital Hospital, Bhubaneswar. He further pleads that he has been transferred from Capital Hospital, Bhubaneswar to the District Headquarters Hospital, Boudh against an existing vacancy. It is further pleaded by him that his application for

interim relief was rejected by the learned Tribunal, against which he preferred a writ application bearing W.P. (C) No. 10253 of 2010, which was disposed of on 10.06.2010 by this Court, wherein directions were given to the Orissa Administrative Tribunal, Bhubaneswar to dispose of the Original Application filed by him by 15th July, 2010 and till that date, no coercive action was to be taken by the petitioner. Rest of the pleadings is almost identical as that of the earlier case.

W.P.(C) No. 13748 of 2010:- In this case, the petitioner happens to be President of the OMSA. He pleads that he joined in the service in 1992 in the District Headquarters Hospital, Balangir and worked there for five years. Then he worked at the District Headquarters Hospital, Dhenkanal. DR. N.R. SAMAL-V-COMMIN.-CUM-SECRETARY [S.K. MISHRA, J]

Thereafter, he had worked in tribal area of Koraput for six years and at present he is working as Dental Surgeon in Capital Hospital at Bhubaneswar. Moreover, he is the President of the OMSA. The petitioner has been transferred from Capital Hospital, Bhubaneswar to District Headquarters Hospital, Sundargarh and one Dr. Ajay Kumar Das of District Headquarters Hospital, Balasore has been posted in place of the applicant. Rest of the pleadings of the petitioner is almost identical as that of the earlier two petitions.

4. In short, the petitioners claim that they being the office bearers of the OMSA are protected from transfer during their tenure as office bearers. Secondly, they contend that their transfers were actuated by mala fides on the part of the authorities and, therefore, bad in law and requires interference.

5. The opposite parties in this case filed their written counter affidavit, inter alia pleading that the transfer of these petitioner were effected in exigency of public service. The authority is competent enough and has got its liberty to take decision in the interest of patient care. The order by which the petitioners have been transferred was issued considering their long stay in the Capital Hospital at Bhubaneswar. The Notification of the Government in General Administration Department, which has been referred to in the writ petitions has no relevancy to the present transfer of the petitioner. It is further pleaded that during the year 2005, the General Administration Department of Government of Orissa have issued revised circular clarifying the transfer of the Government employees bearing no. 19963 dated 15.07.2005 superseding all earlier circulars issued on transfer. Such circulars provide that office bearers of recognized Service Associations; such as President, Secretary and Treasurers may be ordinarily allowed to continue in their respective headquarters for a single term in exceeding three years unless decided in exigency of public service.

The post of Editor of OMSA Voice, Bhubaneswar is not an office bearer of the Service Association. It is specifically pleaded that in the same transfer orders more than 150 similarly placed doctors have been transferred on administrative exigency. Since the petitioner is holding a transferable job, an order of transfer is

inevitable and he cannot claim for his posting in a particular place for a long period on his own interest. It is further pleaded that in this respect, Government is the best Judge as well as the appropriate authority to decide where the employee shall be posted for discharging his duty. Thus, the opposite parties pleaded that the transfers were actuated by exigency of public service and not fraught with mala fides and hence, the writ petitions should be dismissed.

6. The petitioners have filed rejoinder affidavit, in which they pleaded that the authorities have discriminated against them as they have been putting forth the demand of the members of the Association. They have also pleaded that the Circular of the year 2005 was not circulated and, therefore, has no binding effect.

7. In course of hearing of the writ applications, the Learned Counsel appearing for the petitioners very emphatically submitted that the transfers were illegal on two grounds; viz. it is in violation of the statutory guidelines prescribed by the State governing the transfers of office bears of the recognized association and secondly, all these transfers are fraught with mala fides on the part of the authorities and, therefore, they may be struck down. The learned Advocate General, on the other hand, submitted that the transfers were effected for exigency of public service and there is no statutory force of the circular issued by the General Administration Department. There being no mala fides, the order of transfers cannot be interfered with.

8. Law relating to the transfer and posting has been considered time and again by the Hon'ble Supreme Court and it has been settled by a plethora of decisions. It is entirely open to the competent authority to decide when, where and at what point of time, a public servant is to be transferred from his present posting. Transfer is an incident of service. It does not affect the conditions of service in any manner. The employee does not have any extra right to be posted at a particular place, (relied on *B. Varadha Rao Vs. State of Karnataka and Others*, *Somesh Tiwari Vs. Union of India (UOI) and Others*,

9. In *Union of India and Others Vs. S.L. Abbas*, , the Apex Court has observed that the Government 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 tainted with malice or where it is made in violation of the statutory provisions. In the case of *The Calcutta Gas Company (Proprietary) Ltd. Vs. The State of West Bengal and Others*, the apex Court has further observed that the transfer policy does not create any legal right in favour of the employee. It is settled law that a Court/Tribunal can entertain a case only for enforcing the statutory or legal right or when there is a complaint by an employee that there is a breach of a statutory duty on the part of the employer. Therefore, there must be a judicially enforceable legal right for the enforcement of which legal proceedings can be resorted to. The Court/Tribunal can enforce the performance of a statutory duty by public bodies through its jurisdiction at the behest of a person, provided such person satisfies the Court that he/she has a legal right to insist on such

performance. The existence of the said right is a condition precedent for invoking the Court's jurisdiction. Similar view has been taken in *Sadhana Lodh Vs. National Insurance Company Ltd. and Another*, .

10. While dealing with a case on transfer, the Supreme Court in *State of U.P. and Others Vs. Gobardhan Lal*, has observed that a challenge to an order of transfer should normally be eschewed and should not be countenanced by the courts or tribunals as though they are Appellate Authorities over such orders, which could assess the niceties of the administrative needs and requirements of the situation concerned. This is for the reason that courts or tribunals cannot substitute their own decisions in the matter of transfer for that of competent authorities of the State and even allegations of mala fides when made must be such as to inspire confidence in the court or are based on concrete materials and ought not to be entertained on the mere making of it or on consideration borne out of conjectures or surmises and except for strong and convincing reasons, no interference could ordinarily be made with an order of transfer. At paragraph 7 of the said judgment, the Hon''ble Supreme Court has described in very lucid words, the law guiding the matters of transfer. We feel it apposite to quote the same.

7. It is too late in the day for any government servant to contend that once appointed or posted in a particular place or position, he should continue in such place or position as long as he desires. Transfer of an employee is not only an incident inherent in the terms of appointment but also implicit as an essential condition of service in the absence of any specific indication to the contra, in the law governing or conditions of service. Unless the order of transfer is shown to be an outcome of a mala fide exercise of power or violative of any statutory provision (an Act or rule) or passed by an authority not competent to do so, an order of transfer cannot lightly be interfered with as a matter of course or routine for any or every type of grievance sought to be made. Even administrative guidelines for regulating transfers or containing transfer policies at best may afford an opportunity to the officer or servant concerned to approach their higher authorities for redress but cannot have the consequence of depriving or denying the competent authority to transfer a particular officer/servant to any place in public interest and as is found necessitated by exigencies of service as long as the official status is not affected adversely and there is no infraction of any career prospects such as seniority, scale of pay and secured emoluments.

this Court has often reiterated that the order of transfer made even in transgression of administrative guidelines cannot also be interfered with, as they do not confer any legally enforceable rights, unless, as noticed supra, shown to be vitiated by mala fides or is made in violation of any statutory provision.

Furthermore, in the case of *First Land Acquisition Collector and Others Vs. Nirodhi Prakash Gangoli and Another*, the Apex Court held that burden of proving mala fides is very heavy on the person who alleges it. Mere allegation is not enough. Party making such allegations is under a legal obligation to place the

specific materials before the court to substantiate the said allegations.

It is further laid down by the Supreme Court in several cases that it is settled legal proposition that in case allegations of mala fide are made against any person he is to be impleaded by name, otherwise the allegations cannot be considered, to cite one, State of Bihar and another v. P.P. Sharma, I.A.S. and another, AIR 1992 SC 1260;

Thus, this being the settled principle of law, legal position on the matter can be summarized as follows:

Transfer is an incident of service. It does not adversely affect the status or emoluments or seniority of the employee. The employee has no vested right to get a posting at a particular place or can choose to serve at a particular place for a particular tenure. It is within the exclusive domain of the employer to determine as to what place and for how long the services of a particular employee are required. Transfer order should be passed in public interest or administrative exigency, and not arbitrarily or for extraneous consideration or for victimization of the employee nor it should be passed under political pressure. There is a very little scope of judicial review by the Court/Tribunal against the transfer order and the same is restricted only if the transfer order is found to be in contravention of the statutory Rules or mala fides is established. In case of allegation of mala fides, the employee has to make specific averments and should prove the same by adducing unimpeachable evidence. The person against whom allegation of mala fide is alleged is to be impleaded as a party by name. Transfer policy or guidelines issued by the State or employer does not have any statutory force as it merely provides for guidelines for the understanding of the Departmental personnel. The Court does not have a power to annul the transfer order only on the ground that it will cause personal inconvenience to the employee, his family members and children as consideration of these issues fall within the exclusive domain of the employer. If the transfer order is made in mid-academic session of the children of the employee, the Court/Tribunal cannot interfere. It is for the employer to consider such a personal grievance.

11. Applying these principles to the cases in hand, it is seen that the guidelines issued by the Government in G.A. Department regarding transfers of office bearers of recognized Service Association of the employees does not have any statutory force and if in case of their violation as has been laid down by the Supreme Court in State of U.P. and others v. Gobardhan Lal (supra), they do not confer any legal right on the petitioners. In this case, therefore, the order passed by the learned Chairman of the Tribunal cannot be found to be incorrect. Furthermore, there is allegation that the petitioners have been transferred because of their activity as the elected representatives of the Association. In other words, mala fides, are complained of in this case. However, no concrete and unimpeachable materials have been placed before the court to come to the conclusion that actually the authorities have acted with malice to put the petitioners to trouble. On this score also, the petitioners' transfer cannot be said

to be fraught with mala fides. Moreover, the petitioners have not specified the names" of persons who have acted in a mala fide manner and ordered for their transfer. Such persons have not been made a party to the present proceedings.

12. Thus, on the aforesaid discussion, we come to the conclusion that the orders passed by the learned Chairman of the State Administrative Tribunal do not suffer from any illegality requiring interference of this Court. Accordingly, the writ petitions are dismissed as devoid of any merit. No cost.