
(2010) 02 GAU CK 0075
In the Gauhati High Court
Case No : Writ Appeal No. 26 of 2010

Dr. Utpal Bora

APPELLANT

Vs

State of Assam and Others

RESPONDENT

Date of Decision : 03-02-2010

Acts Referred:

Citation : (2010) 3 GLR 780

Hon'ble Judges : I.A. Ansari, J;A.C. Upadhyay, J

Bench : Division Bench

Advocate : N. Dutta, D.K. Sarmah, P.S. Laskar, N. Pathak and S.K. Das, for the Appellant; G.A. Assam and D. Saikia, for the Respondent

Judgement

1. We have heard Mr. N. Dutta, learned Senior Counsel, for the appellant, and Mr. D. Saikia, learned Standing Counsel, Health Department, appearing on behalf of the respondent Nos. 1, 2 and 3. We have also heard Mr. P.C. Deka, learned Government Advocate, appearing on behalf of the respondent Nos. 4 and 5.

2. While working as Medical and Health Officer No. 1, Buragohainthan PHC, Kamrup, under the Health Department, Government of Assam, the service of the appellant was placed at the disposal of Home(B) Department, by his parent Department, namely, Health and Family Welfare Department, Government of Assam. By way of a writ petition, which gave rise to WP(C) No. 235 of 2010, the appellant herein, namely, Dr. Utpal Bora, assailed the order, dated 5.1.2010, whereby he was reverted from Home(B) Department to his parent department and posted at Medical and Health Officer No. 1, Central Training Institute, Civil Defence and Home Guard, Panikhaiti, Kamrup.

3. The appellant challenged the transfer order, dated 5.1.2010, on the ground, inter alia, that the said order of transfer was panel in nature inasmuch as a signature campaign, by making some allegiants, had been initiated against him, at the behest of respondent No. 6 herein, seeking the appellant's transfer to some other place and it was acting Upon the allegations, so made against him,

that the order of transfer aforementioned was made. By order, dated 29.1.2010, a learned Single Judge of this Court has dismissed the writ petition and it is against the dismissal of his writ petition that the appellant has preferred this appeal.

4. On careful perusal of the order, dated 29.1.2010, whereby the writ petition has been dismissed, we notice that the learned Single Judge had perused the relevant record and noted that though the process for change of place of posting of the appellant was initiated on the basis of a complaint made against him, it came to the notice of the respondents concerned that the appellant had been on deputation, with the Home(B) Department, for about 8 years, whereas he could not have remained, on deputation, beyond 3 years, which was extendable, at best, to a period of 5 years. In such circumstances, the impugned order of transfer cannot, according to the learned Single Judge, be held to be bad in law and the impugned order, therefore, needed no interference. On the basis of the conclusion so reached, the learned Single Judge has dismissed the writ petition.

5. Appearing on behalf of the appellant, Mr. Dutta, learned senior Counsel, has, now, submitted that the order, dated 1.8.2001, whereby the appellant's service was placed at the disposal of Home(B) Department, was not an order of deputation inasmuch as the appellant was never paid any deputation allowance. At any rate, submits Mr. Dutta, there was no grave urgency to withdraw the service of the appellant from Home(B) Department, particularly, when the respondents/authorities have not taken into account the immense difficulties of the appellant inasmuch as the appellant's elder daughter is a student of Class-IV, pursuing her course of study under Central Board of Secondary Education, and the impugned transfer was made during the middle of the academic session. In short, what Mr. Dutta submits is that until the time the academic session of the appellant's said daughter is over, the appellant ought to have been allowed to remain with Home(B) Department.

6. Mr. Dutta also submits that the appellant agrees to be transferred from Home(B) Department if he is allowed to remain there until the end of the current academic session of his elder daughter. Mr. Dutta further submits that in the meanwhile, the respondents/authorities concerned may also be directed to explore the possibility of transferring the appellant to a place, where his said daughter can pursue CBSC course. In support of his submission, Mr. Dutta refers to the case of Director of School Education v. O. Karuppa Thevan wherein the Supreme Court held as follows:

Although there is no such rule, we are of the view that in effecting transfer, the fact that the children of an employee are studying should be given due weight, if the exigencies of the service are not urgent. The learned Counsel appearing for the appellant was unable to point out that there was such urgency in the present case that the employee could not have been accommodated till the end of the current academic year. We, therefore, while setting aside the impugned order of the Tribunal, direct that the appellant should not effect the transfer till the end of

the current academic year.

7. Resisting the prayer made on behalf of the appellant, Mr. D. Saikia, learned Counsel, submits that the appellant's transfer by the order, 1.8.2001, was, in effect, placing of the service of the appellant by his parent Department with Home(B) Department and such an act of placing of service of the appellant, with Home(B) Department, by the Department of Health and Family Welfare, amounted to his deputation and an employee, according to the relevant policy of the Government, cannot be allowed to remain on deputation, at any rate, longer than five years. Mr. Saikia also points out that the appellant has remained for a period of more than eight years with Home(B) Department and, in such circumstances and, particularly, when the order of transfer was not based on the allegations received against the appellant, but on noticing the fact that the appellant had been with Home(B) Department for the last eight years, the impugned transfer order may not be interfered with. Mr. Saikia, however, submits that if this Court is inclined, the appellant may be allowed to remain with Home(B) Department until the end of the current academic session of his elder daughter and, thereafter, the appellant may be directed to join the place of posting in terms of the order, dated 5.1.2010, aforementioned.

8. Without entering into the controversy as to whether the appellant has or has not been serving in Home(B) Department on deputation, what we notice is that the appellant has already been with Home(B) Department for a period of more than eight years and he may not have, therefore, been allowed by the respondents/authorities concerned to continue to remain with Home(B) Department. As noted by the learned Single Judge, the appellant's present transfer was not based on the complaint received against him, but on noticing the fact that the appellant had been with the Home(B) Department for the last eight years.

9. Considering the fact that the appellant's transfer was not based on complaint, though the process of transfer might have been initiated on the basis of the complaint received against him, we are of the view that the appellant's transfer was neither penal nor mala fide and that the respondents/authorities concerned were within the ambit of their powers, when they decided to transfer the appellant from Home(B) Department.

10. What is, however, necessary to note is that while transferring an employee, except when the transfer is urgent, the employ's inconvenience or difficulties should be taken note of by the employer. In the present case, on coming to notice that the appellant ought not to have been continued with Home(B) Department any longer, the respondents/authorities concerned had decided to transfer him. This action cannot be said to be illegal. However, while transferring the appellant, when there was apparently no grave urgency, his order of transfer could have been made effective with the end of the current academic session of his said daughter. This aspect appears to have not been taken not of by the respondents/authorities concerned.

11. In the light of the decision in Director of School Education, Madras (supra), it is clear that though the Government has the power to transfer its employee at any point of time, the Government shall ensure that unless transfer is, in exigencies of the service of an employee, urgent, the fact that the employee's children are studying and their transfer, during the middle of the session, may uproot them and disrupt their course of study, are relevant factors and need to be borne in mind. In the present case, except the fact that the appellant had been with Home(B) Department, for a period of 8 years, there was no other ground of his transfer. Hence, in such circumstances, when giving effect to the impugned order of transfer was not urgent, his order of transfer could have been made effective coinciding with the end of the current academic session of his elder daughter. Had the transfer of the appellant been urgent, because of exigencies of service, the matter would have been a little different.

12. In the backdrop of the position of law pointed out above and the fact of the present case, we are of the view that the impugned transfer order, dated 5.1.2010, shall come into force with effect from the end of the academic session 2009-10 of the CBSC course and till then, the appellant shall be allowed to remain with Home(B) Department. It is further made clear that the appellant shall, on completion of the academic session aforementioned, join his place of posting as has been directed by the impugned order, dated 5.1.2010, unless the said order is, in accordance with law, modified either at the initiative of the respondents/authorities themselves or on the basis of any representation, which the appellant may make.

13. With the above modification in the impugned order, dated 5.1.2010, this writ appeal shall stand disposed of.

14. No order as to costs.