
(2013) 05 GAU CK 0014
In the Gauhati High Court
Case No : Writ Petition (C) 133 (AP) of 2013

Dubom Bagra

APPELLANT

Vs

State of Arunachal Pradesh and Others

RESPONDENT

Date of Decision : 29-05-2013

Acts Referred:

Citation : (2013) 5 GLT 487

Hon'ble Judges : N. Chaudhury, J

Bench : Single Bench

Advocate : K. Jini, for the Appellant; R.H. Nabam, Sr. G.A. and Mr. T. Taki, for the Respondent

Final Decision : Allowed

Judgement

N. Chaudhury, J.—By this application under Article 226 of the Constitution of India, petitioner has challenged the validity of order dated 11.4.2013 issued by the Secretary (H & FW), Government of Arunachal Pradesh. Brief facts of the case arising from the writ petition, the affidavit-in-opposition, affidavit-in-reply and additional affidavit filed by the petitioner and respondents are as follows:-

The writ petitioner, Dr. Dubom Bagra was originally working as DRCHO at Aalo wherefrom he was transferred to Daporijo as DMO by order dated 7.10.2010. After completion of more than two years and half, he has been ordered to be transferred by order dated 5.4.2013 from Daporijo to Pasighat in the East Siang district in the same capacity. By the same order, issued by the Commissioner (Health & FW), Government of Arunachal Pradesh, one Dr. Tale Gongo, DMO of Seppa has been transferred to the resultant vacancy of DMO at Daporijo. Due to aforesaid transfer of the petitioner, the post of DMO at Seppa, on turn, has been ordered to be filled up by one Dr. Nyage Geyi, who was the DRCHO, Daporijo. Thus, the order dated 5.4.2013 involves five places and transfer of five persons. By the said order, the petitioner has been directed to report for joining at Pasighat and the Respondent No. 3 herein, who is the in-charge DMO at that place, has been directed to hand over charges to the regular DMO, namely, the

petitioner herein. It may be mentioned here that the Respondent No. 3 was originally posted as DRCHO in Pasighat itself since 2005 and by order dated 9.8.2012 (Annexure-I to the affidavit-in-opposition submitted by the Respondent No. 3), he was posted as I/C DMO at the same place till DPC or posting of regular DMO. This order reveals that the Respondent No. 3 (Dr. Mandip Perme) never appointed as regular DMO at Pasighat, where the petitioner has been transferred by order dated 5.4.2013 (Annexure-2 to the writ petition). The writ petitioner was released from Daporijo on 9.4.2013 enabling him to join his new place of posting at Pasighat and there upon, he reported for joining to the Deputy Commissioner on 11.4.2013. The said joining report appears to have been received by the Confidential Assistant to the Deputy Commissioner on the same day. Subsequent communication dated 24.5.2013 which I shall refer to later on, the Secretary to the Govt. of Arunachal Pradesh in the department of Health & F.W. indicates that the Deputy Commissioner by WT message sent on the same day had apprised the Secretary so as to joining of the petitioner and thus it is discernible from materials on record that the Deputy Commissioner himself was in the active participation of whole affairs. The petitioner has claimed that having reported for joining to the Deputy Commissioner being the head of civil administration at Pasighat, he contacted the respondent No. 3 for taking over the charge pursuant to order dated 5.4.2013 (Annexure-2 of the writ petition) but, he on turn, asked the petitioner to wait for sometime so that he can make necessary arrangement. But finally he went on dilly dallying and did not hand over charge rather finally disclosed on 22.4.2013 that appropriate authority had already passed an order on 11.4.2013 allowing his retention at Pasighat.

2. Having obtained a copy of the said order dated 11.4.2013 and finding therein that respondent No. 3 was allowed to be retained at Pasighat till further order by the Secretary (Health & FW), Government of Arunachal Pradesh on the basis of U. note dated 11.4.2013, the petitioner asked for the said U. note taking recourse to the Right to Information Act and got the same. The said U. note is available at Annexure-8 of the writ petition. On being asked, learned counsel for the parties informed the Court that U. note means unofficial note. The said note is filed by three persons, namely, Minister of Industries, Government of Arunachal Pradesh, Minister of Education, Government of Arunachal Pradesh and Chairman, Pollution Control Board, Arunachal Pradesh, who expressed surprise for transfer of the Respondent No. 3 without their knowledge and urged the Chief Minister to retain the Respondent No. 3 at Pasighat till 2014 general election by passing order "on the body" of their note. The Chief Minister approved the retention till further order and issued direction for passing order to that effect. This is how the Annexure-6 of the writ petition (impugned order dated 11.4.2013) came to be issued.

3. Learned counsel for the petitioner, Mr. K. Jini has made the following submissions:-

1) that the respondent No. 3 was never the DMO and was only holding the

charge of DMO vide order dated 9.8.2012 on specific condition that he would continue to do so till DPC or posting of regular DMO and as such, once the petitioner has been posted there as regular DMO, the respondent No. 3 must go away and hand over charge and as such, the impugned order date 11.4.2013 issued after the petitioner had joined, is illegal.

2) that the substantive posting of the Respondent No. 3 was that of DRCHO which in practice is considered to be lower in status than that of DMO that is why there is mention of DPC in the order dated 11.4.2013.

3) that the order dated 5.4.2013 transferring the petitioner to Pasighat having been passed in the public interest, the same should not have been sought to be modified by the impugned order dated 11.4.2013 without recording valid reasons for the same and without public interest.

4) that the order dated 11.4.2013 has been issued by the Secretary (H & FW) on the basis of U. note dated 11.4.2013 without his own judgment and application of mind abdicating his power in favour of extraneous authority inasmuch as, none of the signatories of the U. note has got authority to do with the Department of Health and Family Welfare to which the petitioner and the respondent No. 3 belong.

5) that after the petitioner had approached this Court and interim order was passed on 23.4.2013 staying the operation of the impugned order dated 11.4.2013, even thereafter the respondent No. 3 did not hand over the charge and went on usurping the office of DMO, Pasighat. Drawing the attention to the order dated 24.5.2013, (Annexure-I of the additional affidavit submitted by the petitioner on 28.5.2013) passed by Secretary (H & FW) Govt. of Arunachal Pradesh, it has been pointed out that the same authority who had passed the impugned order dated 11.4.2013 directed the respondent No. 3 on 24.5.2013 to hand over the charge to the petitioner but even thereafter the respondent No. 3 chose not to budge and inch and has been unauthorizedly holding the office of the DMO till date.

6) that the order dated 24.5.2013 itself is indicative of the fact of release of the petitioner on 9.4.2013 from Daporijo and his joining at Pasighat on 11.4.2013 before the Deputy Commissioner and that the Deputy Commissioner communicated the joining report of the petitioner through W/T message on 11.4.2013 itself to the government. He further submitted that it is a mistake on the part of the respondents to take the plea that (i) the respondent No. 3 is working as DMO, Pasighat (ii) that the petitioner never reported for joining to the Deputy Commissioner at all and (iii) that the joining letter (Annexure-5 of the writ petition) is a mere sham.

4. Learned counsel for the petitioner has relied on the following decisions:-

(i) Ruokuolhoulie Angami Vs. State of Nagaland and Others,

(ii) 2010 (2) GLT 786 Sanat Kumar Borah Vs. State of Assam & Ors.

(iii) (2003) 11 SCC 740 Sarvesh Kumar Awasthi Vs. U.P. Jal Nigam & Ors. and

(iv) Tarlochan Dev Sharma Vs. State of Punjab and Others,

5. I have carefully gone through all these

judgments.

6. Paragraph 8 of Ruokuolhoulie Angami Vs. State of Nagaland and Others, is a decision of this Court in regard to transfer. Paragraph 8 of this judgment is quoted below:-

8. This Court in a catena of decision has held that, for cancellation, modification (emphasis supplied) or keeping in abeyance of the transfer order passed in Public interest must be supported with sufficient reasons necessitating for passing such order. The view taken by this Court has rationale behind it. Once the transfer order is made in public interest, Court normally do not interfere unless the order is passed with malafide or against the statutory rules. The only way open to the aggrieved Government servant is to file a representation before the competent authority to redress his grievances. But this Court insist that for cancellation/ modification or keeping it in abeyance of such order must be supported with sufficient reasons, because transfer of officers are always made in public interest and after elaborate exercise as to who should be transferred where in the exigency of the administration. While processing the transfer order, various factors are taken into consideration. One such factor being the duration of the stationing of one officer in a particular station for a long time. If an officer is posted in a particular station for a long time, no doubt, that he also acquire a considerable knowledge about the administration of the area, but at the same time he also often establishes vested interest in the area because of this long association and to avoid such eventualities, timely posting is always called for. Therefore, if the transfer order made in public interest is allowed to be taken away by another cryptic order modifying/canceling or keeping in abeyance of the transfer order without assigning any reasons, it ceases to be in public interest. Therefore, it must be held that the order has been passed at the whims and caprice of the authorities exercising the power. Public interest would not be allowed to be scarified at the altar of the whims and caprice of the authority exercising the power. It must be grasped that public authority possesses power to use for public interest.

7. In Sanat Kumar Borah Vs. State of Assam & Ors., reported in 2010 (2) GLT 786, this Court has held the general principles in regard to judicial review in transfer matters. The writ petitioner in that case was transferred within six months of his earlier transfer in violation of postulated transfer policy of the Government on recommendation of some political persons to accommodate the private respondent No. 5 in that case. This Court held that such transfer order at the instance of political persons was arbitrary exercise of power and not in public interest and accordingly set aside the order.

8. Tarlochan Dev Sharma Vs. State of Punjab and Others, is a case relating to an order passed u/s 22 of the Punjab Municipal Act, 1911 where the question as to abuse of the powers and the administrative law governing the exercise of jurisdiction by the administrative authority was considered. Relying on various earlier judgments of the Hon'ble Supreme Court including the case of Cane Commissioner, their Lordships reiterated the law that authority exercising jurisdiction must do so by independent application of mind and not at the ipse dixit of extraneous authority. Paragraph 16 of the said judgment is quoted below:-

16. In the system of Indian democratic governance as contemplated by the Constitution, senior officers occupying key positions such as Secretaries are supposed to mortgage their own discretion, volition and decision making authority and be prepared to give way or being pushed back or pressed ahead at the behest of politicians for carrying out commands having no sanctity in law. The Conduct Rules of Central Government Services command the civil servants to maintain at all times absolute integrity and devotion to duty and do nothing which is unbecoming of a government servant. No government servant shall in the performance of his official duties, or in the exercise of power conferred on him, act otherwise than in his best judgment except when he is acting under the direction of his official superior. In Anirudhsinhji Jadeja this Court has held that a statutory authority vested with jurisdiction must exercise it according to its own discretion; discretion exercised under the direction or instruction of some higher authority is failure to exercise discretion altogether. Observations of this Court in Purtabpore Co. Ltd. are instructive and apposite. Executive Officers may in exercise of their statutory discretions take into account considerations of public policy and in some context, policy of a Minister or the Government as a whole when it is a relevant factor in weighing the policy but they are not absolved from their duty to exercise their personal judgment in individual cases unless explicit statutory provision has been made for instructions by a superior to bind them. As already stated, we are not recording, for want of adequate material, any positive finding that the impugned order was passed at the behest of or dictated by someone else than its author. Yet we have no hesitation in holding that the impugned order betrays utter non-application of mind to the facts of the case and the relevant law. The manner in which the power u/s 12 has been exercised by the competent authority is suggestive of betrayed of the confidence which the State Government reposed in the Principal Secretary in conferring upon him the exercised of drastic power like removal of President of a Municipality u/s 22 of the Act. To say the least, what has been done is not what is expected to be done by a senior official like the Principal Secretary of a wing of the State Government. We leave it at that and say no more on this issue.

9. The next case relied on by learned counsel for the petitioner is Sarvesh Kumar Awasthi Vs. U.P. Jal Nigam & Ors. reported in (2003) 11 SCC 740. This is yet another case in regard to transfer of employee, wherein arbitrary and malafide exercise of power in regard to transfer of employees has been deprecated.

Paragraph 3 of the said judgment is quoted below:-

3. In our view, transfer of officers is required to be effected on the basis of set norms or guidelines. The power of transferring an officer cannot be wielded arbitrarily, mala fide or an exercise against efficient and independent officer or at the instance of politicians whose work is not done by the officer concerned. For better administration the officers concerned must have freedom from fear or being harassed by repeated transfers or transfers ordered at the instance of someone who has nothing to do with the business of administration.

10. Learned counsel for the petitioner summarizes that the order dated 5.4.2013 was a regular order of transfer issued in public interest but the same was frustrated in so far as the petitioner is concerned by modification made on 11.4.2013 without consulting the records and without routing it through proper channel by extraneous means of mobbing an U. note by extraneous authority to the Chief Minister without taking the competent authority in confidence and the order dated 11.4.2013 has been issued on the mere asking of the Chief Minister as demanded by three political personalities who have nothing to do with the Department of Health & Family Welfare and as such by no stretch of imagination such an exercise of power can be held to be a valid exercise of jurisdiction. The decision having been taken on extraneous consideration not to speak of in public interest or administrative exigency, the order is liable to be set aside and quashed and the regular order of transfer dated 5.4.2013 may be allowed to be implemented in full.

11. This writ petition was entertained on 23.4.2013 but the Government did not file any affidavit even after more than a month has elapsed.

12. Mr. Nabam, learned Senior Govt. Advocate informed on being asked that the post of DMO at Seppa has been filled up by Dr. Nyage Geyi already, pursuant to the aforesaid order of transfer dated 5.4.2013 with effect from 12.4.2013 and that the post at Daporijo is still to be filled up by Dr. Tale Gongo who is under order of transfer as DMO, Daporijo in view of the fact that he is yet to be released by Deputy Commissioner of Seppa. He has placed an order dated 28.5.2013 on record in this regard. Mr. Nabam has argued that in the certificate issued by one EAC in the office of the Deputy Commissioner, East Siang District certifying that the respondent No. 3 is still holding the post of DMO, Pasighat. Mr. Nabam argues that having filed a representation before the Government on 22.4.2013 complaining against the respondent No. 3 for not handing over the charge to the petitioner despite his joining on 11.4.2013 in the office of the Deputy Commissioner, Pasighat, the petitioner has acted in undue haste in preferring a writ petition on the following day without waiting for the response of the appropriate authority. In nutshell, learned Senior Govt. Advocate desired that the writ petition should be disposed of with a direction to the Government for passing appropriate order without setting aside the impugned order dated 11.4.2013.

13. The learned Senior Govt. Advocate, Mr. Nabam has relied on following two decisions of this Court:-

- 1) Kalyan Kumar Sarkar Vs. Alok Kanti Paul Choudhury and Others, and
- 2) Pramath Ch. Sarma Vs. State of Assam and Others,

14. I have gone through these judgments.

15. Kalyan Kr. Sarka (supra) is a Division Bench judgment of this Court wherein it has been held that office memorandum dated 19.9.2002 laying down the guidelines regarding transfer of the employees being not statutory in character is not enforceable in law and as such, the writ appeal was allowed setting aside the judgment of the learned Single Judge in WP(C) No. 856/2006.

16. Pramath Ch. Sarma (supra), is yet another Division Bench judgment of this Court in regard to enforceability of transfer policy with or without approval of the Chief Minister. Both the judgments referred to above would have been of any relevance to the case in hand if the writ petition would have been based on memorandum of transfer policy. Rather, petitioner has sought implementation of a transfer order passed by the competent authority. Here, in this case admittedly the Government has issued the transfer order describing the same to be in public interest and thereafter it has been modified by a specific order admittedly at the instance of extraneous authority and that too without mentioning anything that the same was required in public interest. The U. note in question merely contains that three signatories were surprised due to transfer of respondent No. 3 without their consent. Incidentally, none of them has any role to play in regard to transaction of business in the department of Health & Family Welfare and as such, consultation with such extraneous authority cannot be expected under the existing rule of executive business.

17. The Respondent No. 3 has filed affidavit-in-opposition and argues that the initial order dated 5.4.2013 transferring the petitioner to Pasighat was also on the basis of some U. note. However, nobody has brought the said U. note on record and as such it is not possible to come to any conclusion as to whether the signatories of the said U. note were related to the Department of Health & Family Welfare or not.

18. Learned counsel, Mr. T. Taki representing the respondent No. 3 however, has argued that admittedly the respondent No. 3 was holding the charge of office of the DMO at Pasighat though he was not a regular DMO. But the said post of DMO has been filled up by order dated 5.4.2013 by the petitioner and no mention has been made therein as to what would happen to the respondent No. 3 after he would hand over the charge to the regular incumbent pursuant to the order.

19. Having heard the learned counsel for the parties and on perusal of the materials on record, it appears that there is an apparent mess in the department of Health & Family Welfare in regard to transfer and posting. While, it is true that the order dated 5.4.2013 is silent in regard to posting of the respondent No. 3

after handing over the charge to the petitioner, the office notes dated 23.4.2013, 29.4.2013 and 2.5.2013 placed on record by the petitioner vide Annexure-1 series of the affidavit-in-reply dated 27.5.2013 reveal that process was going on with the Government for placement of the respondent No. 3 as DRCHO at Daporijo. This proposal appears to have been routed on 29.4.2013 i.e. much after the said respondent No. 3 was directed to hand over the charge on 5.4.2013. The authorities ought to have considered the posting of the respondent No. 3 on 5.4.2013 itself while issuing the order of transfer of five persons and allowed confusion to prevail. Mentioning of a repeated U. notes various authorities other than the persons related to the concerned department in regard to transfer and posting of officers in the department of Health & Family Welfare is indicative of the fact that all is not well in the department and that extraneous consideration other than public interest and administrative exigency must have a sway in regard to transfer and posting of officers. It is needless to say that no Government can expect an efficient functioning of department unless transfer and posting are made strictly in public interest and administrative exigency and that too with transparency. The personal liking or disliking of the person in power in regard to such matter cannot lead to a healthy administration. It is expected that the concerned authorities can keep this in mind in future action so that avowed dream of founding forefather of the Constitution in regard to an efficient administration by civil servants does not get frustrated.

20. I find sufficient force in the submission of the learned counsel for the petitioner in this case. Having issued a transfer order on 5.4.2013 in public interest, the Government fell in error in modifying the same after merely a week and that too at the asking of extraneous authority without there being any nexus to public interest. It is not conceivable under existing cabinet set up of executive as to how some one who has no responsibility in a given department can pock nose and the Hon'ble Chief Minister also obliges to such request. Above all the Secretaries and the Commissioners of the Govt. at various departments are aware about the day to day functioning of their respective departments. So, their view based on the materials on record cannot be in any means be preferred to the personal likes or dislikes of political personalities who in view of electoral politics may have very many compulsions. Besides this Court in the case of R. Angami (supra) has held that a modification order also has to be reasoned one. The impugned modification order dated 11.4.2013 goes counter to such proposition of law. There is nothing any where to hold that the impugned order was issued in public interest. Rather it was passed at the mere asking of some extraneous authority and as such it is not sustainable. So far as the submission of the learned Sr. Govt. Advocate that the petitioner has acted in haste in filing the writ petition also does not appear to be appealing. But the learned Senior Govt. Advocate has not pointed out as to whether there was any further scope for reconsideration where the Secretary (Health & FW) had already issued order on 11.4.2013 to retain the respondent No. 3 at Pasighat on the basis of U. note dated 11.4.2013 referred to above. The representation submitted by the

petitioner on 22.4.2013, therefore, cannot be accepted to be fruitful and as such filing of the writ petition on 23.4.2013 itself, in my opinion, cannot be faulted as one of undue haste. In the result, the writ petition is allowed. The order dated 11.4.2013 allowing respondent No. 3 to remain at Pasighat as DMO is set aside. It is expected that the Government shall take appropriate steps for implementation of its own orders dated 5.4.2013 as well as dated 24.5.2013 mentioned above without any further delay. No order as to costs.