

(2016) 07 GAU CK 0006
In the Gauhati High Court
Case No : W.P. (C) No. 133 (K) of 2016

Er. T.S. Angami

APPELLANT

Vs

State of Nagaland

RESPONDENT

Date of Decision : 22-07-2016

Acts Referred:

Constitution of India, 1950 — Article 226
Nagaland Government Servants (Transfer and Posting) Act, 2009 — Section 2

Citation : (2016) 5 GauLR 741 : (2016) 4 GauLT 261 : (2016) LIC 3637

Hon'ble Judges : L.S. Jamir, J.

Bench : Single Bench

Advocate : Mr. C.T. Jamir, Senior Advocate, Mr. Wati Jamir, Mr. N. Longkumer, Mr. Imkong Jatnir, Mr. Pokyim Yaden and Ms. Chubatola, Advocates, for the Appellant; Mr. T.B. Jamir, Addl. A.G, for the Respondent

Final Decision : Dismissed

Judgement

L.S. Jamir, J.(Oral)—This writ petition is directed against the impugned Notification dated 18.07.2016 by which the petitioner was transferred and posted as OSD, New & Renewable Energy Department, Nagaland Civil Secretariat with immediate effect in terms of the Nagaland Government Servants (Transfer & Posting) Act, 2009 (hereinafter referred to as the "Act of 2009").

2. As the matter pertains to transfer of the petitioner and the Additional Advocate General, Nagaland having produced the records, this Court is disposing of this matter without issuing notice, at the motion stage.

3. Heard Mr. C.T. Jamir, learned senior counsel assisted by Mr. Wati Jamir, learned counsel for the petitioner. Also heard Mr. T.B. Jamir, learned Additional Advocate General, Nagaland appearing for the State respondents.

4. The petitioner is the Director of New & Renewable Energy Department (hereinafter referred to as "NRE") and the respondents, on an earlier occasion, had initiated the transfer of the petitioner to the post of OSD, Power Department.

After processing the matter, the case of the petitioner was placed before the Civil Service Board (hereinafter referred to as "CSB") and the CSB in its meeting held on 01.08.2015 turned down the proposal for transfer of the petitioner. However, by Notification dated 17.10.2015, the petitioner was transferred to the post OSD, Power Department. Being aggrieved with his transfer, the petitioner preferred W.P (C) No. 197 (K) of 2015 before this Court. Upon hearing the parties, the said writ petition was disposed of by judgment and order dated 22.02.2016 by setting aside the impugned Notification dated 17.10.2015.

Thereafter, on 19.05.2016, the Parliamentary Secretary of the Department of NRE issued a Note dated 19.05.2016 to the Chief Secretary, Nagaland with a proposal for posting the petitioner to the ex-cadre post of OSD (NRE) in the Nagaland Civil Secretariat. The matter was placed before the CSB and thereafter by Notification dated 15.07.2016, the petitioner, along with others, was transferred as OSD NRE and one Er. Kavito was given the charge of Director, NRE. However, the said Notification was cancelled by a Corrigendum dated 16.07.2016 in respect of the petitioner and the said Er. Kavito. Again, on 18.07.2016, the respondents issued a Notification in exercise of powers conferred by the Act of 2009 transferring and posting the petitioner as OSD, New & Renewable Energy Department, Nagaland Civil Secretariat.

5. Mr. C.T. Jamir, learned senior counsel for the petitioner submits that the manner in which the petitioner has been transferred as OSD, NRE in the Nagaland Civil Secretariat by the Notification dated 18.07.2016 has been made in violation of Rule 22 A of the Rules of Executive Business and therefore the Notification dated 18.07.2016 stands vitiated. He submits that Rule 22A of the Rules of Executive Business (hereinafter referred to as ("the Rule")) provides that where in a Department a Parliamentary" Secretary is attached to the Chief Minister or a Minister, all matters pertaining to that department shall be submitted through the Parliamentary Secretary to the Chief Minister or the Minister concerned as the case may be who shall pass final orders. In the present case, the direction for transfer of the petitioner was made by the Parliamentary Secretary in-charge of NRE and addressed directly to the Chief Secretary who is also the Chairman of the CSB. He submits that the said note dated 19.05.2016 should have been routed through the Chief Minister of Nagaland inasmuch as, the Chief Minister is in-charge of the Department of NRE. Further submissions have been forwarded that in the Note dated 19.05.2016 made by the Parliamentary Secretary, NRE, it is indicated that for the last three to four years, the Department could not undertake many developmental activities and there also remains a technical gap. He submits that in the earlier occasion, the same Parliamentary Secretary by a Note dated 23.06.2015 had proposed transfer of the petitioner on the ground that there is a hierarchical gap in the NRE Department which is hampering the smooth functioning and further development of the Department. The same would therefore go to show that the sole intention of the Parliamentary Secretary" is to transfer the petitioner out of the Department. Further, the official record would indicate that there are no such

technical gaps in the Department and that the Department is under taking development activities amounting to over Rs. 70 crores. He has drawn the attention of this Court to Annexure-K1, annexed to the writ petition, wherein the development activities of the Department have been listed out. Therefore, learned senior counsel for the petitioner submits that the reasons projected by the Parliamentary Secretary in his Note dated 19.05.2016 is contrary" to the factual position and only indicates his sole intention to transfer the petitioner out of the Department. The same clearly projects the mala fide intention of the Parliamentary Secretary concerned against the petitioner.

Another point of contention taken by the learned senior counsel for the petitioner is that after the Note dated 19.05.2016 was written by the Parliamentary Secretary to the Chief Secretary", the CSB without any application of mind had accepted the direction made by the Parliamentary Secretary" and had thereafter recommended the case of the petitioner for transfer which clearly indicates that the CSB did not act in an independent manner and the decision was passed on extraneous considerations. The same would indicate that the decision making process was not fair and transparent. He submits that the CSB has been constituted in terms of the decision rendered by the Supreme Court in the case of T.S.R. Subramanian & Ors v. Union of India & Ors. on 31.10.2013. It is submitted that the CSB has acted contrary to the direction made in the case of T.S.R. Subramanian (supra).

Another ground taken by the petitioner is the Note dated 28.03. 2016 written by the President of NPF Party" (Annexure-M to writ petition) questioning the functioning and constitution of the CSB wherein the case of the petitioner has also been reflected. He submits that the Note dated 28.03.2016 which was also endorsed to the Chief Secretary and the Principal Secretary, P & AR Department indicates the sole intention of the politicians to dictate the CSB and thereafter make transfer of Government officials that is best suited to the politicians. In that view of the matter, learned senior counsel for the petitioner submits that the transfer so effected by the Notification dated 18.07.2016 is not in public interest but the same is tainted by mala fide and also in violation of Rule 22 A of the Rules.

In his support, learned senior counsel for the petitioner places reliance in the case of

- (i) Prasanna Kumar Nath v. State of Assam & Ors., reported in 2005 (4) GLT 348,
- (ii) Ramen Talukdar v. State of Assam & Ors., reported in 1998 (2) GLT 2.

6. Per contra, learned Additional Advocate General, Nagaland submits that normally this Court should not interfere in matters of transfer inasmuch as, the same is within the domain of the Government unless such transfer orders are in violation of statutory" Rule or tainted by mala fide. He submits that a reading of the Note dated 19.05.2016 would in no way indicate any mala fide intention on the part of the Parliamentary Secretary inasmuch as, the Note would clearly

indicate that the petitioner was required to be posted as OSD, NRE in Nagaland Civil Secretariat considering his excellent technical credentials in the field of solar and green energy. The CSB has taken an independent decision while considering the case of the petitioner for transferring him as OSD, NRE in the Nagaland Civil Secretariat. Further, learned Additional Advocate General, Nagaland submits that the Rules of Executive Business are not mandatory but directory in nature. Therefore, any infraction of the Rule would not vitiate the transfer order. It is further submitted that as the matter pertains to the challenge made to the Notification dated 18.07.2016 whereby the petitioner has been transferred as OSD, NRE in the Nagaland Civil Secretariat, therefore, this Court should not enter into the developmental activities of the Department and should confine its judicial scrutiny only to the manner by which the transfer order has been issued. He also submits that while having a judicial review of the process by which the transfer order has been issued, this Court should not consider the correctness of the decision but only the decision making process should be examined. In the present case in hand, as the decision making process has been found to be fair and transparent, no interference is required in the impugned Notification dated 18.07.2016.

Referring to the records, learned Additional Advocate General, Nagaland submits that the CSB after taking its decision had recommended the case of the petitioner to the Chief Minister, Nagaland who in turn had approved the transfer of the petitioner along with others. Therefore, it cannot be inferred that the Chief Minister, Nagaland was not consulted in any manner. He, therefore, submits that there has been no violation of the Rules of Executive Business inasmuch as, no final decision has been taken by the Parliamentary Secretary and the final decision was taken by the Chief Minister as reflected in the records. In his support, learned Additional Advocate General, Nagaland places reliance in the case of (i) *Rajendra Singh & Ors v. State of Uttar Pradesh & Ors.*, reported in (2009) 15 SCC 178, (ii) *Ajit Kumar Nag v. General Manager (PJ), Indian Oil Corpn. Ltd., Haldia & Ors.*, reported in (2005) 7 SCC 764, (iii) *Ratnagiri Gas and Power Private Limited v. RDS Projects Limited & Ors.*, reported in (2013) 1 SCC 524, (iv) *Ambica Quarry Works v. State of Gujarat & Ors.* reported in (1987) 1 SCC 213, (v) *Crawford Bayley & Co. & Ors. v. Union of India & Ors.*, reported in (2006) 6 SCC 25 and in the case of (vi) *Mohd. Massod Ahmad v. State of U.P. & Ors.*, reported in (2007) 8 SCC 150.

7. In reply, learned senior counsel for the petitioner submits that the case of the petitioner before this Court is not as to whether the Chief Minister has taken a decision but the issue is whether the Note dated 19.05.2016 was placed before the Chief Minister prior to consideration by the CSB. While countering the statements of the learned Additional Advocate General, Nagaland that the Rules are not mandatory but directory in nature, he has placed reliance in the case of *Selvi J. Jayalalithaa & Ors v. State of Karnataka & Ors* wherein it was held by the Supreme Court that when a statute provides for a particular thing to be done in a particular manner, the same has to be done in that manner only and adopting

any other course is not permissible. As the Rules of Executive Business has been framed under the provisions of Article 166 of the Constitution, the respondents are required to follow the Rules and the question of Rules being mandatory" or directory does not arise.

8. I have considered the submissions forwarded by the learned counsel for the parties.

9. As the Notification dated 18.07.2016 has been issued in exercise of the powers conferred by the Act of 2009, this Court is of the considered opinion that the said Act should be considered first. The Act of 2009 was notified in the Gazetted on 08.12.2009. Section 2 of the Act of 2009 reads as under:-

" 2. Power to transfer Government Servants to Ex-Cadre Post.

Notwithstanding anything contained in the service rules of various Departments of the Government of Nagaland, or of various services under the Government of Nagaland, the Government of Nagaland shall have the power to transfer any Government servant, and to post him against any ex-cadre post, in any Government Department, Public Sector Undertaking, Corporation or Company, owned by the State Government, subject to the following conditions:-

(i) That the ex-cadre post against which Government servant is posted is not lower in terms of rank and pay scale, than the post he/she is holding in a substantive capacity.

(ii) That the posting is done, either with the consent of the Government Servant concerned or with the recommendation of the Civil Services Board, consisting of the following:-

(1) Chief Secretary

- Chairman

(2) Secretary in charge of Home Department

- Member

(3) Commissioner, Nagaland

- Member

(4) Secretary in charge of P&AR

- Member"

A reading of the Section 2 of the Act of 2009 would clearly indicate that the Government has the power to transfer any official and to post to any ex-cadre post in any Government Department, Public Sector Undertaking, Corporation or Company owned by the State Government provided such ex-cadre post against which the Government servant is posted is not lower in terms of rank and pay scale than the post he or she is holding in a substantive capacity and that the

posting is done either with the consent of the Government Servant concerned or with the recommendation of the Civil Services Board. It is not the case of the petitioner that he has been posted to a post lower in terms of rank and pay scale. The transfer of the petitioner was made on the recommendation of the C.S.B. After considering the Notification dated 18.07.2016, this Court is of the considered opinion that it was within the power of the Government to issue the Notification dated 18.7.2016, transferring the petitioner as OSD, NRE in the Nagaland Civil Secretariat as there is no violation of the Act of 2009.

10. Having come to the conclusion that the Government has the power under the Act of 2009 to transfer the petitioner, the only question that remains is the manner in which the transfer of the petitioner has been done. This Court has considered Rule 22 A of the Rules of Executive Business. A reading of the same would clearly indicate that the Parliamentary Secretary who is either attached to the Chief Minister shall submit all matters pertaining to that Department to the Chief Minister or the Minister concerned as the case may be who shall pass final orders. In the case in hand, the Note dated 19.05.2016 written by the Parliamentary Secretary, NRE has been considered by this Court. In the considered opinion of this Court, the Note dated 19.05.2016 is not a direction nor a final order but it was only a proposal before the Chief Secretary who is also the Chairman of the CSB.

In the case of Crawford Bayley & Co. & Ors. (supra), the Supreme Court has held as under:-

"20. It was next contended with reference to the Allocation of Business Rules that the Central Government in the Urban Department can appoint an Estate Officer but in the present case, the Finance Department has appointed an Estate Officer which is in violation of the Allocation of Business Rules, 1961. Though the Division Bench dealt this aspect exhaustively in its judgment and held that the provisions of the Business Rules are not mandatory and will not vitiate the appointment, we fully agree that the Rules of Business are administrative in nature for governance of its business of the Government of India framed under Article 77 of the Constitution of India. In this connection, the Division Bench referred to the decision of this Court in Dattatreya Moreshwar Pangarkar v. State of Bombay, There analogous Rules of Business framed by the State under Article 166 of the Constitution of India came up for consideration and it was observed that they are directive and no order will be invalidated, if there is a breach thereof."

Therefore, this Court is also of the considered opinion that the Rules of Executive Business is not mandatory but directory" and therefore, the impugned Notification dated 18.07.2016 cannot be invalidated merely because there may have been some infraction of Rule 22A of the Rules. In any case, the note of the Parliamentary Secretary was only a proposal and not a final order as already indicated herein above.

11. This Court has also considered the records produced by the learned Additional Advocate General, Nagaland. It is seen that the CSB was constituted, consisting of members, as provided in the Act of 2009. Further, the decision taken by the CSB has also been considered by this Court and which is quoted herein below:-

"OSD in N&RE Department

5. The CSB considered the proposal for posting of ER. T.S. Angami. Director, N & RE as OSD and N & RE Department. In view of the technical expertise of the officer and the need for having better coordination with the Ministry of New & Renewable Energy, Government of India, to keep pace with the new initiatives in the renewable energy sector, the CSB recommended posting of Er. T.S. Angami, Director, N & RE as OSD in N & RE Department by way of adjustment against the existing vacancy of OSD in Finance Department."

A consideration of the decision of the CSB would clearly indicate that there was proper appreciation and consideration of the matter before making its recommendation. Therefore, this Court is of the considered opinion that the CSB was not guided by any extraneous consideration as contended by the petitioner.

12. Coming to the issue of mala fide raised by the learned senior counsel for the petitioner, this Court has considered the Note dated 19.5.16. The same is quoted herein below

"Parliamentary Secretary

NRE, F & ES

Nagaland : Kohima

Ref. No. PS(NRE)-2/B/2015

I write this note to you specially pertaining to the Department of New & Renewable Energy, Govt. of Nagaland. In the present context, the importance of the department has increased in manifold ways where it can disseminate and supply green energy for holistic development of the society in terms of power needs. To this end, the Government plans to incorporate various schemes and projects.

However, it is pertinent to point out that for the last 3 to 4 years, the department could not undertake many developmental activities. There remains a technical gap which can comprehend and further execute programs. The main reason being the lack of a fine intermediary possessing sufficient technical expertise that could enable a systematic coordination between the State department and the Ministry in line with the programs and guidelines of the Govt of India.

If such an intermediary could be positioned in the Civil Secretariat, it would act as an excellent position for the department and the State Government which would further benefit the people of the State.

Therefore, I am of the view that the present Director of the N RE deptt. Er. T.S. Angami, having excellent technical credentials in the field of Solar and green energy is deemed suitable enough to occupy the position of the intermediary, an ex-cadre post as OSD (BRE) and to be posted in the civil secretariat.

As such, in the larger interest of the public welfare, you are requested to take up this matter keenly.

Chief Secretary

(Toyang Changkong Chang)

A reading of the Note does not in any manner indicate any mala fide intention therein. Therefore, this Court is unable to infer mala fide intention of the Parliamentary Secretary. In fact, the note indicates the technical credentials of the petitioner which does not in any way substantiate the allegations of mala fide.

In the case of *Ajit Kumar Nag v. General Manager (PJ), Indian Oil Corpn.Ltd., Haldia and Ors* (supra), the Supreme Court has held as under :-

It is well settled that the burden of proving mala fide is on the person making the allegations and the burden is "very heavy" (vide *E.P. Royappa v. State of T.N.*) There is every presumption in favour of the administration that the power has been exercised bona fide and in good faith. It is to be remembered that the allegations of mala fide are often more easily made than made out and the very seriousness of such allegations demands proof of a high degree of credibility. As Krishna Iyer, J stated in *Gulam Mustafa v. State of Maharashtra* (see p. 802, para 2), "It (mala fide) is the last refuge of a losing litigant."

13. It is settled law that a transfer which is an incident of service is not to be interfered with by the Courts unless it is shown to be clearly arbitrary" or vitiated by mala fides or infraction of any professed norm or principle governing the transfer. An order of transfer is a part of the service conditions of an employee which should not be interfered with ordinarily by a Court of law in exercise of its discretionary jurisdiction under Article 226 unless the Court finds that either the order is mala fide or that the service rules prohibit such transfer, or that the authorities who issued the orders, were not competent to pass the orders.

In the case in hand, this Court is unable to accept the contentions of the learned senior counsel for the petitioner that there was mala fide intention on the part of the Parliamentary Secretary while issuing the Note dated 19.05.2016.

14. In the facts and circumstances of the case as discussed herein above, this Court is of the considered opinion that no case has been made out by the petitioner calling for interference of the Notification dated 18.7.16. Accordingly, there is no merit in the writ petition and is accordingly dismissed.

15. No costs.