

(2008) 08 KL CK 0032

In the High Court Of Kerala

Case No : Writ Petition (C) No's. 22740 and 22755 of 2008

Girisankar S.S.

APPELLANT

Vs

State of Kerala and Another

RESPONDENT

Date of Decision : 26-08-2008

Acts Referred:

Constitution of India, 1950 — Article 226
Kerala Collegiate Education Services Special Rules, 1967 — Rule 4
Kerala State and Subordinate Services Rules, 1958 — Rule 32

Citation : (2008) 4 ILR (Ker) 27 : (2008) 3 KLJ 419 : (2009) 2 SLR 607

Hon'ble Judges : Thottathil B. Radhakrishnan, J

Bench : Single Bench

Advocate : P. Ramakrishnan and Preethi Ramakrishnan, for the Appellant; Anu Sivaraman, GP, K. Surendra Mohan and K. Paul Kuriakose, for the Respondent

Final Decision : Dismissed

Judgement

Thottathil B. Radhakrishnan, J.—Petitioners and the second respondent are Lecturers in Law in the State service. They were posted in the Government Law College, Thrissur. These writ petitions are filed challenging the decision of the Government transferring the second respondent from Thrissur to Ernakulam.

The petitioner in WP(C) No. 22740 of 2008 joined service on 4-7-2000 and the petitioner in WP(C) No. 22755 of 2008 joined service on 16-4-2005 on the basis of appointment order dated 8-4-2005. The second respondent joined service on 25-2-2008.

2. Hereinafter, reference is made to the materials and exhibits in WP(C) No. 22740 of 2008, treating that as the main case.

The fact that the petitioners and the second respondent have declared Ernakulam as their home station is not in dispute. The entitlement of the petitioners for being considered for transfer to their home station in accordance with Ext.P 12 transfer norms is also not in dispute.

3. The petitioners challenge the impugned transfer of the second respondent on the ground that she was ineligible for being considered for transfer to the home station in terms of the norms for transfer and posting of Lecturers in Law in the Government Law Colleges, contained in Ext.P12 Government Order, which provides that persons who have completed three years of outside service will become eligible for transfer to their home station. Clause 13 of that Government Order states that no other special considerations will be given on other grounds. That Government Order further states that the terms thereof would be implemented taking also into account, the general guidelines issued by the Government as per Government Order, G.O.(P) No. 13/2000/P&ARD dated 27-4-2000 hereinafter referred to as "G.O.(P) No. 13/2000", which, among other things, provides in Clause 3(b) thereof for transfer on compassionate grounds. The English version of that provision is extracted in Ground-I of WP(C) No. 22740 of 2008. It reads as follows:

Clause 3(b) of the norms enumerate the cases of transfer on compassionate grounds as follows:

(i) Permanent disability to an employee due to some serious disease or accident which makes the employee to have to rely on help from others.

(ii) The Head of the Department certifies that expert treatment is not available elsewhere.

(iii) When the Head of the Department certifies that the wife of the employee (husband in the case of female employee), or son/daughter who is wholly dependant on the employee becomes affected by some serious disease which makes the employee's presence and care indispensable.

(iv) Orders made on the above grounds have to be re-considered after the completion of one year.

4. The impugned transfer of the second respondent has been made taking into consideration her representation that her mother-in-law who is aged 76 years of age was subjected to Neurosurgery and her physical condition is such that she can hardly move around and needs constant attention, care and personal assistance of the second respondent. She represented that her husband is the only child of his parents and there is nobody to assist him in taking care of his ailing mother and the son of the second respondent, now aged around two years. It appears from her representations that the second respondent had lost her mother when she was around two years old and has also lost her father and that she had even taken extension of time to join service till 25-2-2008 though the appointment order was issued to her on 6-12-2007. She joined service facing the likelihood of missing the opportunity to enter Government services.

5. On the very next day of her joining service, that is on 26-2-2008, the second respondent submitted an application for transfer to Ernakulam. In view of the contentions of the petitioners, the Principal of the Law College, Thrissur, as

ordered, filed an affidavit regarding the actual number of days the second respondent had worked as Lecturer in the Thrissur Law College. Going by that affidavit, out of 154 and a half days of her service in Thrissur, 61 days were summer holidays and she actually worked for 74 and a half days after availing leave without allowances for 13 days on medical grounds and six days' casual leave.

6. On 13-6-2008, the second respondent was transferred to Ernakulam. That was stayed by this Court in WP(C) No. 17934 of 2008. On 10-7-2008, that writ petition was ordered recording the Government decision cancelling that transfer. It was directed that the claims of the petitioner in that writ petition, namely, the petitioner in WP(C) No. 22740 of 2008 and that of the second respondent shall be considered in accordance with law and as per the norms governing such transfer. That was to be done in a time bound manner maintaining status quo as on that day until such decision is taken.

7. As per the impugned order, Ext.P 11, the Government concluded that the request of the second respondent for a transfer on compassionate grounds deserves sympathetic consideration and accordingly the impugned order has been issued as a special case in relaxation of the norms. This decision is severely criticized as an arbitrary exercise of power *de hors* declared norms and is essentially an act of favouritism, that too, to an incumbent who has joined service only on 25-2-2008 and could never claim that she is eligible for consideration for a transfer to her home station on the basis of Ext.P 12 Government Order. It is also canvassed, quite strenuously, that Clause 3(b) of G.O.(P) No. 13/2000 provides the conditions for transfer on compassionate grounds and it does not relate even to the parents of the employee, much less the mother-in-law. Reading that Clause in conjunction with the term in Clause 13 of Ext.P 12, it is argued on behalf of the petitioners that no other special considerations are to be given on other grounds and on the face of that provision in Ext.P 12, there is a conscious exclusion by the Government of any other consideration being taken into account, for the purpose of ordering a transfer. It is further pointed out that Ext.P 12 issued solely in relation to transfers of Lecturers of Law Colleges, having been issued in the manner in which it is, that should be treated as reflecting the entire policy of the Government in that matter and no deviation therefrom was permissible and hence the impugned order of transfer is unsustainable. The finding in the impugned Ext.P 11 that the statement of the petitioner in WP(C) No. 22740 of 2008 that he had eight years of outside service is false, is also challenged as even factually wrong and baseless.

8. Per contra, on behalf of the second respondent, it has been argued that the norms for transfer are not statutory and do not exclude the right of the Government to make a transfer otherwise than in accordance with the norms. It is pointed out that the Government Orders providing the transfer norms are only executive orders and in no way impinge the ultimate authority of the

Government to make orders of transfer. On facts, it is pointed out that, by her representations, the second respondent had demonstrated an exceptionally exceptional case for the kind and sympathetic consideration of the Government on compassionate grounds and the impugned transfer orders has been issued in relaxation of the norms on compassionate grounds. It is therefore contended that the said decision so not vitiated, calling for any interference under Article 226 of the Constitution.

9. Rule 32 of Part II K.S. & S.S.R. provides that a member of a service or class of a service may be required to serve in any post borne on the cadre of such service or class and that all transfers and postings shall be made by the appointing authority. Though it was attempted to be pointed out on behalf of the petitioners that till the files reached the hands of the Minister for Education, the entire notings by the subordinate authorities were against the request of the second respondent, it needs to be noticed that those notings were to the effect that she was not eligible for being considered for a transfer to the home station on the ground of her preferential entitlement to a transfer to home station in terms of the transfer guidelines as are contained in the Government Orders. It was also pointed out that the Minister had interfered and passed the order overruling the other authorities. I may notice that in terms of Rule 4 among the Special Rules for the Kerala Collegiate Education Services, 1967, the Government is the appointing authority for the post of Lecturers in Government Law Colleges. Therefore, it cannot be argued that the Minister, the ultimate head of the Ministry dealing with the powers of the Government in relation to education, did not have the authority to decide, as the appointing authority.

10. What has been criticized by the Government in the impugned order as a false "statement by the petitioner in WP(C) No. 22740 of 2008 is only an error or a mistake of fact in an earlier writ petition, which really does not have any impact on the case in hand. There can be no dispute that the petitioner in WP(C) No. 22740 of 2008 would be the one among the parties to these litigations to be the first preferential candidate for posting in terms of Ext.P 12 Government Order and the norms for home station transfer as stated therein.

11. The second respondent does not really project a claim that she is entitled to a preferential posting in Ernakulam treating that as her home station. Fundamentally, she cannot make such claim on the basis of the Government Orders governing the transfer to home station, particularly Ext.P 12, which requires a minimum period of three years of outside service for a person to become eligible for a transfer to home station and in case of open vacancies in home stations, the persons with the longer outside service have to be posted, going by that Government Order.

12. When the Government stated in its G.O.(P) No. 13/2000 that transfers on compassionate grounds are to be made on norms enumerated as Clause 3(b) thereof, it can be easily noticed that the Government did not envisage any situation relatable to the health of a parent-in-law as a ground for transfer on

compassionate grounds. Clause 13 in Ext.P 12 which states that no other special consideration will be given on other grounds was pointed out by the learned Counsel for the petitioners to state that in view of that Clause in Ext.P 12, Clause 3(b) of G.O.(P) No. 13/2000 should be taken as excluding any other consideration on compassionate appointment. It does not appear to be so. This is because, Clause 15 of Ext.P12 provides that the orders contained in Ext.P12 will be implemented taking into account also the general guidelines issued as per G.O. (P) No. 13/2000. But the restriction in Clause 13 of Ext.P 12 can only relate to the modalities of making a home station transfer. It does not go beyond that. Ext.P 12 contains the guidelines for home station transfers, providing a definition for "home station" and the criteria for transfer to home station on the basis of grounds stated in Ext.P 12. That Government Order does not exclude the power of the Government to transfer and post a servant to a station of that person, who, going by Ext.P 12, would not have completed the sufficient number of years of out-station service as would be required to stake a claim for consideration for a transfer to the "home station" on the strength of the executive decision contained in Ext.P 12 Government Order. In fact, there can be no embargo on that.

13. The power to make transfers and postings is within the powers of the Government as the employer. Rule 32 of Part II K.S. & S.S.R. specifically provides that power. It is an incident of service and does not result in any alteration of the conditions of service. The norms and guidelines issued by the authorities are those envisaged by the Government in its executive wisdom and cannot be utilized to curb the ultimate authority to make an order of transfer.

14. The power of transfer cannot, however, be abused. It has to be used properly. The exercise of that power shall not be tainted with malice, mala fides, arbitrariness or favouritism. It has to be immediately borne in mind that courts have recognized the existence of such power with the Government, always to uphold the authority of the Government to make transfers in exigencies of service. The transfer of the second respondent from Thrissur to Ernakulam is not in the exigencies of service. It is in the exigencies of the servant. The mere making an order of transfer in favour of one does not demonstrate favouritism. The result of that order may be a benefit to that servant. But, for that order of transfer to be treated as an act of favouritism, as a vitiating element; it requires something more than a mere favour by an employer, that may be due, on the facts and in the circumstances of a given case. If the totality of the facts discloses that the exercise of power was wholly undue on the given circumstances, that may tend to be a vitiating circumstances.

15. In the case in hand, the health situation of the mother-in-law of the second respondent is not in dispute. The fact that there is none else to take care of her, as of now, is also not in much of a dispute. Therefore, in the absence of a statutory or constitutional prohibition and in the presence of a statutory provision in the nature of Rule 32 among Part II K.S. & S.S.R., the Government cannot be

characterized as devoid of the power to make a transfer under such circumstances, which are, in a given case, noticed as even beyond the general guidelines issued as per G.O.(P) No. 13/2000.

16. However, such a transfer cannot be treated as a transfer to the "home station" for the purpose of Ext. 12 Government Order. This is particularly so in the case of the second respondent because, she was not entitled, in terms of that Government Order, for a transfer to home station while the petitioners had a better preference and the petitioner in WP(C) No. 22740 of 2008 has the best preference as on the date of these writ petitions. Even in the impugned Ext.P 11 Government Order, the second respondent is given the transfer on compassionate grounds and on consideration that her request deserves sympathetic consideration. The Government considered it as a special case in relaxation of the norms. It being so, there is no reason why such compassionate consideration should not be guided by Clause 3(b)(iv) of G.O.(P) No. 13/2000, which is a very rational provision because, compassion can be sought only in deserving circumstances.

17. Incidentally, I may also notice that the learned Counsel for the petitioners has rightly pointed out that the mother-in-law of the second respondent and Sri. P.S. Gopi, who proceeded to Thrissur from Ernakulam had made representations supporting the claim of the second respondent. The Government, in the circumstances of the case, cannot be found fault with having considered the representation of the second respondent's mother-in-law. However, it was quite unnecessary that certain recommendatory statements were made in the report of Sri. P.S. Gopi, in his representation dated 16-7-2008 to the Joint Secretary to Government, stating that the second respondent was his student and he is aware of her family backgrounds and domestic problems. It was quite unnecessary for a Selection Grade Lecturer and Principal in charge of a Law College to make such statements in his representation when there were other teachers also in the same service who were carrying the context for transfer and posting. By making this observation, I do not, in any manner, intend to make any comment or remark on that academician Sri. P.S. Gopi and whatever is stated herein, as regards that representation, are only for appreciating the submission made on behalf of the petitioners on the basis of the Government file. They are not remarks of any nature, that would, in any manner, affect the said person.

18. For the aforesaid reasons, the challenge to Ext.P 11, to the extent it transfers the second respondent from Thrissur to Ernakulam on compassionate grounds, as a special case, in relaxation of the norms, is repelled. It is directed that her such transfer shall be reviewed and reconsidered by the Government on completion of one year from the date of Ext.P 11 order or even earlier, on any change of circumstance, either on the request of any among the petitioners or otherwise. Subject to the aforesaid direction, these writ petitions are dismissed. No costs.