

(2015) 08 AHC CK 0026

In the Allahabad High Court

Case No : Service Single Nos. 4106, 4031 and 4136 of 2015

Girish Shukla and Others

APPELLANT

Vs

State of Uttar Pradesh

RESPONDENT

Date of Decision : 10-08-2015

Acts Referred:

Civil Procedure Code, 1908 (CPC) — Order 23 Rule 23, Order 6 Rule 17, 11, 141
Constitution of India, 1950 — Article 226

Citation : (2015) 5 AWC 5161

Hon'ble Judges : Anil Kumar, J

Bench : Single Bench

Advocate : Vishwa Mohini and Vimal Kumar, for the Appellant

Final Decision : Dismissed

Judgement

Anil Kumar, J—With the consent of learned counsel for the parties, all three writ petitions (W.P. Nos. 4106 (SS) of 2015, 4031 (SS) of 2015 and 4136 (SS) of 2015) are clubbed and heard together as the controversy involved in the present matters stands on same facts and law.

Writ Petition No. 4106 (SS) of 2015

2. Shri Girish Shukla/Petitioner who was working on the post of Junior Assistant (Group-C) in the office of opposite party No. 3/Superintending Engineer, Rural Engineering Department, Circle-Faizabad by means of the order dated 25.06.2015 passed by opposite party No. 2/Director-cum-Chief Engineer, (U.P.), Rural Engineering Department, IIIrd Floor, Jawahar Bhawan, Lucknow has been transferred from Circle-Office-Faizabad to Division-Amethi.

Writ Petition No. 4031 (SS) of 2015

3. Shri Hari Nath/Petitioner who was working on the post of Junior Assistant (Group-C) in the office of opposite party No. 3/Superintending Engineer, Rural Engineering Department, Circle-Faizabad by means of the order dated

26.06.2015 passed by opposite party No. 2/Director-cum-Chief Engineer, (U.P.), Rural Engineering Department, IIIrd Floor, Jawahar Bhawan, Lucknow has been transferred from Circle Office-Faizabad to Division-Amethi.

Writ Petition No. 4136 (SS) of 2015

4. Shri Hari Shankar Mishra/Petitioner who was working on the post of Draftsman (Group-C) in the office of opposite party No. 3/Superintending Engineer, Rural Engineering Department, Circle-Faizabad by means of the order dated 12.06.2015 passed by opposite party No. 2/Director-cum-Chief Engineer, (U.P.), Rural Engineering Department, IIIrd Floor, Jawahar Bhawan, Lucknow has been transferred from Circle Office-Faizabad to Division-Ambedkar Nagar.

5. Km. Vishwa Mohini, learned counsel for the petitioners while challenging the impugned orders of transfer in the matter in question submits that the services of the petitioners are governed by the Rules known as U.P. Rural Engineering Department, Lipik Varg Sewa Niyamawali, 1987 and as per Rule 4(2), the appointing authority of the petitioner is Superintending Engineer, Rural Engineering Department, Circle-Faizabad. So, opposite party No. 2/Director-cum-Chief Engineer (U.P.) Rural Engineering Department, IIIrd Floor, Jawahar Bhawan, Lucknow who is the higher authority to the Superintending Engineer, Rural Engineering Department, Circle-Faizabad/appointing authority has got no power to transfer the petitioners from one place to another place within a circle. In support of her arguments, she has placed reliance on the following judgments:-

(i) Tara Prasad Misra vs. State of U.P. and others (1990) 2 UPLBEC 905

(ii) Om Prakash Rana Vs. Swarup Singh Tomar and Others, AIR 1986 SC 1672 : (1986) 1 SCALE 1320 : (1986) 3 SCC 118 : (1986) 3 SCR 1 : (1986) 3 SLJ 195 : (1986) 2 UJ 16

(iii) B. Varadha Rao Vs. State of Karnataka and Others, AIR 1986 SC 1955 : (1986) 1 JT 249 : (1986) LabIC 1806 : (1986) 2 LLJ 516 : (1986) 2 SCALE 344 : (1986) 4 SCC 131 : (1986) 2 UJ 573

(iv) General Officer Commanding-in-Chief and Another Vs. Dr. Subhash Chandra Yadav and Another, AIR 1988 SC 876 : (1988) 1 JT 458 : (1988) LabIC 1014 : (1988) 2 LLJ 345 : (1988) 1 SCALE 414 : (1988) 2 SCC 351 : (1988) 3 SCR 62 : (1988) 3 SLJ 91 : (1988) 1 UJ 596

(v) Ashok Kumar Singh alias Gappu Bhadauriya, Aruna Singh alias Raja Bhadauriya and Ajeet Singh alias Guddan Bhadauriya (In Jail) Vs. State of U.P., (2006) 3 UPLBEC 2247

6. The next argument advanced by learned counsel for the petitioner is that the impugned orders of transfer were passed in mala fide manner by the opposite party No. 2/Director-cum-Chief Engineer (U.P.) Rural Engineering Department, IIIrd Floor, Jawahar Bhawan, Lucknow only to victimize them and the same are

neither in administrative exigency of service nor in the interest of department. In order to establish the malice, learned counsel for the petitioners placed reliance on the documents and materials as brought by the petitioners by way of supplementary affidavit. Accordingly, it has been argued that persons who are working in circle or division in Faizabad circle got a longer tenure of service in comparison to the petitioners are retained whereas only the petitioners have been transferred. In this regard, it is further submitted by learned counsel for the petitioners that the opposite party No. 2 with oblique, motive and purpose cancel the transfer order passed by the opposite party No. 3. The said action on the part of the opposite party No. 2 is a malice in law. In support of her arguments, reliance has been placed on the following judgments:-

(i) Smt. S.R. Venkataraman Vs. Union of India (UOI) and Another, AIR 1979 SC 49 : (1979) 1 LLJ 25 : (1979) 2 SCC 491 : (1979) 2 SCR 202 : (1979) 11 UJ 14

(ii) Swaran Singh Chand Vs. Punjab State Electricity Board and Others, AIR 2010 SC 151 : (2010) 124 FLR 1101 : (2009) 8 JT 385 : (2009) 7 SCALE 622 : (2009) 13 SCC 758 : (2010) 1 SCC(L&S) 297 : (2009) 8 SCR 1084 : (2009) 8 SLR 488

(iii) Smt. Vineeta Gupta vs. State of U.P. and others 2012 (30) LCD 1339

(iv) Somesh Tiwari Vs. Union of India (UOI) and Others, AIR 2009 SC 1399 : (2009) 1 JT 96 : (2009) 1 SCALE 63 : (2009) 2 SCC 592 : (2009) 1 SCC(L&S) 411 : (2009) 3 SLR 506 : (2009) AIRSCW 854

(v) P. Mohanan Pillai Vs. State of Kerala and Others, AIR 2007 SC 2840 : (2007) 113 FLR 442 : (2007) 3 SCALE 548 : (2007) 9 SCC 497 : (2007) 2 SCC(L&S) 542 : (2007) 3 SCR 53 : (2008) 3 SLJ 144 : (2007) AIRSCW 5157 : (2007) 3 Supreme 727

(vi) Tarkeshwar Pandey and others vs. General Manager, U.P. State Mineral Development Corporation Ltd., Lucknow and others (1995) 2 ULBEC 766.

7. Accordingly, it is submitted by learned counsel for the petitioners that the impugned orders of transfer are neither in administrative exigency of service nor in the interest of department and liable to be set aside.

8. Smt. Bulbul Godiyal, learned Addl. Advocate General while rebutting the contention as raised on behalf of the petitioners submits that opposite party No. 2/Director-cum-Chief Engineer (U.P.) Rural Engineering Department, Lucknow who is a superior authority has go no power to transfer the petitioners on the ground that appointing authority of the petitioners is Superintending Engineer, Rural Engineering Department, Circle-Faizabad and also submits that the said submission advanced on behalf of the petitioners is wholly misconceived and incorrect as opposite party No. 2/Director-cum-Chief Engineer (U.P.) Rural Engineering Department, IIIrd Floor, Jawahar Bhawan, Lucknow being the superior authority has all power to transfer the petitioners in the instant matter.

9. In support of her argument, she has placed reliance on the following

judgments:-

(i) Sajid Hussain and another Vs. District Basic Shiksha Education Officer, Badaun and others, (1998) 1 AWC 745

(ii) Munna Lal Srivas Vs. State of U.P. and Others, (2003) 5 AWC 4540

(iii) Guddu Singh and Others Vs. State of U.P. and Others, (2014) 3 ALJ 86 : (2013) 139 FLR 719

10. Smt. Bulbul Godiyal, learned Addl. Advocate General further argued that from the bare perusal of the pleadings as taken by the petitioners in the writ petitions, there is no ground in respect of the malice. So, in view of the above said facts, once the petitioners have not taken the plea in regard to the malice in law in the writ petitions, they cannot challenge the impugned orders on the said facts on the basis of the ground taken in the supplementary affidavit as the said act on the part of the petitioners is afterthought and the burden of proving mala fides is on a person leveling such allegations. Mere assertions or bald statement is not enough to discharge the heavy burden that the law imposes upon the person levelling allegations of mala fides; it must be supported by requisite materials.

11. In support of her arguments, she has placed reliance on the following judgments:-

(i) Airports Authority of India Vs. Rajeev Ratan Pandey and Others, (2009) 123 FLR 159 : (2009) 10 JT 472 : (2009) 11 SCALE 549 : (2009) 8 SCC 337 : (2009) 13 SCR 343 : (2009) 8 SLR 555

(ii) Rajesh Kumar Srivastava vs. State of U.P. and others 2003 (52) ALR 256

12. Accordingly she submits that the impugned orders do not suffer any illegality or infirmity and the writ petitions are liable to be dismissed.

13. Km. Vishmohini, learned counsel for the petitioner while rebutting the contention raised by learned Addl. Advocate General in regard to the malice as raised by the petitioners in the supplementary affidavit submits that the case of mala fide is fully established. So, keeping in view the said facts as well as law laid down by a Division Bench of this Court in the case of B.P. Pant vs. Cadre Authority, U.P. Co-operative Dairy Federation & Milk Union and others 2002 (20) LCD 888 wherein Paragraph No. 4 held as under:-

"There is yet another reason to arrive at the aforesaid conclusion. It is true that under Civil Procedure Code principles of natural justice based on public policy are encoded. To our mind such provisions are extendable in writ petition by necessary implication inspite of explanation added under Section 141 of Civil Procedure Code such as Section 11 and Order 23 of CPC but for the reasons given hereinabove writ petition cannot be allowed to amended which are founded on affidavit sworn on personal knowledge, on record, on information and on legal advice. We are of the view that as statement given on oath by a witness cannot

be allowed to be amended at the behest of a witness, similarly writ petition founded on affidavit cannot be allowed to be amended under Order 6 Rule 17 CPC. A witness can be recalled and can be re-examined and on the same pattern supplementary affidavits and supplementary counter affidavits can be permitted to be filed in writ petitions without causing any harm to any party to bring on record subsequent events in a writ petition provided such cause shown by petitioner for filing supplementary affidavit is found to the satisfaction of the Court to be bona fide."

14. Accordingly, learned counsel for the petitioners submits that it is clearly established and proved that the impugned orders of transfer are outcome of the mala fide exercise on the part of the opposite party No. 2. So the impugned order of transfers are liable to be set aside.

15. Effective utilization of the service of a Government employee is in the very core of administrative exigency. It is an accepted position in law that even if a service is transferable, an employee in public employment cannot be transferred on mere ipse dixit of the superior authority having power to make an order of transfer. The administrative exigency and/or public interest must be fulfilled before passing the order of transfer against an employee.

16. A transfer is a very important incidence of service and often the order of transfer which may appear innocuous causes serious hardship to the concerned employee. It should be noted in this connection that how best the service of a Government employee can be utilized must be left to the wisdom of the employer and for that purpose, to the appropriate authorities in a public service.

17. Whether the service of a Government employee can be better utilized in some other place is not a justifiable issue in a court of law. It will be sufficient to sustain an order of transfer if it can be shown that the service is a transferable one and by the impugned order of transfer, no condition of service or the norm laid down for such transfer has been violated and that a proper consideration of administrative exigency and/or public interest has been made by the concerned authority and on being satisfied of such administrative exigency and/or public interest, the order of transfer has been made.

18. In the instant matters, the services of the petitioners are governed by the Rules known as U.P. Rural Engineering Department, Lipik Varg Sewa Niyamawali, 1987 and Rule 4(2) of the said Rules, the position which emerges out is that for transferring a person from one place to another place, a competent authority is a Superintending Engineer, Rural Engineering Department, Circle-Faizabad and it is also not in dispute in the present case that Director-cum-Chief Engineer (U.P.) Rural Engineering Department, IIIrd Floor, Jawahar Bhawan, Lucknow is a superior authority/head of department under whose petitioners are working.

19. A Division Bench of this Court in the case of Sajid Hussain and another (Supra) has held that Shri Verma has next contended that the competent authority for passing a transfer order was B.S.A. but in the present case a

direction had been issued by the Assistant Director (Basic) and it will amount to transferring the petitioner at the dictate of some other authority. There is no dispute that the Assistant Director (Basic) is a higher authority and B.S.A. works under him. No illegality is committed if a higher authority of the department passes an order directing a subordinate authority to transfer an employee. In the impugned order dated 16.9.97 of the Assistant Director it is mentioned that there was serious complaint against the appellants and, therefore, it is not in public interest to keep them in the office of B.S.A. In our opinion, the Assistant Director was fully competent to pass such an order and the same does not suffer from any error of law.

20. In the case of Munna Lal Srivastava (Supra), a Division Bench of this Court has held that the impugned order of transfer passed by an authority which was much higher in rank as compared to the District Magistrate, the question of the said order being vitiated on account of that the same is passed by the higher authority.

21. In the case of Guddu Singh & Others (Supra), this Court held that there is no illegality committed if an order of transfer is passed by the higher authority.

22. Same view has been reiterated by this Court in the case of Matadin Maurya Vs. State of U.P., (2014) 9 ADJ 250 .

23. So far as the argument advanced by learned counsel for the petitioners that the order of transfer cannot be passed by the higher authority/opposite party No. 2 and the same is contrary to law as laid down by a Full Bench Judgment of this Court in the case of Tara Prasad Misra (Supra). From the perusal of the said judgment, the position which emerges out is that in the said case, Full Bench Judgment of this Court has held that a direction issued by the higher authority is binding on the subordinate authority. Hence, Full Bench Judgment is not applicable in the present case and the petitioners cannot derive any benefit from the said judgment.

24. In the case of Om Prakash Rana (Supra), Hon"ble the Apex Court held as under:

"that as is clear by now, the fundamental basis of the contention that "as is clear by now, the fundamental basis of the contention that the power of transfer under the Education Act and its Regulations continues in force even after the enactment of the Services Commission Act rests on the assumption that the power of appointment does not include the power of transfer. In our opinion, the assumption is unsustainable. The scheme under the Education Act envisages the appointment of a Principal in relation to a specific college. The appointment is in relation to that college and to no other. Moreover, different colleges may be owned by different bodies or organisations, so that each Principal serves a different employer. Therefore, on filling the office of a Principal to a college, a new contract of employment with a particular employer comes into existence. There is no State-level service to which Principals are appointed. Had that been

so, it would have been possible to say that when a Principal is transferred from one college to another no fresh appointment is involved. But when a Principal is appointed in respect of a particular college and is thereafter transferred as a Principal of another college it can hardly be doubted that a new appointment comes into existence. Although the process of transfer may be governed by considerations and move through a machinery different from the considerations governing the appointment of a person ab initio as Principal, the nature of the transaction is the same, namely, that of appointment, and that is so whether the appointment be through direct recruitment, through promotion from the teaching staff of the same institution or by transfer from another institution."

25. The same view has been reiterated in the case of B. Varadha Rao (Supra) Hon"ble Apex Court has held as under:-

"it is no doubt true that if the power of transfer is abused, the exercise of the power is vitiated. But it is one thing to say that an order of transfer which is not made in public interest but for collateral purposes and with oblique motives is vitiated by abuse of powers, and an altogether different thing to say that such an order per se made in the exigencies of service varies any condition of service, express or implied, to the disadvantage of the concerned government servant. The petitioner who appeared in person placed reliance, as he did in the High Court, on the decision of the Bombay High Court in Seshrao Nagorao Umap Vs. State of Maharashtra and others, (1985) 1 BomCR 30 : (1985) 2 LLJ 73 : (1984) MhLj 627 . We do not see how the decision can be of any avail to the question at issue. The learned Judges were dealing with a petition under Article 226 of the Constitution by which a Medical Officer challenged his order of transfer on the ground that it was not only mala fide but was issued in colourable exercise of power and therefore wholly illegal and void. It was contended by the petitioner that he was being transferred contrary to the government policy with a view to accommodate one Dr. R.P. Patil because of the political with a view to accommodate one Dr. R.P. Patil because of the political influence he wielded. In allowing the writ petition, the learned Judges observed that it was no doubt true that the government has power to transfer its employees employed in a transferable post but this power has to be exercised bona fide to meet the exigencies of the administration. If the power is exercised mala fide, then obviously the order of transfer is liable to be struck down. They relied on the observations made by this Court in E.P. Royappa Vs. State of Tamil Nadu and Another, AIR 1974 SC 555 : (1974) LabIC 427 : (1974) 1 LLJ 172 : (1974) 4 SCC 3 : (1974) 2 SCR 348 for the positivistic view that "equality is antithetic to arbitrariness" and held that the observations equally apply to the policy regarding the transfer of public servants. It was observed:-

"It is an accepted principle that in public service transfer is an incident of service. It is also an implied condition of service and appointing authority has a wide discretion in the matter. The government is the best judge to decide how to distribute and utilise the services of its employees. However this power must be

exercised honestly, bona fide and reasonably. It should be exercised in public interest. If the exercise of power is based on extraneous considerations or for achieving an alien purpose or an oblique motive it would amount to mala fide and colourable exercise of power. Frequent transfers, without sufficient reasons to justify such transfers, cannot, but be held as mala fide. A transfer is mala fide when it is made not for professed purpose, such as in normal course or in public or administrative interest or in the exigencies of service but for other purpose, that is to accommodate another person for undisclosed reasons. It is the basic principle of rule of law and good administration, that even administrative actions should be just and fair."

26. In the case of General Officer Commanding-in-Chief and Another Vs. Dr. Subhash Chandra Yadav and Another, AIR 1988 SC 876 : (1988) 1 JT 458 : (1988) LabIC 1014 : (1988) 2 LLJ 345 : (1988) 1 SCALE 414 : (1988) 2 SCC 351 : (1988) 3 SCR 62 : (1988) 3 SLJ 91 : (1988) 1 UJ 596 , Hon'ble the Apex Court held as under:-

"There is much force in the contention of the respondent that as service under the Cantonment Board is not a centralised service or a service at the State level, the transfer of an employee from one Cantonment Board to another would mean the termination of appointment of the employee in the Cantonment Board from which he is transferred and a fresh appointment in the Board where he is so transferred. The GOC-in-Chief, Central Command, is not the appointing authority of the respondent or the employees of the Cantonment Board, and so transfer of the respondent by the GOC-in-Chief is not permissible. In any event, one autonomous body cannot transfer its employee to another autonomous body even within the same State, unless the services of the employees of these two bodies are under a centralised or a State level service. In this connection, we may refer to a decision of this Court in Om Prakash Rana Vs. Swarup Singh Tomar and Others, AIR 1986 SC 1672 : (1986) 1 SCALE 1320 : (1986) 3 SCC 118 : (1986) 3 SCR 1 : (1986) 3 SLJ 195 : (1986) 2 UJ 16 , the Court observed as follows:-

"As is clear by now, the fundamental basis of the contention that the power of transfer under the Education Act and its Regulations continues in force even after the enactment of the Services Commission Act rests on the assumption that the power of appointment does not include the power of transfer. In our opinion, the assumption is unsustainable. The scheme under the Education Act envisages the appointment of a Principal in relation to a specific college. The appointment is in relation to that college and to no other. Moreover, different colleges may be owned by different bodies or organisations, so that each Principal serves a different employer. Therefore, on filling the office of a Principal to a college, a new contract of employment with a particular employer comes into existence. There is no State level service to which Principals are appointed. Had that been so, it would have been possible to say that when a Principal is transferred from one college to another no fresh appointment is involved. But when a Principal is

appointed in respect of a particular college and is thereafter transferred as a Principal of another college it can hardly be doubted that a new appointment comes into existence. Although the process of transfer may be governed by considerations and move through a machinery different from the considerations governing the appointment of a person ab initio as Principal, the nature of the transaction is the same, namely, that of appointment, and that is so whether the appointment be through direct recruitment, through promotion from the teaching staff of the same institution or by transfer from another institution."

27. In the case of Ashok Kumar Singh alias Gappu Bhadauriya, Aruna Singh alias Raja Bhadauriya and Ajeet Singh alias Guddan Bhadauriya (In Jail) Vs. State of U.P., (2006) 3 UPLBEC 2247 this Court has quashed the order of suspension passed by the higher authority to the appointing authority on the ground that higher authority is an appellate authority. The said position does not exist in the present case.

28. In the case of S.K. Majumdar vs. State of U.P. and others 1996 (14) LCD 887, a Division Bench of this Court has held as under:-

"It is settled view of law that transfers can be made by appointing authority only unless the Act or the Rules provide for delegation of this power to some other authority. No provision under the Drugs and Cosmetics Act or the Rules framed thereunder has been referred to by the learned counsel for the respondents to show that the power of transfer of Drug Inspectors had been delegated by the appointing authority to some other authority or the Drug Controller who is vested with the powers of Controlling Authority as well as the Licensing Authority. Unless there is specific delegation of power the Controlling Authority cannot transfer the Drug Inspectors. The respondents have utterly failed to show that the Drug Controller was vested with the power of transfer. A reference has been made in the earlier part of the judgment of Rule 50 which does not provide that the Controlling Authority shall also have powers to transfer Drug Inspectors. The Act only provides that the Drug Inspectors shall work under the control and supervision of the Controlling Authority. Thus the power of the Controlling Authority is to supervise the work of the Drug Inspectors and it has not been given the power of transferring the Drug Inspectors."

29. After going through the case of S.K. Mazumdar (supra), I am of the considered opinion that the same is not applicable in the present case and the petitioners cannot derive any benefit from the said judgment.

30. In view of the above said facts as well as facts that the private rights of the appellant being unaffected by the transfer, he would have been well advised to leave the matter to those in public life who felt aggrieved by his transfer to fight their own battle in the forum available to them. The appellant belongs to a disciplined force and as a senior officer would be making several transfers himself. Quite likely many of his men, like him, may be genuinely aggrieved by their transfers. If even a few of them follow his example and challenge the

transfer in Courts, the appellant would be spending his time defending his actions instead of doing the work for which he holds the office. Challenge in Courts of a transfer when the career prospects remain unaffected and there is no detriment to the Government servant must be eschewed and interference by Courts should be rare, only when a judicially manageable and permissible ground is made out. This litigation was ill-advised. So, there is no illegality or infirmity on the part of the opposite party No. 2 as he is higher authority to the appointing authority/Superintending Engineer, Rural Engineering Department, Circle-Faizabad while passing the impugned orders of transfer.

31. So far argument advanced by learned counsel for the petitioners challenging the impugned orders of transfer on the ground that the same is mala fide exercise on the part of the opposite party No. 2 is concerned, mala fide exercise of power means use of power for a purpose other than that for which the power is conferred upon the authority. Same will be the case when the order is for a purpose other than which finds in the order itself. This ulterior or alien purpose clearly speaks of misuse of power and suggests bad faith.

32. Lord Lindley in *General Assembly of Free Church of Scotland v. Overtown* 1904 AC 515, has stressed the need of bona fide use of power by the administrative authority and it is held that there is a condition implied in this as well as in other instruments which create powers, namely that the powers shall be used bona fide for the purpose for which they are conferred. That an act done in bad faith vitiates the act has also been indicated by Warrington, C.J. in *State v. Pool Construction* 1926 Ch 66 as follows:-

"No public body can be regarded as having statutory authority to act in bad faith or corrupt motives, and any action purporting to be of that body, but proved to be committed in bad faith or from corrupt motives, would certainly be held to be inoperative."

33. Malice or mala fide is of two types:- (1) express malice or "malice in fact"; and (2) implied or legal malice or "malice in law". Mala fides violating proceedings may be factual or legal.

34. Malice in fact means when an action is taken out of personal ill-will, enmity, animosity, vengeance or spite, it can be described as "malice in fact", as there is personal mala fide.

35. Malice in law means when an action is taken or power is exercised without just or reasonable cause or for a purpose foreign to the statute it can be said that there is legal mala fide or "malice in law".

36. The former is actuated by extraneous considerations whereas the latter arises where a public authority acts deliberately in defiance of law, may be without malicious intention or improper motive (*Somesh Tiwari Vs. Union of India (UOI) and Others*, AIR 2009 SC 1399 : (2009) 1 JT 96 : (2009) 1 SCALE 63 : (2009) 2 SCC 592 : (2009) 1 SCC(L&S) 411 : (2009) 3 SLR 506 : (2009)

AIRSCW 854).

37. The State is under obligation to act fairly without ill will or malice-in facts or in law. "Legal malice" or "malice in law" means something done without lawful excuse. It is an act done wrongfully and willfully without reasonable or probable cause, and not necessarily an act done from ill felling and spite. It is a deliberate act in disregard to the rights of others. Where malice is attributed to the State, it can never be a case of personal ill-will or spite on the part of the State. It is an act which is taken with an oblique or indirect object mala fide exercise of power does not imply any moral turpitude, exercise of statutory power for purposes foreign to those for which it is in law intended. (Vide Jaichand Lall Sethia Vs. State of West Bengal and Others, AIR 1967 SC 483 : (1967) CriLJ 520 : (1966) SCR 464 Supp ; Additional District Magistrate, Jabalpur Vs. Shivakant Shukla, AIR 1976 SC 1207 : (1976) CriLJ 945 : (1976) 2 SCC 521 : (1976) SCR 172 Supp : (1976) 8 UJ 610 ; State of Andhra Pradesh and Others Vs. Goverdhanlal Pitti, AIR 2003 SC 1941 : (2003) 5 JT 74 : (2003) 3 SCALE 107 : (2003) 4 SCC 739 : (2003) 2 SCR 908 : (2003) AIRSCW 1430 : (2003) 2 Supreme 713).

38. Further, the issue of "malus animus" was considered in Tara Chand Khatri vs. Municipal Corporation of Delhi & Ors., AIR 1977 SC 567, wherein the Supreme Court has held that the High Court would be justified in refusing to carry on investigation into the allegation of mala fides, if necessary particulars of the charge making out a prima facie case are not given in the writ petition and burden of establishing mala fide lies very heavily on the person who alleges it and there must be sufficient material to establish malus animus.

39. Accordingly, in order to challenge the order of transfer on the ground of mala fide there has to be very strong and convincing evidence to establish the allegations of mala fides specifically alleged in the petition as the same cannot merely on the basis of the presumption. The presumption is in favour of the bona fides of the order unless contradicted by acceptable material. (Vide Kiran Gupta and Others Vs. State of U.P. and Others Etc., AIR 2000 SC 3299 : (2000) 1 JT 105 Supp : (2000) 6 SCALE 552 : (2000) 7 SCC 719 : (2000) SCC(L&S) 1020 : (2000) 3 SCR 474 Supp : (2000) AIRSCW 3606 : (2000) 6 Supreme 555 and Netai Bag and Others Vs. The State of West Bengal and Others, AIR 2000 SC 3313 : (2000) 1 JT 181 Supp : (2000) 6 SCALE 504 : (2000) 8 SCC 262 : (2000) 3 SCR 424 Supp : (2001) 1 UJ 391 : (2000) AIRSCW 3590 : (2000) 6 Supreme 425).

40. In State of Punjab Vs. V.K. Khanna and Others, (2000) 3 JT 349 Supp : (2000) 7 SCALE 731 : (2000) 5 SCR 200 Supp : (2000) AIRSCW 4472 : (2000) 8 Supreme 105 , the Apex Court examined the issue of bias and mala fide, observing as under:-

"Whereas fairness is synonymous with reasonableness - bias stands included within the attributes and broader purview of the word "malice" which in common acceptation means and implies "spite" or "ill will". Once redeeming feature in the

matter of attributing bias or malice and is now well settled that mere general statements will not be sufficient for the purposes of indication of ill will. There must be cogent evidence available on record to come to the conclusion as to whether in fact, was existing a bias or a mala fide move which results in the miscarriage of justice..... In almost all legal inquiries, "intention as distinguished from motive is the all-important factor" and in common parlance a malicious act stands equated with an intentional act without just cause or excuse."

41. Further, the person against whom personal mala fides or "malice in fact" and "malice in law" is imputed should be impleaded as a party respondent to the proceedings and he should be afforded opportunity to meet with those allegations. In his absence, no enquiry into the correctness or otherwise of the allegations can be made. The reason is very simple. The principles of natural justice require that no person should be condemned unheard. Now if allegations have been made against a person who is not made party to the proceedings and the court proceeds on the basis of those allegations, the person against whom such allegations have been levelled is condemned unheard.

42. In the case of State of Bihar and Another Vs. P.P. Sharma, IAS and Another, AIR 1991 SC 1260 : (1991) 2 CompLJ 197 : (1991) CriLJ 1438 : (1991) 2 Crimes 113 : (1991) 2 JT 147 : (1992) 1 SCC 222 Supp : (1991) 2 SCR 1 , Hon"ble the Supreme Court held as under:-

"It is a settled law that the person against whom mala fides or bias was imputed should be impleaded eo nomine as a party respondent to the proceedings and given an opportunity to meet those allegations. In his/her absence no enquiry into those allegations would be made. Otherwise it itself is violative of the principles of natural justice as it amounts to condemning a person without an opportunity. (All India State Bank Officers" Federation and Others Vs. Union of India (UOI) and Others, (1997) 75 FLR 288 : (1996) 8 JT 550 : (1997) 1 LLJ 419 : (1996) 6 SCALE 634 : (1997) 9 SCC 151 : (1997) SCC(L&S) 1004 : (1996) 6 SCR 255 Supp and I.K. Mishra Vs. Union of India and Others, AIR 1997 SC 3740 : (1997) 6 JT 390 : (1997) 4 SCALE 646 : (1997) 6 SCC 228 : (1997) SCC(L&S) 1654 : (1997) 2 SCR 260 Supp : (1997) 2 UJ 396 : (1997) AIRSCW 2944)"

43. In Federation of Railway Officers Association and Others Vs. Union of India (UOI), AIR 2003 SC 1344 : (2003) 5 JT 123 : (2003) 3 SCALE 251 : (2003) 4 SCC 289 : (2003) 2 SCR 1085 , the Apex Court has held that the allegation of mala fide has to be specifically made and the person against whom such allegations are made has to be impleaded and in his absence such allegations cannot be taken into consideration.

44. It is also the 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 so made cannot be considered. (Vide State of Bihar and Another Vs.

P.P. Sharma, IAS and Another, AIR 1991 SC 1260 : (1991) 2 CompLJ 197 : (1991) CriLJ 1438 : (1991) 2 Crimes 113 : (1991) 2 JT 147 : (1992) 1 SCC 222 Supp : (1991) 2 SCR 1 ; Dr. J.N. Banavalikar Vs. Municipal Corporation of Delhi and another, AIR 1996 SC 326 : (1995) 71 FLR 918 : (1995) 7 JT 105 : (1995) 5 SCALE 509 : (1995) 4 SCC 89 Supp : (1995) 4 SCR 1 Supp : (1996) 1 SLJ 128 ; All India State Bank Officers' Federation and Others Vs. Union of India (UOI) and Others, (1997) 75 FLR 288 : (1996) 8 JT 550 : (1997) 1 LLJ 419 : (1996) 6 SCALE 634 : (1997) 9 SCC 151 : (1997) SCC(L&S) 1004 : (1996) 6 SCR 255 Supp ; and I.K. Mishra Vs. Union of India and Others, AIR 1997 SC 3740 : (1997) 6 JT 390 : (1997) 4 SCALE 646 : (1997) 6 SCC 228 : (1997) SCC(L&S) 1654 : (1997) 2 SCR 260 Supp : (1997) 2 UJ 396 : (1997) AIRSCW 2944).

45. Thus a question of mala fide may be looked into from two different angles. One relates to the mind set of the authority and the other to the actual manner of exercise of the power. On the first part, the inquiry is limited to the search if there is any personal bias, oblique motive or ulterior purpose in the act. The other is an inquiry into the powers of the authority and whether they have been exercised contrary to the requirements. Where apart from the allegations nothing is stated in the petition attributing any personal bias, grudge, oblique motive or ulterior purpose, there is absolutely no need for exercising any inquiry by putting the opposite party on cross-examination to prove his affidavit of denial of the allegation of mala fide.

46. Hon"ble the Supreme Court in the case of Ratnagiri Gas and Power Pvt. Ltd. Vs. RDS Projects Ltd. and Others, AIR 2013 SC 200 : (2013) 115 CLT 562 : (2012) 10 JT 629 : (2012) 10 SCALE 410 : (2013) 1 SCC 524 has considered the malice in law and held as under:-

"Coming then to the question whether the action taken by the appellant-RGPPL was vitiated by malice in law, we need hardly mention that in cases involving malice in law the administrative action is unsupportable on the touchstone of an acknowledged or acceptable principle and can be avoided even when the decision maker may have had no real or actual malice at work in his mind. The conceptual difference between the two has been succinctly stated in the following paragraph by Lord Haldane in Shearer v. Shields (1914) A.C. 808 quoted with approval by this Court Additional District Magistrate, Jabalpur Vs. Shivakant Shukla, AIR 1976 SC 1207 : (1976) CriLJ 945 : (1976) 2 SCC 521 : (1976) SCR 172 Supp : (1976) 8 UJ 610 .

".....Between "malice in fact" and "malice in law" there is a broad distinction which is not peculiar to any system of jurisprudence. The person who inflicts a wrong or an injury upon any person in contravention of the law is not allowed to say that he did so with an innocent mind. He is taken to know the law and can only act within the law. He may, therefore, be guilty of "malice in law", although, so far as the state of his mind was concerned he acted ignorantly, and in that sense innocently. "Malice in fact" is a different thing. It means an actual malicious intention on the part of the person who has done the wrongful act."

Reference may also be made to the decision of this Court in *State of Andhra Pradesh and Others Vs. Goverdhanlal Pitti*, AIR 2003 SC 1941 : (2003) 5 JT 74 : (2003) 3 SCALE 107 : (2003) 4 SCC 739 : (2003) 2 SCR 908 : (2003) AIRSCW 1430 : (2003) 2 Supreme 713 where the difference between malice in fact and malice in law was summed up in the following words:

"The legal meaning of malice is "ill-will or spite towards a party and any indirect or improper motive in taking an action". This is sometimes described as "malice in fact". "Legal malice" or "malice in law" means "something done without lawful excuse". In other words, "it is an act done wrongfully and wilfully without reasonable or probable cause, and not necessarily an act done from ill feeling and spite". It is a deliberate act in disregard of the rights of others". [See Words and Phrases legally defined in Third Edition, London Butterworths 1989].

Where malice is attributed to the State, it can never be a case of personal ill-will or spite on the part of the State. If at all, it is malice in legal sense, it can be described as an act which is taken with a oblique or indirect object..."

To the same effect is the recent decision of this Court in *Ravi Yashwant Bhoir Vs. District Collector, Raigad and Others*, AIR 2012 SC 1339 : (2012) 3 SCALE 303 : (2012) 4 SCC 407 : (2012) 2 SLJ 353 : (2012) AIRSCW 1877 : (2012) 2 Supreme 506 where this Court observed:

"MALICE IN LAW:

This Court has consistently held that the State is under an obligation to act fairly without ill will or malice - in fact or in law. Where malice is attributed to the State, it can never be a case of personal ill-will or spite on the part of the State. "Legal malice" or "malice in law" means something done without lawful excuse. It is a deliberate act in disregard to the rights of others. It is an act which is taken with an oblique or indirect object. It is an act done wrongfully and wilfully without reasonable or probable cause, and not necessarily an act done from ill feeling and spite. Mala fide exercise of power does not imply any moral turpitude. It means exercise of statutory power for "purposes foreign to those for which it is in law intended." It means conscious violation of the law to the prejudice of another, a depraved inclination on the part of the authority to disregard the rights of others, where intent is manifested by its injurious acts. Passing an order for unauthorized purpose constitutes malice in law. (See: *Additional District Magistrate, Jabalpur Vs. Shivakant Shukla*, AIR 1976 SC 1207 : (1976) CriLJ 945 : (1976) 2 SCC 521 : (1976) SCR 172 Supp : (1976) 8 UJ 610 ; *Union of India (UOI) through Govt. of Pondicherry and Another Vs. V. Ramakrishnan and Others*, AIR 2005 SC 4295 : (2005) 9 JT 422 : (2005) 8 SCALE 273 : (2005) 8 SCC 394 : (2005) SCC(L&S) 1150 : (2006) 1 SLJ 320 : (2005) AIRSCW 5147 : (2005) 7 Supreme 136 ; and *Kalabharati Advertising Vs. Hemant Vimalnath Narichania and Others*, AIR 2010 SC 3745 : (2010) 9 JT 382 : (2011) 1 RCR(Civil) 216 : (2010) 9 SCC 437 : (2010) 10 SCR 971)."

47. Keeping in view the above said facts as well as the fact that no foundation

has been led by the petitioners in order to challenge the impugned orders of transfer on the ground of mala fide in the present writ petition only and on the basis of the supplementary affidavit, the argument has been made on behalf of the petitioners on the ground of malice, the petitioners cannot be permitted to do so in view of the judgment given by Hon"ble the Apex Court in the case of Airports Authority of India (supra) relevant portion quoted herein below:-

"In the present case, as noticed above, at the threshold, no allegations of mala fides have been pleaded in the writ petition. It is only by way of a supplementary affidavit that allegations of mala fides have been put forth by Respondent 1 but even such allegations are not supported by any material whatsoever. In a matter such as the present one where plea of mala fides is not made in the writ petition and the assertion of mala fides is made for the first time in a supplementary affidavit which too is not supported by any convincing and cogent material, the plea of mala fides hardly deserved acceptance, prima facie, justifying stay of operation of a transfer order."

48. Accordingly, keeping in view the said facts and legal position of law on the point in issue, a challenge to an order of transfer should normally be eschewed and should not be countenanced by the Courts or tribunals when the same is passed for requirements of the situation concerned in the administrative exigency of services and in the interest of the department. 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 considerations borne out of conjectures or surmises and except for strong and convincing reasons, accordingly no interference could ordinarily be made with an order of transfer.

49. For the foregoing reasons, I do not find any illegality or infirmity in the impugned orders of transfer under challenge in the present writ petitions (W.P. Nos. 4106 (SS) of 2015, 4031 (SS) of 2015 and 4136 (SS) of 2015). Accordingly, the same are dismissed.