

(2014) 09 KL CK 0102
In the High Court Of Kerala
Case No : O.P. (KAT) No. 225 of 2014

Gopinathan

APPELLANT

Vs

State of Kerala

RESPONDENT

Date of Decision : 29-09-2014

Acts Referred:

Constitution of India, 1950 — Article 227

Citation : (2014) 4 ILR 573 : (2014) 4 KHC 315 : (2014) 4 KLJ 345 : (2014) 4 KLT 285

Hon'ble Judges : Antony Dominic, J; Anil K. Narendran, J

Bench : Division Bench

Advocate : P.C. Sasidharan, Advocate for the Appellant; P.A. Muhammed Sha, Sr. Government Pleader, Advocate for the Respondent

Judgement

Anil K. Narendran, J.—The petitioners are the applicants in O.A. No. 1068 of 2014 filed before the Kerala Administrative Tribunal. They have filed the said Original Application seeking an order to set aside Annexures-A1 and A4 orders by which the 1st petitioner who was working as HSA (Natural Science) was ordered to be transferred from Government Higher Secondary School, Chettiyankinar, to Government Higher Secondary School, Kadungapuram, and the 2nd petitioner who was working as HSA (Physical Science) in Government Higher Secondary School, Chettiyankinar was ordered to be transferred to Government Vocational Higher Secondary School, Vengara. By Ext. P2 order dated 18.6.2014, the Tribunal dismissed O.A. No. 1068 of 2014 and it is aggrieved by the said order the petitioners are before us in this Original Application. By order dated 10.7.2014 this Court granted an interim stay for a period of 10 days, which was extended from time to time. The learned counsel for the petitioners contended that Ext. P2 order of the Tribunal suffers from manifest error apparent on the face of the record. The petitioners were transferred from Government Higher Secondary School, Chettiyankinar, absolutely without any valid reasons. It is a punitive transfer in as much as the petitioners have been transferred on the basis of certain complaints alleged to have been made against them. Though the

petitioners are ordered to be transferred from Government Higher Secondary School, Chettiyankinar, based on an enquiry conducted by the Deputy Director of Education, Malappuram, the 3rd respondent herein, the finding in Annexure-A5 enquiry report is that there are no serious lapses on the part of the petitioners in discharging their duties. Per contra the learned Senior Government Pleader appearing for respondents 1 to 3 submitted that there is absolutely no illegality or irregularity in Annexures-A1 and A4 orders and therefore the finding to that effect in Ext. P2 order passed by the Tribunal is perfectly legal and no interference of this Court under Article 227 of the Constitution of India is warranted.

2. We have considered the rival submissions made at the Bar.

3. The petitioners were working as HSA (Natural Science) and HSA (Physical Science) in Government Higher Secondary School, Chettiyankinar. When they were ordered to be transferred from the said school to Government Higher Secondary School, Kadungapuram, and Government Higher Secondary School, Vengara, respectively, they had approached the Tribunal in O.A. No. 2836 of 2013. Pursuant to the interim order passed by the Tribunal in that Original Application the petitioners were permitted to continue at Government Higher Secondary School, Chettiyankinar. By Annexure A2 order the Tribunal disposed of O.A. No. 2836 of 2013 permitting the petitioners to represent before the Director of Public Instruction, the 2nd respondent herein, against the order of transfer and the said respondent was directed to consider such representations and pass appropriate orders within a period of two months from the date of receipt of a copy of the order. It was made clear that till orders are passed as directed above the interim order granted by the Tribunal in O.A. No. 2836 of 2013 will remain in force.

4. Pursuant to the direction contained in Annexure-A2 order, the petitioners filed Annexure-A3 representation before the 2nd respondent. But the same ended in dismissal by Annexure-A4 order stating that the transfer of the petitioners is essential to maintain the harmonious atmosphere of the school and to have a good educational environment. The finding to that effect in Annexure-A4 order passed by the 2nd respondent is based on a complaint alleged to have been made by the parents of about 50 students studying in Government Higher Secondary School, Chettiyankinar, that the petitioners are not regularly attending the school and they are not completing the portions within the stipulated time. The 3rd respondent conducted an enquiry on the said complaint and thereafter the petitioners were ordered to be transferred to another school. The reasoning of the 2nd respondent in Annexure-A4 order is that the 3rd respondent has issued the order of transfer after assessing the situation thoroughly and properly and hence he finds no reason to interfere with the stand of the 3rd respondent.

5. However, a perusal of Annexure-A5 enquiry report submitted by the 3rd respondent would show that, based on the enquiry conducted on 26.6.2012, the 3rd respondent came to the conclusion that there was no serious lapse on the

part of the petitioners in discharging their duties and that the leave availed by them are lawful. The 3rd respondent also found that the petitioners have completed their portions in time, by taking special classes, which was proved from the statement given by the students. In such circumstances, the 3rd respondent in Annexure-A5 concluded that there is no truth in the complaint made by the parents and that there are no lapses on the part of the petitioners in discharging their duties, warranting any disciplinary proceedings.

6. The learned Senior Government Pleader appearing for respondents 1 to 3 contended that the petitioners were not regularly attending the school and they have not completed the portions within the stipulated time. In the enquiry conducted by the 3rd respondent, it was found that the 1st petitioner availed leave for 42 days and the 2nd petitioner availed leave for 33 days during a short span of 9 months between June, 2012 and February, 2013. Going by Annexure-A5 enquiry report, the 1st petitioner availed casual leave for 15 days, commuted leave for 7 days, restricted holiday for 1 day, absented due to strike on 7 days and he was on other duty for 12 days. Similarly, the 2nd petitioner availed casual leave for 15 days, absented due to strike on 5 days and he was on other duty for 13 days.

7. On 17.9.2014, we have directed the learned Senior Government Pleader to find out the nature of "other duty" mentioned in Annexure-A5 enquiry report. Pursuant to that direction, the learned Senior Government Pleader made available the details of the leave availed by the petitioners for the period between June, 2012 and February, 2013, as per which, the 1st petitioner was on "other duty" on 26.11.2012, 27.11.2012 and 28.11.2012 in connection with Sub-District Arts Festival. On 04.12.2012, 05.12.2012 and 06.12.2012 he was on "other duty" in connection with Teachers Training. On 15.1.2013, 16.1.2013, 17.1.2013 and 18.1.2013 he was on "other duty" in connection with State Youth Festival. On 11.2.2013 and 12.02.2013 he was on "other duty" in connection with Trade Union State Conference. Similarly the 2nd petitioner was on "other duty" on 30.10.2012 and 31.10.2012 in connection with Sub-District Science Exhibition. On 3.1.2013 and 4.1.2013 he was on "other duty" in connection with Teachers Training. On 15.1.2013, 16.1.2013, 17.1.2013 and 18.1.2013 he was on "other duty" in connection with State School Arts Festival. On 11.2.2013 and 12.2.2013 he was on "other duty" in connection with State Trade Union Conference. On 18.2.2013 and 19.2.2013 he was on "other duty" as SSLCIT Examination Invigilator.

8. The details of leave availed by the petitioners, furnished by the learned Senior Government Pleader, make it abundantly clear that for 42 days and 33 days respectively, referred to in Annexure-A5 enquiry report, the petitioners were either on eligible leave or on "other duty" in connection with arts festival, youth festival, teachers training, etc. In such circumstances, the finding of the Tribunal in Ext. P2 order that the petitioners were irregular in attending the classes is factually incorrect and legally unsustainable. As evident from Annexure-A5

enquiry report, the students have a good opinion about the classes taken by the petitioners and they have no complaint against both of the petitioners. The students have stated that, though the petitioners were on leave on various dates, they completed the portions by taking special classes. It is also not in dispute that the percentage of pass in the subjects handled by the petitioners was high during the relevant period and it has gone up to 100% in the subsequent academic year. In addition to this, as evident from Annexure-A6 resolution, the Executive Committee of the Parent Teacher Association of Government Higher Secondary School, Chettiyankinar, unanimously resolved against the transfer of the petitioners from that school. Annexure-A6 also indicate that, the complaints alleged to have been made against the petitioners are baseless and the parents of the students in Government Higher Secondary School, Chettiyankinar, have no connection whatsoever with those complaints.

9. According to the learned counsel for the petitioners, Annexure-A1 order of transfer is a punitive transfer in as much as the petitioners have been transferred on the basis of certain complaints alleged to have been made against them. In Union of India (UOI) and Others Vs. Sri Janardhan Debanath and Another, , the Apex Court held that, the manner, nature and extent of exercise to be undertaken by Courts/Tribunals in a case to adjudge whether an order of transfer casts a stigma or constitutes one by way of punishment would also very much depend upon the consequences flowing from the order and as to whether it adversely affected any service conditions - status, service prospects financially - and same yardstick, norms or standards cannot be applied to all category of cases. Transfers unless they involve any such adverse impact or visits the persons concerned with any penal consequences, are not required to be subjected to same type of scrutiny, approach and assessment as in the case of dismissal, discharge, reversion or termination and utmost latitude should be left with the department concerned to enforce discipline, decency and decorum in public service which are indisputably essential to maintain quality of public service and meet untoward administrative exigencies to ensure smooth functioning of the administration. In the said decision, the Apex Court further held that, for the purposes of effecting a transfer, the question of holding an enquiry to find out whether there was misbehaviour or conduct unbecoming of an employee is unnecessary and what is needed is the prima facie satisfaction of the authority concerned on the contemporary reports about the occurrence complained of and if the requirements of holding an elaborate enquiry is to be insisted upon, the very purpose of transferring an employee in public interest or exigencies of administration to enforce decorum and ensure probity would get frustrated.

10. Therefore, if the service of an employee is found to be not satisfactory at a particular place for whatever reasons, it would be open to the employer to take such remedial measures as are permissible under law to meet the requirements of that situation, like initiation of disciplinary proceedings or transferring the employee out of that place. If the employer opines that mere transfer of the

employee would suffice the interest of the administration and accordingly orders transfer of such employee, such order of transfer need not necessarily be a measure of punishment to such employee. Therefore, the contention raised by the learned counsel for the petitioners that, an order of transfer based on certain complaints alleged to have been made against the employees would render the transfer a punitive transfer can only be rejected.

11. In *State of Madhya Pradesh, and Another Vs. S.S. Kourav and Others*, , the Apex Court held that, the Courts or Tribunals are not appellate forums to decide on transfers of officers on administrative grounds. It is for the administration to take appropriate decision and such decision shall stand unless they are vitiated either by mala fides or extraneous considerations without any factual background foundation. Later, in *Somesh Tiwari Vs. Union of India (UOI) and Others*, , the Apex Court held that, an order of transfer passed on material which was non-existent not only suffers from total non-application of mind on the part of the authorities, but also suffers from malice in law. Paragraphs 16 and 17 of the judgment read thus;

"16. Indisputably an order of transfer is an administrative order. There cannot be any doubt whatsoever that transfer, which is ordinarily an incident of service should not be interfered with, save in cases where inter alia mala fide on the part of the authority is proved. Mala fide is of two kinds - one malice in fact and the second malice in law. The order in question would attract the principle of malice in law as it was not based on any factor germane for passing an order of transfer and based on an irrelevant ground i.e., on the allegations made against the appellant in the anonymous complaint. It is one thing to say that the employer is entitled to pass an order of transfer in administrative exigencies but it is another thing to say that the order of transfer is passed by way of or in lieu of punishment. When an order of transfer is passed in lieu of punishment, the same is liable to be set aside being wholly illegal.

17. An enquiry was initiated against the appellant in terms of the allegations contained in an anonymous letter. Having regard to the directives of the Central Vigilance Commission, no enquiry could have been initiated against him but it is beyond any doubt or dispute that in the said enquiry, the allegations were found to be untrue. Despite the same not only an order of transfer was passed but to a station, which, according to the respondents themselves, was "harsh".

12. In the case on hand, the materials on record clearly indicate that, Annexure-A1 order of transfer was issued without any factual foundation or legal support. Annexure-A1 order of transfer passed on materials which were non-existent not only suffers from total non-application of mind on the part of the 3rd respondent, but also suffers from malice in law. The said order is only a colourable exercise of power by the 3rd respondent. Similarly, the finding of the 2nd respondent in Annexure-A4 order that the transfer of the petitioners is essential to maintain the harmonious atmosphere of the school and to have a good educational environment is also without any factual foundation or legal support. Therefore, in

our view, the Tribunal failed to take note of the above crucial aspects of the matter while passing Ext. P2 order. The reasoning of the Tribunal in Ext. P2 order is that, in the light of R. 32 of the Kerala State and Subordinate Rules, the petitioners are liable to serve anywhere in their unit of appointment. So, if they are transferred to schools within Malappuram District, such transfer is perfectly in order and in tune with R. 32. It is trite law that transfer is an incident of service and an employee working on a transferable post cannot claim, as a matter of right, that he should be retained in a particular post or at a particular place. It is the choice of the employer to determine how long the service of an employee is required in a particular post or at a particular place. The order of transfer does not affect any legal rights of the employee and the court or tribunal cannot interfere with an order of transfer or posting, which is made in public interest or on administrative exigency. However, if the power of transfer is abused or the transfer is not made in public interest, but for collateral purposes and with oblique motive, the order would stand vitiated, warranting interference of the court or tribunal. When Annexure-A1 order of transfer is found to be one without any factual foundation or legal support, it is only a colourable exercise of power by the 3rd respondent, and such exercise of power cannot be sustained in the eye of law. Therefore, in our view, the Tribunal committed a mistake in not interfering with Annexure-A1 order of transfer issued by the 3rd respondent and Annexure-A4 order passed by the 4th respondent rejecting the representation made by the petitioners against their transfer from Government Higher Secondary School, Chettiyankinar.

In the result, this O.P. (KAT) is allowed setting aside order dated 18.6.2014 of the Kerala Administrative Tribunal in O.A. No. 1068 of 2014. Resultantly, O.A. No. 1068 of 2014 will stand allowed setting aside Annexures-A1 and A4 orders. We direct that the petitioners shall be allowed to continue at Government Higher Secondary School, Chettiyankinar. However, it is made clear that this judgment will not stand in the way of the petitioners being transferred in accordance with law, from Government Higher Secondary School, Chettiyankinar, for any valid administrative reasons.