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**(2006) 08 GAU CK 0010**  
**In the Gauhati High Court**

Kalyan Kumar Sarkar

APPELLANT

Vs

Alok Kanti Paul Choudhury and Others

RESPONDENT

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**Date of Decision :** 01-08-2006

**Acts Referred:**

Constitution of India, 1950 — Article 226

**Citation :** (2007) 1 GLR 462 : (2006) 3 GLT 624

**Hon'ble Judges :** B. Sudershan Reddy, C.J;B.P. Katakey, J

**Bench :** Division Bench

**Final Decision :** Allowed

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## Judgement

B.P. Katakey, J.—Sri Alok Kanti Paul Choudhury, respondent No. 1 herein, filed W.P.(C) No. 856 of 2006 challenging the notification dated 7.2.2006 issued by the Commissioner & Secretary to the Govt. of Assam, Education (Higher & Technical) Department "transferring him from Guwhati to Bongaigaon as Principal of Bongaigaon Polytechnic vice the appellant Sri Kalyan Kumar Sarkar, who was transferred from Bongaigaon to Guwahati as Principal in Assam Textile Institute in place of the respondent No. 1-writ petitioner. Such transfer order was basically challenged on two grounds, namely, mala fide exercise of power and violation of the transfer policy formulated by the Government of Assam. The learned Single Judge vide order dated 10.3.2006 set aside the said transfer order dated 7.2.2006 on the ground that the same was passed in violation of the transfer policy by not recording the reason for transfer and without prior approval of the hon"ble Chief Minister and as desired by the Minister of Social Welfare, Assam, who is totally unconnected with the department of Education. Hence, the present appeal by the appellant who was respondent No. 4 in the said writ petition.

2. We have heard Mr. A. Mazumdar, learned senior counsel appearing on behalf of the appellant and Dr. B. Ahmed, learned Counsel for the respondent No. 1 as well as learned standing counsel Education Department appearing on behalf of the respondent Nos. 2 to 4.

3. Mr. Mazumdar, learned senior counsel appearing on behalf of the appellant referring to the pleadings of the writ petitioner in the writ petition, who is respondent No. 1 herein, has submitted that the transfer order was challenged on two grounds, firstly on the ground of violation of the transfer guideline and secondly on the ground that the same was passed at the instance of the Minister of Social Welfare, he has nothing to do with the Education Department. According to the learned senior counsel the violation of the transfer guideline/policy formulated by the State of Assam cannot give rise to any legally enforceable right on the writ petitioner/respondent No. 1 seeking a writ under Article 226 of the Constitution of India, even if such guideline/transfer policy is violated by the authority while passing the order of transfer. Mr. Mazumdar, has submitted that in fact in the present case such guideline was never violated and the approval of the hon"ble Chief Minister which requires to be obtained in case of transferring an officer before completion of three years tenure at a particular place of posting was in fact obtained. It has further been submitted that it is not that the transfer order was issued at the behest of the Minister of Social Welfare and in any case according to the learned senior counsel there is no wrong in approaching a minister who is the elected representative of the people and the transfer order cannot be set aside on the ground that at one point of time the appellant or his wife approached the minister of another department. Such order of transfer can be interfered with only if the same is not issued in the interest of public service or in the administrative exigencies or issued in violation of any statutory provision or if the transfer order amounts to change of conditions of the service of the employee or was passed in mala fide exercise of power or by an authority who is not competent to pass such transfer order, submitted by the learned senior counsel. Mr. Mazumdar, has further contended that the petitioner though in the writ petition has stated that the transfer order was passed mala fide, no foundational fact even to suggest mala fide has been pleaded in the writ petition. According to the learned senior counsel the learned Single Judge interfered with the order of transfer on the ground of not recording the reason and not taking the approval of the hon"ble Chief Minister and as well as on the ground that the same was issued at the instance of the Minister of Social Welfare, without recording any finding that the authority has exercised the power mala fide. Mr. Mazumdar, therefore, submits that the judgment passed by the learned Single Judge requires to be interfered with.

4. Dr. Ahmed, learned Counsel appearing on behalf of the respondent No. 1-writ petitioner referring to the statements made in the writ petition has submitted that the mala fide writ large on the face of the order of transfer, as that was passed because of taking action against the wife of the appellant who happens to be the demonstrator in science under the respondent/writ petitioner in Assam Textile Institute where he was the Principal prior to his order of transfer and also because of his recommendation to transfer her from Guwahati and consequently her order of transfer dated 4.2.2006 to Bongaigaon as demonstrator was issued. It has further been submitted that it is also evident from the record produced

that the transfer order was in fact issued on the basis of the communication issued by the Minister of Social Welfare requesting the Minister Higher Education for transfer of the appellant from Bongaigaon to Guwahati vice the respondent-writ petitioner, which has been quoted in the impugned order passed by the learned Single Judge. The learned Counsel, therefore, submits that transfer order was issued mala fide and the learned Single Judge has rightly interfered with such order of transfer.

5. It has further been submitted that the Government having formulated the transfer policy is bound to follow such policy and in the instant case as the respondent-writ petitioner was transferred by the notification dated 7.2.2006 before completion of three years tenure in Guwahati as Principal of Assam Textile Institute, reason, for transfer have to be recorded and approval of the hon'ble Chief Minister has to be taken, but in the instant case the learned Single Judge has found that no such reason has been recorded and no approval was obtained from the hon'ble Chief Minister. The learned Counsel further contended that the transfer order was passed whimsically without applying the mind to the relevant factors. The learned Counsel in support of his contention has placed reliance on a Single Bench judgment of this court in *Dayal Das v. State of Assam and Ors.* reported in 2002 (2) GLT 109 as well as the decision of the Apex Court in *Arvind Dattatraya Dhande Vs. State of Maharashtra and others*, and in *Tarlochan Dev Sharma Vs. State of Punjab and Others*,

6. The Chief Secretary to the Government of Assam issued an office memorandum dated 19.9.1992 formulating certain guidelines to be followed by various departments in the matter of transfer. Another office memorandum dated 4.2.2002 was issued by the Commissioner and Secretary, Government, of Assam, personnel department issuing further guidelines in that regard. It appears from the said guidelines that the transferable officer and members of the staff are normally be transferred only upon completion of three years of service at one place and whenever public interest demands that an officer should be transferred even before completion of three years, proper justification and grounds to be recorded in writing for the transfer and after getting the approval of the hon'ble Chief Minister for such a transfer. One of the grounds for challenging the order of transfer dated 7.2.2006 is the violation of such guideline. The learned Single Judge has set aside the order of transfer on the ground that the same is not violative of the transfer guideline issued by the government.

7. The writ court can exercise its power of judicial review under Article 226 of the Constitution of India only when the person seeking such writ establishes that his fundamental or other legal right has been infringed. The writ court can issue a writ for enforcement of any of the rights conferred by Part III of the Constitution of India and also for enforcement of any other legally enforceable right. The High Court can issue a writ of mandamus also to secure the performance of a public or statutory duty in the performance of which the person who seek such writ has a

sufficient legal interest. In the instant case as discussed above one of the ground for challenging the order of transfer dated 7.2.2006 is the violation of the transfer guideline/policy issued by the Chief Secretary as well as by the Commissioner, Personnel Department of the Government of Assam. Such guideline or the transfer policy has no statutory backing, those are merely the instructions and cannot be enforced in the courts of law. Such guideline/policy having no statutory force no right can be claimed on such guideline/policy and those cannot be enforced. Those administrative guidelines regulating the transfer and containing the transfer policy at the best may afford the opportunity to the officer concerned to approach their higher authorities but cannot have the consequence of depriving or denying the competent authority to transfer a particular officer from any place in public interest as long as official status is not affected adversely and there is no infraction of any career prospect such as seniority, scale of pay and secured emoluments. Therefore, the first ground of challenge to the order of transfer dated 7.2.2006 falls through.

8. The next ground of challenge to the order of transfer is that the same was passed mala fide as it was because of the action taken by the respondent-writ petitioner against the wife of the appellant and also for recommending her transfer as well as on the ground that the same was passed at the behest of the Minister of another department, who has nothing to do with the Education Department.

9. No doubt an order of transfer can be interfered with if the same is passed mala fide. The burden of establishing mala fide is very high on the person who alleges it and it being a very serious allegation against a person, it demands proof of a higher order of credibility and must be supported by the foundational facts. The person against whom the mala fide is alleged must also be impleaded as party so that he gets an opportunity to controvert such allegation. It is very easy to allege mala fide than to prove. At the same time it may not always be possible to demonstrate malice in fact with full and elaborate particulars and in appropriate case it may be permissible to draw reasonable inference of mala fide from the facts pleaded and established. But for drawing such inference there must be firm foundational facts pleaded and established and such inference cannot be drawn on the basis of insinuations conjectures and surmises.

10. In the instant case the respondent-writ petitioner in the writ petition has pleaded that the transfer order was passed because of the action taken by him against, the wife of the present appellant and also because of her recommendation for transfer. Except that nothing has been stated in the writ petition to show that the transfer order was passed mala fide. Even there is no allegation of mala fide against any person including the authority who passed such order of transfer. Except by making a general and vague statement that the order of transfer was passed in mala fide exercise of power, no other factual foundation except one as discussed above has been pleaded in the writ petition. That apart the respondent-writ petitioner has not impleaded the concerned

authority by name as a party in the writ petition. The statements which are narrated above and which according to the respondent-writ petitioner are the foundational fact to constitute mala fide is nothing but the vague statement and on the basis of such vague statement no inference of mala fide can be drawn against any authority. The petitioner though alleges in the writ petition that the transfer order was passed at the behest of the Minister of Social Welfare, he has not been impleaded as party in the writ petition. It is also evident from the record and in fact an admitted position of fact that the respondent-writ petitioner also approach the Minister of Social Welfare on 6.2.2006 not to transfer him from Guwahati to any other place. It does not fit in the mouth of the respondent-writ petitioner to say that the transfer order dated 7.2.2006 has been vitiated on the ground of mala fide exercise of power because that was initiated at the instance of the said Minister, when the respondent himself approached the said Minister. Moreover, merely because the minister of another department is approached by any person, who in turn may have requested, the Minister of the concerned department to look into the matter, that ipso facto will not constitute mala fide as the Minister is the people's elected representative. In the instant case it is evident by the learned Single Judge that the Minister of Social Welfare only requested the Minister of Education to pass the transfer order but the record produced before this court by the learned standing counsel, Education Department does not reveal that the transfer order was issued only because of such request made by the Minister of Social Welfare.

11. The learned Single Judge in allowing the writ petition has placed reliance on the Single Bench decision of this court in Jibeswar Thakur and Ors. v. State of Assam and Ors. reported in 2004 (1) GLT347. In the said case the transfer orders were interfered with on the back ground fact that in fact such orders were passed because of the insistence of the Minister of other department and to accommodate the respondents therein in place of their choice and was not passed in the public interest. Fact situation in the present case is different and not identical to the fact situation of the said case and, therefore, cannot be applied in the case in hand.

12. The learned Counsel for the respondents-writ petitioner placed reliance on another Single Bench decision of this court in Dayal Das (supra) wherein the order of transfer was interfered with on the ground that there was no justification for issuance of order of transfer by holding that the transfer guideline though confers no right having no statutory force but being checks against arbitrary action, the recording of reason on the facts of that case was found to be necessary. We have already recorded the finding that such guideline cannot be enforced in court of law and violation thereof cannot be a ground for challenging an order of transfer. The decision of the Apex Court in Arvind Dttatraya Dande (supra) relied upon by the learned Counsel for the respondent-writ petitioner, has reiterated the established principle that the order of transfer can be interfered with if it is passed mala fide and such order was passed at the behest of the person interested to target the honoest officer who efficiently discharge the duty.

There is no dispute to such legal proposition, but in the instant case as discussed above, the order of transfer can not be held to be mala fide or passed at the behest of any person. In Tarlochan Dev Sharma (supra), the Apex Court has held that if the order passed an authority suffers from non-application of mind to the relevant facts and the laws, such orders is to be held illegal. There is also no dispute to such proposition of law.

13. The said decision is not applicable in the present case. The transfer being an incident of service, the Government has sample power to transfer one person from one place to another in public interest as well as in administrative exigencies. Such order of transfer is open to judicial review by the High Court in exercise of the power conferred under Article 226 of the Constitution of India only if it is not issued in the interest of public service or issued in violation of any statutory provision or the order suffers from vice of mala fide or passed by an authority who is not competent, to pass such order of transfer or if it affects the service conditions such as seniority, scale of pay, secured emoluments, etc. But in the instant case as discussed above, the respondents-writ petitioner could not demonstrate any of such ground to interfere with the order of transfer. The learned Single Judge has set aside the order of transfer on the ground of violation of the transfer guideline and on the ground that such order was passed as desired by the Minister of Social Welfare, about which we have already discussed.

14. In view of the above discussions, we have no alternative but to interfere with the order dated 10.3.2006 passed by the learned Single Judge in W.P.(C) No. 856 of 2006 and accordingly the said order is set aside. The appeal preferred by the appellant is allowed with cost of Rs. 2,000 payable by the respondent-writ petitioner to the appellant.