

(2007) 07 GAU CK 0021
In the Gauhati High Court

Kapil Kumar Sinha

APPELLANT

Vs

State of Tripura and Others

RESPONDENT

Date of Decision : 13-07-2007

Acts Referred:

Citation : (2009) 1 GLR 563 : (2007) 3 GLT 944

Hon'ble Judges : U.B. Saha, J

Bench : Single Bench

Judgement

U.B. Saha, J.—The instant writ petition is filed by the petitioner, an Assistant Teacher of Abhoynagar N.S. Vidyalaya, Sadar, Challenging the order of transfer dated 8.5.2006 (Annexure-5 to the writ petition) issued by the Director of School Education, Government of Tripura, the respondent No. 2 herein, whereby and whereunder the petitioner was transferred from Abhoynagar N.S. Vidyalaya, Sadar to Kulai Col High School under Inspectorate of Kamalpur, under Dhalai District, on the ground that he is working in the said school as an Assistant Teacher (NCC Trained) and an NCC commissioned officer and that he trained a number of NCC cadets in the school as well as at the state level and national level, but the school where he has been transferred, he has no scope to discharge such duties of an N.C.C commissioned officer as in the said school i.e., Kulai Col High School, there is no unit of N.C.C.

2. Heard Dr. H.K. Bhattacharjee, learned Counsel for the petitioner and Mr. T.D. Majumder as well as Mr. S. Chakraborty, learned Additional Govt. Advocate appearing for the state respondents 1 to 3 in absence of Mr. D.C. Nath, learned Counsel for the state respondents. Also heard Mr. R.K. Biswas, learned Assistant SG appearing for the respondents 4 to 7.

3. Before challenging the order of transfer by filing the present writ petition, the petitioner submitted a representation on 19.5.2006 (Annexure-6 to the writ petition) to the Director of School Education praying for stay of the transfer order stating, inter alia, that his service cannot be transferred in Kulai Col High School where a Unit of N.C.C. is not available and that, before transferring him to the

said school, the authorities did not take any permission from the Officer Commanding, N.C.C. as required as per order No. F. 77(9) DE/71 dated 3.9.1976 issued by the Director of Education.

4. It appears from the letter dated 29.5.2006 (Annexure-7 to the writ petition), that the Officer Commanding, 15 Tripura Bn NCC, Tripura requested the Director of School Education, Government of Tripura to cancel the transfer order of the petitioner and the Director of School Education kept the said transfer order in respect of the petitioner in abeyance up to 31st December, 2006 vide Memo dated 27.6.2006 (Annexure-8 to the writ petition).

5. The petitioner also made a representation to the Commandant, 15 Tripura (I) Coy N.C.C., Agartala, Tripura for cancellation of his transfer order and in view of the said representation, the Officer Commanding, N.C.C. wrote a letter on 4.8.2006 (Annexure-10 to the writ petition) to the Director of Higher Education, Govt. of Tripura, the respondent No. 3 herein, requesting him for cancellation of the order of transfer of the petitioner. But ultimately, vide memo dated 13.11.2006 (Annexure-11 to the writ petition) issued by the Director of School Education, the petitioner was informed that his representation was rejected and the transfer order was upheld and given effect to. Hence, the petitioner has filed this writ petition.

6. The state respondents by filing the counter-affidavit has contended that the substantive appointment of the petitioner is as Assistant Teacher of a School under the State Government and the State Government has no liability so far as function of the petitioner as an NCC commissioned officer and that the NCC training in the school is "not must, rather optional and it is not possible to transfer a school teacher like the petitioner always in a school where N.C.C. unit is available. It is also contended by the state respondents that it is not the case of the petitioner that the transfer order of the petitioner is a mala fide or arbitrary one; and/or issued with an ulterior motive to harass the petitioner or to create hardship to him and the petitioner is/was transferred in Kulai Col High School in public interest.

7. Dr. Bhattacharjee, learned Counsel for the petitioner submits that though the transfer order was not issued with mala fide intention, but it would be found that the order of transfer of the petitioner was issued against the guidelines of the Education Directorate dated 3.9.1976 issued by the Director of Education. Dr. Bhattacharjee also submits that the petitioner was permitted by the authorities for training in the NCC Officers Training School to develop himself as an NCC officer in order to train the students of the school as member of National Cadet Corps (NCC) and there was also a discussion between the Hon'ble Minister, Higher Education, Tripura and the officer Commanding, NCC in the presence of the officers of DHE (NCC) and it was decided that without prior permission from the Officer Commanding, NCC, a School teacher like the petitioner should not be transferred. In support of his contention, Mr. Bhattacharjee placed reliance upon the letter of the Officer Commanding dated 29.5.2006 (Annexure-7 to the writ

petition). He further submits that it is admitted that the petitioner is not entitled to any choice posting, but at the same time, the representation of the petitioner should not be rejected in an unreasonable manner and in violation of the policy decision or order dated 3.9.1976.

8. Mr. Majumder, learned Addl. Govt. Advocate in support of the case of the state respondents contends that the petitioner is liable to be transferred to in any school within the State of Tripura and as such, the petitioner cannot except that in all time, he will be posted in a school where an NCC unit is available. He further contends that the order dated 3.9.1976 does not confer any right in favour of the petitioner for posting him in a particular school where NCC unit is available, as the said order is not a policy decision, but a guidelines. In support of his contention, he has cited the case of Union of India and Others Vs. S.L. Abbas, and submitted that the Court cannot interfere with the order of transfer unless the same is issued by an authority without jurisdiction or the transfer order is mala fide and against the public interest. According to him, the competent authority has issued the instant transfer order in the exigency of service and also in public interest.

9. Mr. Biswas, learned Assistant SG for the respondents 4 to 7 supporting the contention of the learned Counsel for the petitioner submits that it is the prerogative of the State Government to transfer its employees to the institutions according to its choice, but such prerogative of the State cannot be misutilised and also cannot deprive an officer-cum-teacher like the petitioner to utilize his service for which he was trained by the Central Government, which was meant to train the school boys in order to encourage them to come forward to join the National Cadet Corps (NCC) and in future to join in the defence service with a view to serving the Nation. He also submits that the State Govt. may transfer the petitioner in a school after discussion with the NCC authority in the State where the NCC unit is available, but in the instant case, no such discussion was held between the NCC authority and the Director of school Education and, therefore, the transfer order in question is though not illegal but improper and against the public interest, which is liable to be set aside.

10. Perused the available documents on record and also carefully considered the rival submissions advanced by the learned Counsel for the parties. The memo-dated 13.11.06 (Annexure-11 to the writ petition) has been issued by the Director of School Education informing the petitioner that the order of transfer of the petitioner can not be cancelled. It is not clear that if the petitioner is not entitled to any benefit of the guidelines/order dated 3.9.1976 for which he mentioned and prayed for in his representation dated 19.5.2006 (Annexure-6 to the writ petition) and the benefit of the request of the Commanding Officer, N.C.C., why the transfer order of the petitioner was ordered to be kept in abeyance by the Director of School Education vide Memo dated 27.6.2006 (Annexure-8 to the writ petition). It also appears from the record that there was discussion as regards the transfer of the school teachers functioning as ANO/CTO

like the petitioner between the Hon"ble Minister, Higher Education, Tripura and the Officer Commanding, N.C.C. in presence of the officers of the Directorate of Higher Education (NCC) and it was decided not to transfer any ANO/CTO without prior permission from the CO/OC of respective NCC Unit. For better appreciation, the relevant letter dated 29.5.2006 and 4.8.2006, Annexure-7 and 8 to the writ petition, of the Officer Commanding to the Director of School Education, Government of Tripura and to the Director of Higher Education, Government of Tripura respectively, are reproduced hereunder:

Annexure-7

Tel:Civil: 2516027

15 Tripura Bn, NCC College Tilla, Agartala Bench

No. F. 171(B)/Estt/NCC/97/79(2) 29 May,2006.

To

The Directorate of School Education Government of Tripura Agartala, Tripura(w)
(Estt.N/G Section)

Transfer of assistant Teacher (ANO) 1st Officer Kapil Kumar Sinha of Abhoynagar
N.S. Vidyalaya

1. Please ref. To following (copy attest)(a) No. F.1(2-1)-SE/E(N.G) 2006 (L-40)
dated Agartala the 08.05.2006

2. It is once again requested to cancel the above posting failing which NCC may
be withdrawn from his School.

3. The matter was discussed with Hon"ble Minister of Higher Education in the
presence of all Officers of DHE (NCC) and decided not to transfer any ANO/CTO
without prior permission from Commanding Officer of NCC Unit (Copy of minutes
sheet of 28 July attest)(sic).

4. In view of above, you are requested to issue necessary amendment at the
earliest and strongly recommended that the posting of 1st Officer Kapil Kumar
Sinha be cancelled.

Sd/-illegible (Chandra Bhanu KC) Lt. Col Officer Commanding

Copy to:

1. Director of Higher for kind information Education Govt. of & Necessary Tripura,
Agartala, action Tripura(W) please. Annexure-10

Tele-Civil: 2514092

15 Tripura(I) copy NCC Pin-900318 C/O-99 APO

No. F. 171(B)/East/NCC/06/192

04Aug ?2006

To

The Director of Higher Education Govt. of Tripura, Agartala Agartala, Tripura (W)

Transfer of Asstt teacher (ANO) 1st Officer Kapil Kumar Sinha of Abhoynagar N/S Vidyalaya

1. It is further intimated that vide DSE letter No. F.(2-1) SE/E(NG) 2006(L-40) (Loose) dated 08.05.2006 posting of 1st Officer Kapil Kumar Sinha, who is a Senior most AND of Abhoynagar N/S Vidyalaya under 15 Tripura (I) coy N.C.C. has been issued to Kulai Col High School, Kamalpur.

2. The Director of School Education, Govt. of Tripura vide his memo No. F1(2-1)-SE/E(WG)in 2006(L-40)(Loose) dated 27.06.2006 directed to keep transfer Order dated 08.05.2006 in abeyance up to 31st December, 2006 instead of cancellation of the transfer Order. It means after 31st December, 2006 Sri Sinha will have to join at Kulai Col High School where there is no NCC troop.

3. It is further requested to cancel the above posting, otherwise NCC Troop may be withdrawn from his school and also intimated NCC commissioned officer cannot be decommissioned due to abrupt posting by higher authorities in education Department.

4. The matter was totally discussed by. Lt. Col Chandra Bhanu KC reasons (sic) Commanding Officer with the Hon''ble Minister of Higher Education in the presence of all officers of DHE(NCC) and it was decided that not to transfer any ANO/CTO without prior permission from the CO/OC of respective NCC Unit.

5. In view of the above, you are requested to issue necessary amendment at the earliest and it is strongly recommended that the posting of 1st officer Kapil Kumar Sinha be cancelled.

(R.K. Biala) Lt.Col Officer Commanding

10.1. By this time, it is settled by the Apex Court that it is not duty of the Court to decide where and how the employer will utilize the services of its employees, rather the employer is the best judge to decide who should be transferred where and how. But when the employer passes an order in violation of its own guidelines and rejects the representation of an employee thereon without application of its mind at the time of consideration and disposal of the representation, such an order can be interfered with by the Court, which was made in the instant case.

10.2. The impugned transfer order was issued on 8.5.2006 and the same could not be given effect to either due to pendency of the writ petition or due to the discussion held between the officers of the State and the N.C.C. The order of transfer of the petitioner was also kept in abeyance for a period as noted earlier, which action of the respondent authorities goes to show that the authorities once

considered that the service of the petitioner was not so required in the Kulai Col High School, where the petitioner was transferred. This Court in the case of V.K. Mathew Vs. Union of India (UOI) and Others, observed that improper consideration of representation violates the provisions of guidelines, which may create indiscipline in the administration in future and the employers for whom the policies were framed, they may not be in a position to fully believe the employers and their actions for, they themselves are not acting on their own policies in the name of Doctrine of possibility. In S.L. Abbas (supra), the Apex Court though did not interfere with the transfer order, but mentioned that "while considering the transfer of Government employee, there is no doubt, the authority must keep in mind the guidelines issued by the Government on the subject, but the said guidelines do not confer upon the Government employee a legally enforceable right." If a reasonable man centralizes himself to the aforesaid observations of the Apex Court, then he will find that their Lordships in the aforesaid case though did not interfere with the transfer order impugned in that case, but reminded the authority to see the object of the guidelines. In the instant case, the authorities failed to appreciate the purpose of their guidelines/order dated 3.9.1976 and thus denied the real justice to an employee like the petitioner by rejecting the prayer for stay of the transfer order. It is true that the Government may not be in a position to transfer an employee like the petitioner to a particular school where a unit of NCC is available. But that does not mean that the authorities are not in a position to consider an attempt for such aposting after discussion with the NCC authorities as agreed to while the matter of transfer of a teacher performing as ANO/CTO like the petitioner in the school was discussed at the higher level in which Hon"ble Minister, Higher Education, Tripura was present. The petitioner also should not except a particular posting of his choice, but he can except that his representation is considered in a reasonable manner keeping in mind the guidelines framed by the employers and he is given opportunities to utilize his experience gathered through training for development of future generation, the students of school and motivate them to be members of national cadets and later get encouraged to join in the defence service for the sake of national interest. Therefore, the representation of the petitioner was to be considered by the authorities in the light of the guidelines/order dated 3.9.1976 and in consideration of the request of Officer Commanding, N.C.C. vide letter dated 29.5.2006 and 4.8.2006, Anneuxre-7 and 10 to the writ petition respectively, which is totally absent in the instant case.

11. In the facts and circumstances, this Court thinks it proper to dispose of the entire writ petition with a direction to the Commissioner-cum-Secretary, Education Department, Government of Tripura (Respondent No. 1 herein) and the Director of School Education, Government of Tripura, Tripura (Respondent No. 2 herein) to reconsider the prayer of the petitioner in the light of the discussion held between the Commanding Officer, N.C.C. and the Hon"ble Minister, Higher Education, Tripura in presence of the officers of the directorate of Higher Education, Tripura and keeping in mind the guidelines/order dated

3.9.1976. The petitioner is directed to submit a fresh representation within a period of fifteen days stating all his grievances along with a copy of the writ petition to the Commissioner-cum-Secretary, Education Department, Government of Tripura with a copy to the Director of School Education, Tripura, who shall reconsider the representation of the petitioner and dispose of the same within a period of two weeks of receipt of such representation of the petitioner, by a reasoned order keeping in view the objects of the guidelines/order dated 3.9.1976 and the discussion held between the Officer Commanding , N.C.C and the Hon"ble Minister, Higher Education, Tripura in presence of the officers of the DHE(NCC) and also keeping in mind the provisions of Rule 23 of the National Cadet Corps Rules, 1948, which discussed as regards the rights of the N.C.C. officers. Till disposal of the said representation of the petitioner, the interim order passed earlier by this Court on 18.11.2006 staying the impugned transfer order of the petitioner dated 8.5.2006 shall continue.

12. With the aforesaid discussion and observation, the writ petition stands disposed. No order as to cost.