

(2014) 10 KL CK 0117
In the High Court Of Kerala
Case No : O.P. (KAT). No. 90 of 2014 (Z)

K.R. Pavithran

APPELLANT

Vs

State of Kerala

RESPONDENT

Date of Decision : 20-10-2014

Acts Referred:

Constitution of India, 1950 — Article 227

Citation : (2014) 10 KL CK 0117

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

Bench : Division Bench

Advocate : Elvin Peter P.J., T.G. Sunil (Pranavam) and K.R. Ganesh, Advocate for the Appellant; K.A. Jaleel, Addl. Advocate General and Joe Kalliath, Sr. Government pleader, Advocate for the Respondent

Judgement

Anil K. Narendran, J.—The petitioner is the applicant in O.A. (EKM) No. 8/2014 on the file of the Kerala Administrative Tribunal. The said O.A. was filed to set aside Annexure A8 Government order dated 31/1/2014, by which the Government upheld Annexure A5 order dated 17/6/2013 of the Director of Public Instruction, the 2nd respondent herein, to the extent of transferring one Shajimon D. as the Headmaster of Government Higher Secondary School, South Ezhippuram (hereinafter referred to as "GHSS, South Ezhippuram") in order to transfer the petitioner out of that school. The Kerala Administrative Tribunal dismissed the said Original Application, by Exhibit P7 order dated 11/2/2014, holding that the Tribunal in its jurisdiction cannot sit in appeal over the finding of the Government that the petitioner is engaging in partisan activities among the teachers, parents and students, against the interest of the school; especially when none of the legal rights of the petitioner, who is liable to be posted anywhere in the State under Rule 32 of the Kerala State and Subordinate Service Rules (hereinafter referred to as "the KS & SSR"), is affected. The Tribunal has also taken note of the fact that, the Government in Annexure A8 order have directed the 2nd respondent to consider the request, if any, made by the petitioner for a convenient posting as Headmaster of any school other than

GHSS, South Ezhippuram, or as Assistant Educational Officer. It is aggrieved by Exhibit P7 order passed by the Tribunal in O.A. (EKM) No. 8/14, the petitioner is before us in this O.P. (KAT) filed under Article 227 of the Constitution of India.

2. On 3/3/2014, this Court ordered that the petitioner shall not be relieved from the post of Headmaster, GHSS, South Ezhippuram, until further orders. On the strength of the said order, the petitioner is still continuing as Headmaster of GHSS, South Ezhippuram.

3. We heard the arguments of the learned counsel for the petitioner and the learned Senior Government Pleader appearing for the respondents.

4. The learned counsel for the petitioner contended that, as the petitioner was ordered to be transferred from GHSS, South Ezhippuram, on extraneous considerations and absolutely without any legal basis, the Tribunal ought to have exercised its jurisdiction and interfered with the malafide actions of the respondents in that regard. To buttress the above contentions, the learned counsel relied on various documents, including Exhibit P8, certifying that the Parent Teacher Association (PTA) in GHSS, South Ezhippuram, was selected as the best PTA in Ernakulam Revenue District for the year 2013-14. The learned counsel further pointed out that, subsequent to the order of stay granted by the Tribunal in O.A. No. 1306/2013, Sri. Shajimon D., who was ordered to be transferred and posted as Headmaster, GHSS, South Ezhippuram, in the place of the petitioner, was re-posted to Government Higher Secondary School, Kongorppilly, vide Exhibit R2 (d) order dated 27/6/2013 of the 2nd respondent. While continuing as such, he was appointed as the Assistant Educational Officer, Pattambi, vide order dated 28/10/2013 of the 2nd respondent, and the said person is no more interested in a posting as the Headmaster of GHSS, South Ezhippuram.

5. Per contra, the learned Senior Government Pleader appearing for the respondents would contend that, the stand taken by the Government in Annexure A8 order is perfectly legal and in the facts and circumstances of the case the Tribunal rightly declined to exercise its jurisdiction. Hence, according to the learned Senior Government Pleader, no interference of this Court is warranted and Exhibit P7 order passed by the Tribunal deserves to be upheld. We have considered the rival submissions made at the Bar.

6. While the petitioner was working as HSA (Natural Science) at GHSS, South Ezhippuram, he was promoted as Headmaster and posted at Government Higher Secondary School, Mamalassery, on 28/6/2012. While continuing as such, during the General Transfer for the academic year 2013-14, the petitioner requested for transfer to GHSS, South Ezhippuram, and considering the said request he was ordered to be transferred as Headmaster, GHSS, South Ezhippuram, vide Annexure A3 General Transfer order dated 7/6/2013 issued by the 2nd respondent. Based on Annexure A3 order, the petitioner took charge as Headmaster, GHSS, South Ezhippuram, on 14/6/2013, as evidenced by Annexure

A4 report of transfer of charge. While the petitioner was continuing as such, the 2nd respondent vide Annexure A5 order dated 17/6/2013 promoted one Shajimon D., who is Sl. No. 247 in the said order, as Headmaster and posted him at GHSS, South Ezhippuram, in the place of the petitioner.

7. Challenging Annexure A5 order, the petitioner approached the Kerala Administrative Tribunal in O.A. No. 1306/2013 and the Tribunal by Annexure A6 order granted interim stay of Annexure A5 order, to the extent it posts Sri. Shajimon D., the 3rd respondent in that O.A. as Headmaster, GHSS, South Ezhippuram, for a period of one month. Later the said O.A. was disposed of by Annexure A7 order, by which, the Tribunal directed the Government to consider representation dated 16/7/2013 submitted by the petitioner, within two months from the date of receipt of a copy of the order, after affording him an opportunity of being heard. Pursuant to the direction contained in Annexure A7 order, the Government conducted a personal hearing and thereafter passed Annexure A8 order, upholding the transfer of the petitioner out of GHSS, South Ezhippuram. The reasoning in Annexure A8 is that the petitioner is engaging in partisan activities among the teachers, parents and pupils and his continuance will be detrimental to the well-being of the school and for its proper functioning. Therefore, according to the 1st respondent, his transfer on administrative exigencies is essential in order to restore calm atmosphere in the school and also to maintain discipline.

8. Rule 32 of the KS & SSR enables the appointing authority to transfer a member of a service or a class of service to serve in any post borne on the cadre of such service or class. 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. Therefore, as rightly observed by the Tribunal, the petitioner is liable to be posted anywhere in the State. 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.

9. 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. 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.

10. It was while working as HSA (Natural Science) at GHSS, South Ezhippuram, the petitioner was promoted as Headmaster and posted at Government Higher Secondary School, Mamalassery, on 28/6/2012. The specific averments made in paragraph 6.1 of the O.A. and reiterated in paragraph 2 of the O.P. (KAT) are that, during the period when the petitioner was working as HSA in GHSS, South Ezhippuram, he had incessantly and painstakingly worked for the upliftment of the school which was on the verge of closure and it was the result of his yeoman service that the school was selected as a "Smart School" and that he had charted out programmes in association with the members of the PTA in order to facilitate and create an atmosphere conducive to the students to develop their learning habits. The said facts are not denied either in the counter affidavit filed on behalf of the 1st respondent or that filed on behalf of the 2nd respondent. In *Venkitaramanan Potti v. Travancore Devaswom Board* (1993 (2) KLT 374) another Division Bench of this Court, following the judgment of the Apex Court in *C.S. Rowjee and Others Vs. Andhra Pradesh State Road Transport Corporation*, held that, "an averment in the original petition which is not traversed by the respondents in the counter affidavit must be taken to have been admitted." Therefore, in the absence of a clear denial of the specific averments contained in paragraph 6.1 of the O.A. and reiterated in paragraph 2 of the O.P. (KAT), those averments must be taken to have been admitted. Moreover, in the enquiry report dated 17/7/2013 submitted by the Deputy Director of Education (a copy of which was made available to this Court by the learned Senior Government Pleader, pursuant to order dated 3/3/2014) there is a finding that, the petitioner had been working for the development of GHSS, South Ezhippuram, and also for academic upliftment, even while working as an HSA in that school. The said finding in the enquiry report is also referred to in paragraph 10 of Annexure A8 order passed by the Government.

11. It is not in dispute that, pursuant to Annexure A3 General Transfer order dated 7/6/2013 issued by the 2nd respondent, the petitioner took charge as Headmaster, GHSS, South Ezhippuram, only on 14/6/2013, which was a Friday. On 17/6/2013, the 2nd respondent vide Annexure A5 order promoted Sri. Shajimon D. as Headmaster and posted him to GHSS, South Ezhippuram, in the place of the petitioner. By another order dated 17/6/2013 issued by the 2nd respondent (a copy of which has been marked as Exhibit R2 (b) in the counter affidavit filed on behalf of the 2nd respondent) the petitioner was ordered to be transferred to Government Higher Secondary School, Kongorppilly, "on administrative ground". In paragraph 8 of Annexure A8 order, the 1st respondent has made reference to a complaint made against the petitioner by Smt. Subaida HSA (Malayalam) and Smt. Nazeema HSA (Arabic), alleging that the continuance of the petitioner at GHSS, South Ezhippuram, will be detrimental to the interest of the school, as he is engaging in partisan activities among the students, teachers, and public. But, as evident from Annexure A8 order, the said complaints dated 4/12/2013 and 13/1/2014 (see Ref:-(2) in Annexure A8

Government order) are made much after the issuance of Exhibit R2 (b) order of transfer dated 17/6/2013 issued by the 2nd respondent transferring the petitioner from GHSS, South Ezhippuram, which cannot form basis for transferring the petitioner from that school.

12. The stand taken by the 1st and 2nd respondents in their counter affidavits filed before this Court is that, apart from the complaints made by Smt. Subaida HSA (Malayalam) and Smt. Nazeema HSA (Arabic), another complaint was received from one N.M. Aliyar and others alleging that, as Headmaster of GHSS, South Ezhippuram, the petitioner is creating groupism among the staff of the school and that he is looting Government money along with the President of the PTA under the guise of infrastructure development. In *Mohinder Singh Gill and Another Vs. The Chief Election Commissioner, New Delhi and Others*, , the Apex Court, following the observations in *Commissioner of Police, Bombay Vs. Gordhandas Bhanji*, held that, "when a statutory functionary makes an order based on certain grounds, its validity must be judged by the reasons so mentioned and cannot be supplemented by fresh reasons in the shape of affidavit or otherwise. Otherwise, an order bad in the beginning may, by the time it comes to Court on account of a challenge, get validated by additional grounds later brought out." In such circumstances, the 1st respondent cannot be allowed to supplement Annexure A8 order by the fresh reasons stated in the counter affidavit.

13. As already noticed, the petitioner took charge as Headmaster, GHSS, South Ezhippuram, only on 14/6/2013 and within two days thereafter, i.e., on 17/6/2014 he was ordered to be transferred out of that school, vide Exhibit R2 (d) order of transfer issued by the 2nd respondent. Any incident alleged to have happened in between 14/6/2013 and 17/6/2013, within a short span of two days, which necessitated the petitioner being transferred out of GHSS, South Ezhippuram, is not disclosed in Annexure A8 order. No such incident is disclosed in the enquiry report of the Deputy Director of Education as well. Smt. Subaida HSA (Malayalam) and Smt. Nazeema HSA (Arabic), who made complaints against the petitioner have not even chosen to appear before the enquiry officer. On the other hand, the PTA President and members of teaching staff gave statement to the effect that the complaints made against the petitioner are without any basis. Moreover, any incident alleged to have happened on 8/7/2013, at the time of the enquiry conducted by the Deputy Director of Education, cannot be allowed to be raised as a ground to sustain Annexure A8 order of transfer dated 16/6/2013, which is otherwise illegal. As evident from Exhibit P8, the PTA in GHSS, South Ezhippuram, was selected by the Government of Kerala as the best PTA in Ernakulam Revenue District for the year 2013-14. We have referred to this aspect only to indicate that there is considerable force in the submission made by the learned counsel for the petitioner that, the petitioner had worked incessantly and painstakingly for the upliftment of the school in association with the members of the PTA.

14. Therefore, the materials on record clearly indicate that, the order of transfer against the petitioner was without any factual foundation or legal support. The said order of transfer passed on materials which were non-existent not only suffers from total non-application of mind, but also suffers from malice in law. The said order is only a colourable exercise of power. Similarly, the findings of the 1st respondent in Annexure A8 order that, the continuance of the petitioner at GHSS, South Ezhippuram, will be detrimental to the well-being of the school and for its proper functioning and that his transfer on administrative exigencies is essential in order to restore calm atmosphere in the school and also to maintain discipline are without any factual foundation or legal support. When the 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 2nd respondent, and such exercise of power cannot be sustained in the eye of law. Therefore, in our view, the Tribunal failed to take note of the above crucial aspects of the matter while passing Exhibit P7 order and committed a mistake in not interfering with the order of transfer of the petitioner and Annexure A8 order passed by the 1st respondent rejecting the representation made by the petitioner against the said order of transfer.

15. In the result, this O.P. (KAT) is allowed setting aside Exhibit P7 order dated 11/2/2014 of the Kerala Administrative Tribunal in O.A. (EKM) No. 8/2014. Resultantly, O.A. (EKM) No. 8/2014 will stand allowed setting aside Annexure A8 order, thereby permitting the petitioner to continue as the Headmaster of Government Higher Secondary School, South Ezhippuram.

However, it is made clear that this judgment will not stand in the way of the petitioner being transferred in accordance with law from the Government Higher Secondary School, South Ezhippuram, for any valid administrative reasons.