
(2012) 08 GAU CK 0051
In the Gauhati High Court
Case No : Writ Petition (Civil) No.115 of 2012

Nkklam Teji

APPELLANT

Vs

State of Arunachal Pradesh and Ors.

RESPONDENT

Date of Decision : 17-08-2012

Acts Referred:

Citation : (2013) 1 GLR 829

Hon'ble Judges : S.C.Das, J

Bench : Single Bench

Advocate : Mr. D. Choudhury , Mr. N. Taji for the petitioner.??Dr. Ashok Saraf, Ms. G. Deka, Mr. D. Pangging, Mr. D. Pada, Mr. D. Soki , Mr. K. Bogo for the respondents., Advocates appearing for Parties

Judgement

1. By this writ petition the petitioner challenged the Order vide No.PERS70/2009 dated 19.3.2012 (Annexure IV to the writ petition), whereby the State respondents (respondent Nos.1 and 2) partially modified the transfer Order vide No. PERS 08/2010/1094 dated 9.3.2012 (Annexure I to the writ petition) in respect of the petitioner and respondent No.3, alleging that the impugned order dated 19.3.2012 has been issued by the respondent Nos.1 and 2 to favour respondent No.3 maliciously, violating the principles of natural justice and also violating the transfer policy adopted by the respondents, illegally and arbitrarily.

2. In a short compass, the case of the petitioner is that he is a member of Arunachal Pradesh Civil Service CAPOS") and at the relevant point of time he was posted as Officer on Special Duty(OSD) as Protocol Officer in the Department of Protocol, Government of Arunachal Pradesh at Itanagar. By transfer Order, dated 9.3.2012, he was transferred and posted as Circle Officer cum Block Development Officer ("CO cum BDO") at Yachuli vice respondent No.3, who was on promotion from the post of CO cum BDO, Yachuli posted as Extra Assistant Commissioner CEAC") in D.C.'s office, Bomdila. Immediately after order dated 9.3.2012 was issued by the Chief Secretary, the petitioner submitted his joining report as CO cum BDO, Yachuli in the Lower Subansiri

District, /iro, on 13.3.2012, in the office of the Deputy Commissioner but his joining report was not accepted and he was asked to submit his release order from the office of the Department of Protocol, Government of Arunachal Pradesh, Itanagar. Accordingly, the petitioner approached the Department of Protocol i.e. his earlier place of posting for his release and the Department, accordingly, issued release order No. AP/PD/ ESTT/ OSD (P)41/2009 dated 19.3.2012 (Annexure III to the writ petition) and, with .that release order the petitioner joined his duties as COcumBDO, Yachuli on 20.3.2012. On his joining in the post of COcumBDO, as aforesaid, the Incharge Deputy Commissioner, Yachuli vide Memo. No.YCI7ESTT01/201112/112225 dated 20.3.2012 (Annexure V to the writ petition) accepted the joining report of the petitioner and, accordingly, the petitioner started discharging his duties. To his utter surprise, the State respondent, i.e. the Chief Secretary, Government of Arunachal Pradesh, vide Order No.PERS70/2009 dated 19.3.2012 (Annexure IV to the writ petition) modified the transfer order in respect of the petitioner and respondent No.3, and thereby, retained respondent No.3 as EACcumBDO of Yachuli and the petitioner has been directed to continue as Protocol Officer, Itanagar in his earlier post. The petitioner challenged the order dated 19.3.2012, alleging that the order was issued mala fide with a view to somehow accommodate respondent No.3 at Yachuli and that the order suffers from favouritism and nepotism, as well, an arbitrary action of the State respondents and, therefore, the petitioner approached this court for cancellation of order dated 19.3.2012 (Annexure IV to the writ petition).

3. Respondent Nos.1 and 2, by filing counter affidavit, contended that the order dated 9.3.2012 was issued in the public interest and, subsequently, order dated 19.3.2012 was also issued in the public interest by the State respondents in a routine process and, there was no point of any favouritism, nepotism or mala fide as alleged by the petitioner. It is the prerogative of the State respondents to utilize the services of the public servants in the public interest as and when and where necessary and that, order dated 9.3.2012 was modified on 19.3.2012 before joining of the petitioner in the transferred post at Yachuli. It is further contended by the State respondents that the contention of the petitioner that he joined the post of COcumBDO, Yachuli on 13.3.2012 is false in view of the fact that he has applied to his authority i.e. the State Protocol Officer for his release only on 14.3.2012 and, therefore, his contention that he joined the post of COcumBDO, Yachuli on 13.3.2012 is nothing but a false statement made; by him and, since ho made a false statement, he cannot be favoured with an order by a court of equity. It is also contended that the State respondents, being the authority of the petitioner, in the exigencies of public interest, passed the transfer order and subsequently modified the same and since there was no mala fide, the order passed by the State respondents cannot be interfered.

4. Respondent No.3 contended that he was working in the post of COcumBDO, Yachuli with all devotion and sincerity and he was promoted to the post of KAC and, by the impugned order dated 9.3.2012 he was transferred to Bomdila but,

subsequently, that order was modified by order dated 19.3.2012 and that, he has been working as BDOcumEAC at Yachuli in the post in which he was promoted. There is no question of favouritism or nepotism in his favour, done by the State respondents.

5. Heard learned counsel, Mr. D. Choudhury for the petitioner and learned Advocate General, Dr. A. Saraf, assisted by learned Addl. Sr. G.A., Ms. G. Deka for respondent Nos.1 and 2 as well as learned counsel, Mr. D. Panging, for respondent No.3.

6. Learned counsel, Mr. Choudhury appearing for the petitioner contended that on the filing of the writ petition, i.e., on 21.3.2012, this court by an order dated 22.3.2012 was pleased to direct that the present posting of the petitioner at Yachuli may not be disturbed and the order was passed considering the fact that the petitioner was relieved from the post of OSD, Protocol Department, and he joined the post of COcumBDO Yachuli. While he was already relieved from the post of OSD, Protocol Department and joined the post of COcumBDO Yachuli, subsequent modification of the transfer order should be held to be an order passed, not in the public interest but only to favour respondent No.3 showing nepotism and favouritism, etc. The order dated 19.3.2012 was not passed in the public interest at all. It is also submitted by the learned counsel that the State respondents submitted a petition seeking modification and/or alteration or vacation of the interim order dated 22.3.2012, which has been registered as MC[WP (C)] No.59 of 2012 and, in that petition the writ petitioner submitted objection annexing copies of certain documents, and referring to those documents, learned counsel, Mr. Choudhury has submitted that order dated 19.3.2012 was passed by the State respondents at the instance of a Parliamentary Secretary ("MLA") of the particular area and at his intervention the transfer order was interfered illegally and arbitrarily, in violation of the principles of natural justice and the malice of law may be inferred by this court from those documents itself. In support of his contention learned counsel, Mr. Choudhury relied on the following case laws :

(i) Dayal Das v. State of Assam, 2002 (2) GLT 109.

(ii) Jibeswar Thakurla and Ors. v. State of Assam and Ors., 2004 (1) GLT 347 12001) 3 GLR 146..

(iii) Toheli Sumi v. State of Nagaland and Ors., 2009 (2) GLT 956.

(iv) Rubu Opo v. State of Arunachal Pradesh and Ors., 2011 (3) GLT 544.

It is also contended by learned counsel, Mr. Choudhury that the ratio of the decision in the case of Mohd. Masood Ahmad v. State of U.P., (2007) 8 SCC 150 cannot be applied in the facts of the case at hand since in the case at hand it is clearly brought on record that the transfer order was modified at the behest of an extraconstitutional authority having no public interest, rather it is an interference in the smooth public administration.

7. Appearing on behalf of the State respondents, learned Advocate General, Dr. Saraf contended that both the orders dated 9.3.2012 and 19.3.2012 were issued in the public interest. It is the prerogative of the State authority to enjoy and/or to utilize the services of the public servants in the better and greater interest of the public exigencies. There cannot be a straightjacket formula in respect of the transfer and posting of a public servant. Mere allegation that the order issued by the State authority suffers from favouritism and nepotism, mala fide or arbitrariness, etc., will not suffice, unless it is brought on record with specific averments and supporting evidence that the public authority actually acted not bona fide, rather mala fide, and that the order was issued in violation of any statutory rules or public policy. It is further contended by learned Advocate General that there is no averment in the writ petition alleging mala fide or violation of any statutory rules. The statement made by the petitioner in the objection filed in MC[WP (C)] No.59 of 2012, cannot be considered as an averment made in the writ petition and, therefore, the submission of learned counsel of the petitioner in respect of the office note given by the Parliamentary Secretary (local MLA) cannot be considered for decision of the writ case. In the alternative, it is also submitted that the Parliamentary Secretary, being an MLA of the locality, in his note as alleged, simply stated that respondent No.3 performed well in that area and if respondent No.3 is retained it will serve the interest of the people of that locality in a better manner. In that note nothing alleged against the petitioner and, so, even if that note is taken into consideration that cannot be termed as malice on the part of the State respondents. He has, however, strongly contended that the averment made in the objection in connection with that miscellaneous case can in no way be considered as an averment in the writ petition. The contents of the writ petition are supported by the affidavit sworn by the petitioner and the petitioner's case, according to law, should be considered based on the averments of the writ petition and supporting documents alone. It is further contended by learned Advocate General that the contention of the petitioner that he joined the post of COcumBDO, Yachuli on 13.3.2012 is a sheer falsehood in view of the fact that he approached his superior authority, the Protocol Officer, for his release only on 14.3.2012 and the release order was issued only on 19.3.2012, but on that day itself, the transfer order dated 19.3.2012 in respect of the petitioner and respondent No.3 concerned was modified. So, the petitioner would not join the post of COcumBDO, Yachuli on 20.3.2012, when order dated 9.3.2012 becomes non est. Further, the petitioner, since failed to make out a special case to interfere in the order issued by the State authority, this court should not interfere in the modification order of transfer dated 19.3.2012 and that the writ petition should be dismissed. In support of his contention, learned Advocate General referred the following case laws :

(i) Redam Jini v. State of Arunachal Pradesh, (2011) 2 GLR 639.

(ii) State of Assam v. Dilip Kumar Sarma and Ors., (2011) 6 GLR 526.

(iii) Union of India and Ors. v. S.L. Abbas., (1993) 4 SCC 357.

(iv) Kumsong Pangging v. State of Arunachal Pradesh and Ors., (1998) 2 GLR 388.

(v) Dr. M. Priyobarta Singh v. State of Manipur and Ors., (2003) 3 GLR 484.

(vi) State of U.P. and Anr. v. Siya Ram and Anr., (2004) 7 SCC 405.

Learned Advocate General further contended that the decision of this court in Toheli Sumi (*supra*) as has been referred by the learned counsel for the petitioner has already been distinguished by this court in Dilip Kumar Sarma (*supra*).

8. The point to be decided in this case is whether order dated 19.3.2012 (Annexure IV to the writ petition) suffers from mala fide and whether it was issued in violation of any statutory rules.

9. Transfer and posting of a public servant is not only an incident in the terms of appointment but also an implicit as an essential condition of service. It is settled law that the authority, for appropriate maintenance of administration, can take into account any administrative exigencies, and considering such facts, may place any public servant to any post at any place in the public interest within service terms and conditions of the concerned employee.

The scope of judicial review of an order of transfer and posting is very limited. An order, transferring a public servant, or in the alternative, cancelling an order of transfer, can be interfered with by a writ court in exercise of power under article 226 of the Constitution of India, if such an order is passed in mala fide exercise of power or in violation of statutory rules thereof. The court also may interfere, if such order adversely affects the official status or results any infraction of any career prospect of the public servant concerned. Such an order may also be interfered if the same is passed by an authority, not competent to do so or that it is punitive in nature.

10. The Supreme Court in the case of Chief General Manager (Telecom) and Anr. v. Rajendra Ch. Bhattacharjee and Ors., (7.9.95) 2 SCC 532, while considering the grievance of the public servant concerned in respect of his posting, in paragraph 7 of the judgment has held, thus :

"It is needless to emphasise that a Government employee or any servant of a Public Undertaking has no legal right to insist for being posted at any particular place. It cannot be disputed that the respondent holds a transferable post and unless specifically provided in his service conditions, he has no choice in the matter of posting. Since the respondent has no legal or statutory right to claim his posting at Agartala, therefore, there was no justification for the Tribunal to set aside the respondent's transfer to Dimapur.""

11. In the case of S.L. Abbas (*supra*) the Apex Court has held, thus :

"An order of transfer is an incident of Government service. Who should be

transferred where, is a matter for the appropriate authority to decide. Unless the order of transfer is vitiated by mala fides or is made in violation of any statutory provisions, the court cannot interfere with it. While ordering the transfer, there is no doubt, the authority must keep in mind the guidelines issued by the Government on the subject. Similarly if a person makes any representation with respect to his transfer, the appropriate authority must consider the same having regard to the exigencies of administration. The guidelines say that as far as possible, husband and wife must be posted at the same place. The same guideline however does not confer upon the Government employee a legally enforceable right. Executive instructions are in the nature of guidelines. They do not have statutory force."

12. In the case of Siya Ram (supra), the Apex Court held, thus :

"5. The High Court while exercising jurisdiction under articles 226 and 227 of the Constitution of India had gone into the question as to whether the transfer was in the interest of public service. That would essentially require factual adjudication and invariably depend upon peculiar facts and circumstances of the case concerned. No Government servant or employee of a public undertaking has any legal right to be posted forever at any one particular place or place of his choice since transfer of a particular employee appointed to the class or category of transferable posts from one place to other is not only an incident, but a condition of service, necessary too in public interest and efficiency in the public administration. Unless an order of transfer is shown to be an outcome of mala fide exercise or stated to be in violation of statutory provisions prohibiting any such transfer, the courts or the tribunals normally cannot interfere with such orders as a matter of routine, as though they were appellate authorities substituting their own decision for that of the employer/management, as against such orders passed in the interest of administrative exigencies of the service concerned. This position was highlighted by this court in *National Hydroelectric Power Corpn. Ltd. v. Shri Bhagwan*, (2001) 8 SCC 574:2001 SCC (L&S) 21."

13. The petitioner in the writ petition simply alleged that the order dated 19.3.2012, modifying the transfer order dated 9.3.2012, in respect of the petitioner and respondent No.3, is mala fide and is an instances of favouritism and nepotism, etc. No particulars of mala fide or favouritism or nepotism, etc. are detailed in the writ petition. The particulars of facts, as narrated in the objection filed in the miscellaneous case, cannot be read as an allegation made by the petitioner in the writ petition. Even if, it is taken into consideration, in my considered opinion, that cannot be termed as a malice on the part of the State respondents. A local MLA, who is holding the post of Parliamentary Secretary of the Government, might have certified the work undertaken by respondent No.3 as good and appreciated his performance and, thereby, requested the authority for his retention and that does not mean that it was nepotism or favouritism or that in view of that recommendation the State respondents acted mala fide. The allegation of mala fide is to be proved by the petitioner with materials. Mere

making an allegation does not serve the purpose.

I would like to reiterate here the settled principle of law that in a writ petition, the petitioner must plead and prove facts by evidence which must appear from the writ petition and if he is the respondent from the counteraffidavit. If the facts are not pleaded or the evidence in support of such facts is not annexed to the writ petition or to the counter affidavit, as the case may be, the court will not entertain the point. In this context it will not be out of place to point out that in this behalf there is a distinction between a pleading under the Code of Civil Procedure and a writ petition or a counteraffidavit. In pleadings of a civil suit, i.e., the plaint or a written statement, the facts and not evidence are required to be pleaded, however in a writ petition or in the counteraffidavit not only the facts are to be pleaded but also the evidence in proof of such facts have to be annexed to it. If a fact is not pleaded in the writ petition supported by evidence and affidavit thereto, such facts cannot be legally taken to consideration for decision of the writ case.

14. The fact, what is brought on record, shows that the release order of the petitioner was issued by the Chief Secretary on 19.3.2012, pursuant to the transfer order issued on 9.3.2012. On the same day, i.e., on 19.3.2012, the Chief Secretary issued modification of the transfer order. It shows that the State authority has taken steps aimlessly and at their whims which, though, may not be termed as mala fide, but can in no way be termed as healthy in public administration. It is not expected that the State authority, at its highest level, while issuing an order of transfer will cancel the same so whimsically. Such action is bound to demoralize the public servants and discredit the authority of the State administration in the eye of the common people. The petitioner might have approached for joining his new place of posting on 13.3.2012, but such approach cannot be legally taken into consideration, since the petitioner, being a gazetted officer, was supposed to join to his place of posting only after being relieved by the authority wherefrom he was transferred. The petitioner, as it appears, joined the post of COcumBDO, Yachuli, only on 20.3.2012 on the strength of the transfer order dated 9.3.2012, which was already modified/cancelled in respect of the petitioner is concerned, on 19.3.2012, i.e., before his joining to the post. Hence, so far the petitioner is concerned, order, dated 9.3.2012, was non est on 20.3.2012 for all practical purpose, though, technically the joining of the petitioner was accepted by the authority being not informed or not known about the cancellation/modification order dated 19.3.2012. The allegation made by the petitioner regarding interference of the Parliamentary Secretary in the transfer order, based on which the transfer order in respect of the petitioner and respondent No.3, as it appears, was modified, cannot be termed as violative of fundamental or any legal right of the petitioner.

15. We may gainfully refer here the observation of the hon"ble Apex Court in the case of Mohd. Masood Ahmad (supra) and, the Apex Court in that reported case has held that if an officer is transferred at the instance of an MLA that by itself

would not vitiate the transfer order. The Apex Court in paragraphs 7 and 8 of the judgment has held, thus :

"7. The scope of judicial review of transfer under article 226 of the Constitution of India has been settled by the Supreme Court in *Rajendra Roy v. Union of India*, *National Hydroelectric Power Corpn. Ltd. v. Shri Bhagwan*, *State Bank of India v. Anjan Sanyal*. Following the aforesaid principles laid down by the Supreme Court, the Allahabad High Court in *VijayPal Singh v. State of U.P.* and *Onkar Nath Tiwari v. Chief Engineer, Minor Irrigation Department* has held that the principle of law laid down in the aforesaid decisions is that an order of transfer is a part of the service conditions of an employee which should not be interfered with ordinarily by a court of law in exercise of its discretionary jurisdiction under article 226 unless the court finds that either the order is mala fide or that the service rules prohibit such transfer, or that the authorities who issued the orders, were not competent to pass the orders.

8. Learned counsel for the appellant submitted that the impugned transfer order of the appellant from Muzaffarnagar to Mawana, District Meerut was made at the instance of an MLA. On the other hand, it has been stated in the counteraffidavit filed on behalf of respondent Nos. 1 and 2 that the appellant has been transferred due to complaints against him. In our opinion, even if the allegation of the appellant is correct that he was transferred on the recommendation of an MLA, that by itself would not vitiate the transfer order. After all, it is the duty of the representatives of the people in the Legislature to express the grievances of the people and if there is any complaint against an official the State Government is certainly within its jurisdiction to transfer such an employee. There can be no hard and fast rule that every transfer at the instance of an MP or MLA would be vitiated. It all depends on the facts and circumstances of an individual case. In the present case, we see no infirmity in the impugned transfer order."

16. In the case at hand, there is no pleading on the part of the petitioner in the writ petition that the impugned transfer order was cancelled at the instance of any extraconstitutional authority. Learned counsel of the petitioner, however, put serious stress on the averment made in the written objection filed in the miscellaneous case, wherein it has been stated that an MLA, who is holding the post of Parliamentary Secretary in the Government, has submitted a note to the State Government appreciating the work of respondent No.3 and proposed for his retention at Yachuli in the post of EDO. Though the said fact is not a part of the writ petition, however, for fair ends of justice, the submission made by learned counsel, Mr. Choudhury has been taken into consideration to see whether any such note initiated by the local MLA to the State Government amounts to mala fide on the part of the authority which passed the transfer order and subsequent cancellation order.

17. In a democracy, like us, public representatives play a very important role. They take part in the governance forming Government. This is our constitutional mandate. In the parliamentary form of democracy, role of public representatives

cannot be ignored. The Court has to see whether any role of the public representative, who is not in the decision making process, was so adverse that it amounts to interference in the ordinary daytoday function of the Government. A public representative communicated his mind giving a note regarding performance of a public servant in a particular post or area and that by itself cannot be termed as interference in the process of the administration. The note initiated by the public representative appreciating the work of respondent No.3 can in no way be clothed as mala fide as against the petitioner is concerned. While Government has the authority to issue transfer order, it has the authority to cancel or modify it which by itself, though, cannot be termed as a healthy instance, can also not be termed as mala fide, illegal, arbitrary or unconstitutional.

The ratio of the decision of the Division Bench of this court in the case of Toheli Sumi (supra) as referred by learned counsel, Mr. Choudhury cannot be applied in the fact of this case since it has already been distinguished by a subsequent decision of the Division Bench of this court in the case of Dilip Kumar Sanna (supra). Further, in my considered opinion, every case shall be decided on the particular fact and circumstances pleaded in the case. In the case at hand, no fact pleaded in the writ petition regarding interference by any extraconstitutional authority and, therefore, the ratio of Toheli Sumi (supra) can in no way be applied in the facts of this case. Based on the same principle, the ratio of Rubu Opo (supra) also cannot be applied in the facts of the case at hand.

18. During the course of argument, learned counsel, Mr. Choudhury referred a circular vide No.AFFIT19/90 dated 2.6.1998 issued by the Government of Arunachal Pradesh in the Department of Personnel and, referring to clause I(b) of that circular, learned counsel, Mr. Choudhury has submitted that the petitioner, since, has been transferred from the Protocol Department of the Government to the post of COcumBDO, Yachuli, he should be allowed to work their for at least three years as prescribed in clause Kb) of the circular. Learned Advocate General has submitted that there is no averment made in the writ petition referring to that circular and, therefore, the same cannot be taken into consideration.

On going through the writ petition, I find no reference made by the petitioner in respect of that circular dated 2.6.1998. So, legally the same cannot be taken into consideration. Further, I find, clause Kb) of the circular prescribes that an employee should be normally allowed for a period of three years in a particular post for the sake of continuity. In the present case, the petitioner had been working as an OSD in the Department of Protocol, Government of Arunachal Pradesh at Itanagar. He was transferred from the post of OSD, Department of Protocol to the post of COcumBDO, Yachuli. The transfer order modified and/or cancelled in respect of the petitioner and respondent No.3 are concerned before joining of the petitioner to the post. Therefore, the circular has no manner of application in the case of the petitioner is concerned. There is no case pleaded by the petitioner that he has been transferred from the post of OSD, Protocol

Department before completion of three years. Since the petitioner could not make out a case of malice in respect of modification order of the order of transfer, the ratio of the case in Dayal Das (supra) also cannot be applied in the facts of this case.

19. In view of the discussions made above, the petitioner, since, could not make out a special case to interfere with the order dated 19.3.2012 (Annexure IV to the writ petition), the writ petition stands dismissed but, in the facts and circumstances, without costs.