

**(2010) 02 MAD CK 0146**

**In the Madras High Court**

**Case No :** Writ Petition (MD) No. 6036 of 2009 and M.P. (MD) No's. 2 and 3 of 2009

P. Gurunathan

APPELLANT

Vs

The Commissioner, Adi Dravidar Welfare Department, The District Adi Dravidar and Tribal Welfare Officer, Adi Dravidar and Tribal Welfare Department and K. Balakrishnan, Warden, Government Boys Hostel (ADW)

RESPONDENT

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**Date of Decision :** 26-02-2010

**Acts Referred:**

Constitution of India, 1950 — Article 14

**Citation :** (2010) 02 MAD CK 0146

**Hon'ble Judges :** R.S. Ramanathan, J

**Bench :** Single Bench

**Advocate :** R. Anand, for the Appellant; K. Balasubramanian, Addl. Govt. Pleader for Respondents 1 and 2 and P. Guneseakaran, for Respondent 3, for the Respondent

**Final Decision :** Dismissed

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**Judgement**

R.S. Ramanathan, J.—Heard both sides.

2. The petitioner is working as Warden at Adi Dravidar Boys Hostel at Ramanathapuram. He was transferred to that post on mutual transfer, by proceedings, dated 23.06.2009 and in his place, the 3rd respondent was transferred. According to the petitioner, the transfer of staff in the respondent's Department is governed by various Government Orders and for the year 2003, the 1st respondent has issued G.O.Ms. No. 64, Adi Dravidar and Tribal Welfare Department, dated 03.06.2009 for conducting general counseling as well as for mutual transfer. As per the said G.O, before conducting general counseling, the authorities have to decide the mutual transfer of employees on the basis of the request given by the employees and after completing the transfer on mutual basis, transfer on general counseling can be conducted. Therefore, the petitioner and the 3rd respondent jointly made request to the 2nd respondent for mutual

transfer and that was also accepted by the 2nd respondent and the 2nd respondent passed the transfer order, by his proceedings, dated, 23.06.2009 and the petitioner is serving in the transferred post from 26.06.2009. The petitioner has also admitted his son in a school at Ramanathapuram and his wife is also taking treatment after undergoing a major surgery in a hospital at Ramanathapuram and the petitioner is settled in Ramanathapuram. While so, the petitioner was informed by the 2nd respondent that the first respondent has issued an order, cancelling the mutual transfer ordered in favour of the petitioner and the 3rd respondent and that order was dated 07.07.2009 and in that order, it has been stated that those who are working as Warden consecutively for three years shall be subject to transfer as per rules and as the petitioner and the 3rd respondent have consecutively worked as Warden for more than three years, the order of mutual transfer was cancelled. The order of the first respondent in cancelling the mutual transfer is challenged in this writ petition.

3. The first respondent filed a counter stating that as per G.O.Ms. No. 64, Adi Dravidar and Tribal Welfare Department, dated 03.06.2009, a Warden, who served for 3 years in the Government Hostel as on 01.06.2009 should be transferred and posted as teacher in the school and as per 4(c)(ix) of the said G.O., a Warden after completion of three years should serve as a teacher for three years to claim the posting of Warden for the next turn. The petitioner colluded with the 3rd respondent has applied for mutual transfer and without knowing that the petitioner had already worked as Warden for three years and the 3rd respondent has already worked for more than 19 years, the request of the petitioner and the 3rd respondent were considered and orders were issued by the 2nd respondent, dated 23.06.2009 and after realising that the petitioner and the 3rd respondent cannot claim transfer on mutual basis and erroneously the aforesaid order was passed, proceedings were issued by the first respondent setting aside the mutual transfer order already issued and it is in consonance with the aforesaid G.O.Ms. No. 64. It is further stated that there are two posts of B.T. teachers in the subject Maths and Science and those posts are lying vacant for considerable time and by reason of the mutual transfer ordered in favour of the petitioner and the 3rd respondent, those posts of teachers could not be filled up and taking into consideration of all these facts, the mutual transfer order granted earlier was set aside by the impugned order and hence, the writ petition is liable to be dismissed.

4. The petitioner filed the additional affidavit stating that there is no collusion between him and the 3rd respondent and even during counseling, all the parties have given their choice and transfer orders were passed accordingly and therefore, there is no need to set aside the transfer granted on mutual basis. It is further stated that not only the petitioner and the 3rd respondent, who have served as Warden consecutively for a period of 3 years, but also other persons, who have worked as Warden consecutively for a period of three years and they were also transferred and posted as Warden only and they were not given any teacher posting and therefore, the stand taken by the respondents 1 and 2 that

the petitioner and the 3rd respondent have consecutively worked as warden for a period of 3 years and therefore, as per the aforesaid G.O., they have to be posted as teachers cannot be accepted. The petitioner has also named 6 persons, who worked as Warden in various hostels for three years and were subsequently, posted as Warden on transfer basis. It is, therefore, contended that the impugned order is discriminating in nature. He further stated that the G.O.Ms. No. 64, (ADW), dated 03.06.2009 was also challenged in W.P.(MD)No.8634 of 2009 by the Adi Dravidar and Tribal Welfare Association and in that writ petition, this Court has passed an interim order, directing the 1st and 2nd respondents not to confirm the transfer order except the mutual transfer and the Chief Secretary of the State of Tamil Nadu has issued a letter, dated 20.05.2009 giving guidelines to all the Departments not to conduct general counseling on the reason that the employees of the concerned Department have already served their three years continuous service period in a particular Post/Station and therefore, the impugned order has to be quashed.

5. Mr. R. Anand, the learned Counsel appearing for the the petitioner submitted that as per G.O.Ms. No. 64 (ADW), dated 03.06.2009, it has been specifically stated that the post of teachers are not executive posts and therefore, the G.O requiring persons to be transferred, who worked in a particular place for more than 3 months need not be followed and cannot be made applicable to teachers and as per Clause (vii) mutual transfers have to be considered before Clause and (v) mutual transfers have to be finalised before general counseling and the first respondent has transferred various persons, who worked as Warden for three years to the same post and hence, the petitioner and the 3rd respondent cannot be singled out on the ground that they have worked as Warden consecutively for three years and therefore, they are not eligible to apply for transfer on mutual basis and having allowed the other persons, who worked consecutively for more than three years to work as Warden in the transferred place, the petitioner and the 3rd respondent should also be allowed to work as Warden on the basis of the mutual transfer order passed by the 2nd respondent and therefore, the order of cancelling amounts to in-discrimination and that has to be set aside.

6. Mr. P. Gunasekaran, the learned Counsel appearing for the 3rd respondent has also adopted the argument of the petitioner.

7. Per contra, Mr. K. Balasubramaniam, the learned Additional Government Pleader, submitted that the transfer is an incident of service and as per G.O.Ms. No. 64, dated 03.06.2009, prior to 01.06.2009 if any person worked as Warden consecutively for more than 3 years, they have to be transferred and posted as teachers and therefore, the order was passed having realised that the petitioner and the 3rd respondent had already worked as Warden consecutively for a period of three years and the earlier order accepting the mutual transfer was erroneously passed and when the error has been found out, that has been rectified by passing the impugned order and hence, the impugned order cannot be challenged.

8. He further submitted that this Court in W.A. No. 69 of 2009 held that G.O.Ms. No. 63, Adi Dravidar and Tribal Welfare (ADW-7) Department, dated 27.05.2008, which is similar to G.O.Ms. No. 64 ADW, dated 03.06.2009, only serve as a guidelines to regulate the transfers and postings and it was not made for the advantage of the teachers to continue at one place and in administrative exigencies, it is always open for the authorities to transfer any teacher, including the teachers posted as Warden at any time even during the midst of the session and therefore, relying upon the said judgment, the learned Additional Government Pleader contended that the impugned order cannot be set aside.

9. I have given my anxious consideration to the submissions made by both the counsels.

10. In this case admittedly, the petitioner and the 3rd respondent have served as Warden, consecutively for a period of three years and so far as the 3rd respondent is concerned, he worked as Warden for a consecutive period of 19 years and as per G.O.Ms. No. 64, the aforesaid mutual transfer has to be finalised before conducting general counseling. But at the same time, the said G.O. also states that a person, who worked as Warden consecutively for a period of three years should not be posted as Warden and he must serve as teacher for a period of three years before claiming the posting of Warden. Therefore, as per the said G.O. in order to claim the post of Warden, a person must have worked as teacher. In this case, prior to 01.06.2009, the petitioner worked as Warden for a period of three years. Therefore, he is not eligible to be posted as "Warden" without undergoing the post of teacher for a period of three years. This was not noticed by the authorities when the petitioner and the 3rd respondent applied for mutual transfer and their request was accepted and the orders were passed accepting the mutual transfer. When that mistake was found out that has been rectified and the order of earlier transfer was cancelled. It is also settled law that when an order has been passed erroneously without knowing the provisions of law, the same can be rectified and that cannot be challenged on the ground that no opportunity was given, while passing subsequent orders.

11. Mr. R. Anand, the learned Counsel appearing for the petitioner submitted that if the transfers ordered in favour of the petitioner and the 3rd respondent were set aside on the ground that they worked as Warden for three years prior to 01.06.2009, the first respondent has allowed 6 persons to work as Warden, even after they completed three years as Warden and hence, their transfer orders should not have been cancelled. Though, the said argument of the learned Counsel appearing for the petitioner appears to be attractive, it is seen from the additional typed set of papers filed by the petitioner that those persons, who worked as Warden for a period of three years, were given that post for another three years during the general counseling and they did not get that post on mutual transfer. Had the petitioner and the 3rd respondent attended the general counseling and in that general counseling, if the petitioner and the 3rd respondent had been given the post of teachers, then the petitioner and the 3rd

respondent can contend that there were discriminated by posting them as teachers. But in this case, admittedly both the petitioner and the 3rd respondent were transferred on mutual basis and it has been made clear by the respondents 1 and 2 without realising that the petitioner and the 3rd respondent worked as Warden consecutively for a period of three years, their request were accepted and they were transferred on mutual basis. Further, the Government servant cannot claim to any post as of right. The Honourable Supreme Court in the judgment reported in National Hydroelectric Power Corporation Ltd. Vs. Shri Bhagwan and others, , held that "no Government servant or employee of a public undertaking has any legal right to be posted forever at any one particular place 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 of power or stated to be in violation of statutory provisions, prohibiting any such transfer, the Courts or the Tribunals cannot interfere with such orders as a matter of routine, as though they were the Appellate authorities substituting their own decision for that of the management and it is against such orders passed in the interest of administrative exigencies of the service concerned." Therefore, the petitioner and the 3rd respondent cannot claim that they are entitled to be transferred on mutual basis as Warden. Further, in the case of six persons, named by the petitioner, in the additional typed set of papers, though they were served as Warden for a consecutive period of three years, they were reposted as Warden during general counseling and during general counseling, the authorities can consider the request made by the participants, having regard to the vacancies available.

12. On the other hand, when a person applied for transfer on mutual basis, they are selecting their place of posting and therefore, that cannot be compared with the transfer, effected during general counseling. Hence, in my opinion, the stand of the petitioner that six other persons, who have completed three years of posting as Warden were given the same posting and hence, the cancellation of the mutual transfer order by indiscriminating and violating of Article 14 cannot be accepted.

13. It has been held by our Honourable Supreme Court that the transfer is an incident of service and when the transfer order is not violative of any statutory rules or mala-fide in nature, the same cannot be challenged. It has been held in the reported judgment reported State of U.P. and Others Vs. Siya Ram and Another, that "transfer is not only an incident of service, but a condition of service as well and is necessary in public interest and efficiency in public administration. In the case of State of U.P. and Others Vs. Gobardhan Lal, , it has been held that" the transfer is prerogative of the authorities and Court should not normally interfere therewith, except when the transfer order shown to be vitiated by malafides or in violation of any statutory provisions or having been passed by an authority not competent to pass such an order. It has been held that the order

of transfer made even in transgression of administrative guidelines cannot also be interfered with, as they do not confer any legally enforceable rights, unless shown to be vitiated by mala fides or is made in violation of any statutory provision." Therefore, having regard to the various guide-lines of the Honourable Supreme Court, the order of transfer is only an incident of service and that cannot be challenged and in this case, the respondents 1 and 2 have realised that they have committed an error in granting earlier transfer to the petitioner as it is against the G.O.Ms. No. 64, dated 03.06.2009 and the petitioner and the 3rd respondent are not eligible for mutual transfer, without working teacher and therefore, the 1st respondent validly set aside the mutual transfer order and the same cannot be challenged by the petitioner in this writ petition.

14. In the result, the writ petition deserves to be dismissed and accordingly, it is dismissed. Consequently, connected Miscellaneous Petitions are closed. No costs.