
(1999) 08 AP CK 0122

In the Andhra Pradesh High Court

Case No : Writ Petition No. 15476 of 1998

P.C.G. Roy

APPELLANT

Vs

National Commission for SC and ST, A.P. and others

RESPONDENT

Date of Decision : 03-08-1999

Acts Referred:

Citation : (2000) 3 ALD 32 : (2000) 2 ALT 348

Hon'ble Judges : V. Bhaskara Rao, J

Bench : Single Bench

Advocate : Mr. C. Sudesh Anand, for the Appellant; Mr. B. Adinarayana Rao, SC for CG and Mr. K. Srinivasa Murthy, for the Respondent

Judgement

1. The petitioner who is working as Deputy Manager (Marketing) in respondent No.3-company is assailing the order of his posting in Mechanical Section of Engineering Department at the factory by order dated 18-3-1998 and the consequential Order No.43 of 1998, dated 5-6-1998 designating him as Deputy Manager (Mechanical).

2. A few facts which are relevant are that 3rd respondent is a Central Government Enterprise incorporated on 14-7-1983 under the Companies Act. It is jointly promoted by Hindustan Organic Chemicals Limited and A.P. Industrial Development Corporation for the purpose of manufacturing Engineering Polymer known as Poly-Tetra Flouro Ethylene Pursuant to an advertisement in July, 1989, the petitioner applied for the post of Engineer (ADCS/Mech) but nevertheless, after interview, he was appointed as Marketing Officer in the time-scale of Rs.960-50-1610 vide letter dated 8-3-1989. He satisfactorily completed probation period of 12 months and was confirmed vide Part-II Order No.132 of 1990 dated 29-12-1990. Thereafter he pursued the Course of MBA (Marketing) in the Evening College while serving the company during the day and completed the same in 1992.

3. While so respondent No.3 had advertised for the post of Manger Marketing in

the year 1991. He was heading the Marketing Department at that time and he had requisite qualifications and experience. Hence he applied for the said post through proper channel. However, the Selection Committee appointed him as Senior Marketing Officer vide appointment order dated 1-6-1991. He has completed the probation and later confirmed with effect from 1-6-1992 in the said post. Thereafter he completed Post-Graduate Degree in MBA (Marketing).

4. Then respondent No.3 had advertised for the post of Manger (Marketing) on 10-3-1994. As the petitioner possessed the qualification of MBA (Marketing) and experience of 5 years, the Selection Committee appointed him as Deputy Manger, (Marketing) with effect from 3-10-1994 vide Part-II Order no.147 of 1994, dated 3-10-1994. He completed probation in that post also and confirmed by order dated 11-10-1995. Thus, he has put in 15 years of service in Marketing and he headed the Marketing Department for 9 years. It is asserted by him that he ensured continuous improvement in volume and value of business by his dedicated service.

5. It is then stated that he proceeded on sick leave form 6-3-1998 due to Diabetis, High Cholesterol and Blood Pressure and the Company Medical Officer had examined him and confirmed his sickness and accordingly he was advised to take complete rest. While he was recovering, respondent No.3 transferred him from Marketing to Mechanical Section in Engineering Department at factory by impugned order dated 18-3-1998. The grievance of the petitioner is that he has been so transferred without giving any reasons or notice and he had never applied for such a transfer. He, therefore, made an appeal dated 17-4-1998 to the Officer of Director, NationalCommission for SC, ST Government of India, explaining the unreasonable and unfair transfer and while that representation was forwarded to respondent No.3-company, the Assistant Manager (P and A) by letter dated 26-5-1998 suggested to report to duty and not to await the outcome of his representation. The petitioner also represented to the Government of India Nominee on the Board of respondent No.3 and explained about the illegal transfer. At the same time he reported to duty on 2-6-1998 as Deputy Manger (Marketing) at Head Office and he has been advised to report at factory in the mechanical Section of Engineering Department. Respondent No.1 in its turn held that his transfer from the post of Deputy Manger Marketing to Mechanical is illegal, biased, unfair and prejudicial for various reasons which are set out in the writ affidavit. However, he has not handed over the charge as Deputy Manger, marketing and he sought for a writ, order or direction more particularly in the nature of mandamus declaring Part-11 Order No.23 of 1998, dated 18-3-1998 and consequential order dated 5-6-1998 as illegal, arbitrary and to set aside the same.

6. He also filed WPMP No. 18484 of 1998 and sought for suspension of the impugned order. This Court by order dated 11-6-1998 directed respondents to maintain status quo. The petitioner was not satisfied with the above order and hence he filed WPMP No.21096 of 1998 and sought for a positive direction to

respondent No.3 to allow him to work as Deputy Manager, marketing, during the pendency of writ petition. This Court by order dated 8-10-1998 issued an interim direction to that effect. Thus the petitioner is continuing as Deputy Manager, marketing, by virtue of the above order.

7. The writ petition is resisted by respondent No.3. A counter affidavit is filed denying all the allegations made in the affidavit of the petitioner. It is stated that the company had advertised for the post of Engineering (Mechanical) ADCS and pursuant to that advertisement he had applied and he was interviewed for the post of Engineering (Mechanical). The remaining averments relating to his appointment as Manager (Marketing) during 1991 are admitted. It is, however, pointed out that the petitioner was habitually absenting from duty for long periods and a memo dated 21-1-1992 was issued for his long absentism and he was again absent from 8-3-1993 to 27-7-1993 and also for more than 90 days from May, 1997 to 29-3-1998. It is further pointed out that his leave has expired and he unauthorisedly absented without any permission or even without any intimation.

8, It is also stated that the work in the Marketing Division is more strenuous than a stationary job in the factory and that he was not transferred as a vindictive measure, but it was purely on administrative grounds. The petitioner is basically a Mechanical Engineer and hence it is not as though he has been transferred to a new job. It is asserted that the Management has the power to transfer any one from one Department to another and one shift to another shift as per clause 7 of the appointment order and that the impugned order has not altered his employment conditions nor has he suffered any monetary loss. He will be the senior most man in the Mechanical Department and there is no hindrance for his career and there is no ulterior motive behind his transfer and in fact the stress, strain and extensive travelling is avoided. As regards his representation to respondent No.1-SC, ST Commission and its communication to respondent No.3, it is stated that the Commission had sent the letter on a wrong assumption and being a non-statutory body, it cannot enforce its decision although it may advise the Management and it is for the Management to decide on the facts and circumstances of the case. It is also stated that he was relieved on 5-6-1998 and hence the order directing status quo has become infructuous.

9. The petitioner filed a reply affidavit reiterating the contentions raised by him in the writ affidavit. As regards the allegation that he has absented himself for long spells he stated that he has only availed leave as per the Leave Rules of respondent No.3-company and the Competent Authority has duly sanctioned the same. He justified the same on the ground that he had to appear for MBA Examination during 1992 and thereafter he was on sick leave between March, 1993 and July, 1993 and so forth. As regards the nature of the job of Mechanical Engineer he stated that it cannot be contended that it is equally a strenuous job. That apart, the process of manufacture is highly sophisticated involving high risk of runaway reactions leading to explosions and hence a good portion of the plant

is enclosed by concrete bunkers to avoid human loss and damage to equipment, it is specifically stated that the personnel have been trained abroad, but he was not trained abroad in any Department or factory as his entire service has been in marketing Department. According to him his promotional chances also will be effected as next promotion for Deputy Manager, (Marketing) is Manager, (Marketing) while that of Deputy Manager, (Mechanical) is Chief Engineer and the requirement for the post of Chief Engineer is 10 years of experience (minimum) with 5 years in the next lower post. Hence, the impugned transfer order will affect his promotional prospects and career. It is finally stated that clause 7 of the order of appointment is a general clause and it should be read in consonance with the post advertised and his initial appointment and experience.

10. Respondent No.3-company filed an additional counter with the permission of the Court. After reiterating the main averments in the counter, it is stated that the petitioner was appointed as Mechanical Engineer for the purpose of maintaining and for smooth running of the plant and that while working as such he applied for the post of Manager (Marketing). While admitting that he was given a lumpsum incentive of Rs.750/- for completing MBA and that it was enhanced to Rs. 1,500/-, it is asserted that by itself cannot be treated as a qualification. Tracing out the reasons for his transfer from Marketing Department to the mechanical side, it is stated that marketing requires comparatively more strain as one has to go round various places to consumer market; that the petitioner was frequently going on leave complaining of Diabetis, High Cholesterol and Blood Pressure and that therefore the Management wanted the petitioner to look after the factory side. It is pointed out that he has availed leave for 94 days between 5-6-1997 and 9-3-1998. Thus it is stated that the performance of the petitioner was drastically affected due to his continued sickness because of marketing pressures and that in fact the company was loosing nearly Rs.10 to 20 lakhs of business and that the business was finally achieved by another Deputy Manager (Marketing) by visiting the customers in the souther region. As regards the grievance of the petitioner that the transfer would effect his career it is stated that it provides him far more promotional opportunities compared to the present marketing set up as shown in the organisation chart and his salary and other benefits are not at all effected as both the posts arc on the same level. There are no mala fides and that it is a transfer in the normal course of business from the administrative side and that it is open to the Management to transfer an employee from one post to another under powers of the head of the department and the ManagingDirector. The judgment reported in T, Ramamurthy v. V.C. and M.D., Nizam Sugar Factory Limited 1992 (2) An. WR 229, is sought to be distinguished on facts and it is stated that it is not applicable to the facts of this case. It is finally stated that the petitioner has no legal right or statutory right to insist that he should be continued in the Marketing Department and the interim order dated 8-10-1998 in WPMP No.21906 of 1998 is fit to be vacated.

11. Heard both sides.

12. The sum and substance of the case of the petitioner is that he was directly recruited as Deputy Manager (Marketing) as he possessed the requisite qualification viz., MBA (Marketing) and experience in the Marketing Department and hence he cannot be transferred to a post in the Mechanical Department where the functions and duties are not similar. According to him both these posts are independent and hence not inter-changeable, and his promotional avenues will be effected inasmuch as the promotional post on the Mechanical side viz., Chief Engineer requires 10 years experience with a minimum service of 5 years in the next lower post; whereas he fulfils the qualifications for next promotion in the Marketing Department. Thus, it is contended that the transfer to a dissimilar post amounts to alteration of service condition for which he is neither given an opportunity nor any reasons are assigned. On the other hand the case of respondent No.3-company is that both the posts are in one organisation and they are equal in status; that the petitioner is a qualified Mechanical Engineer and originally he was appointed as Mechanical Engineer; that it is permissible to transfer him from one post to another post or one shift to another shift as per clause 7 of the appointment order and that his promotional chances are in no way effected. It is also contended that the petitioner is a sickly person who has been frequently absenting himself and he is unable to bear the stress, strain and required extensive travel in the Marketing Department which resulted in a business of Rs.10 to 20 lakhs.

13. Having regard to the above pleadings and rival contentions, the only point that arises for consideration is whether the impugned order of transfer of the petitioner from Marketing Department to Mechanical Department is sustainable.

14. Sri V.V.S. Rao (later elevated as Judge), learned senior Counsel placing strong reliance upon T. Ramamurthy's case (supra), vehemently contended that the petitioner though a qualified Mechanical Engineer, was originally appointed to the Marketing Department and he has been continuously working in that Department for about 15 years, out of which, he was heading the Department for 9 years and he never worked on mechanical side and therefore, the ratio that "those two posts are not inter se transferable because the functions and duties of the two posts are different and relate to different disciplines and specialists" is aptly applicable. He further contended that the transfer would amount to alteration of service conditions for which an opportunity should have been given to the petitioner and adequate reasons are required to be recorded and in the absence of notice and reasons and in view of the ratio in T. Ramamurthy's case (supra), the impugned order is liable to be set aside.

15. Ms. Sudha representing Sri K. Srinivasa Murthy, learned Counsel for respondent No.3 on the other hand contended that the petitioner was originally appointed a Mechanical Engineer and that both the posts are equally in status and carry similar functions, inasmuch as both the posts are managerial posts and the expected duties are supervisory in character. According to her the Management has to keep the interests of the company in view and to decide as to

which person suits to which post and accordingly the Management effected the impugned transfer for administrative reasons. She pointed out that the continuance of the petitioner as Deputy Manager (Marketing) is detrimental to the company as he has been absenting himself for long spells admittedly on account of ill-health. She also argued that there is no alteration of service conditions and hence the argument that an opportunity should have been given to the petitioner is without any substance. She mainly relied upon clause 7 of the appointment order and stated that the petitioner himself agreed to abide by the above terms and accordingly it does not lie in his mouth that he cannot be transferred from Marketing Department to Mechanical Department. In support of her contentions she cited the judgments in Delhi Development Authority v. H.C. Khurana, (SC) 1993 (2) SLR 509; K. Seetharama Prasad Vs. Andhra Bank Ltd. and Another, ; Bank of India Vs. Jagjit Singh Mehta, ; State of Uttar Pradesh v. Dr. D.N. Prasad; Rajendra Roy Vs. Union of India (UOI) and Another, , and Punjab National Bank and others Vs. All India New Bank of India Employees Federation and others, .

16. I applied my anxious consideration to the above contentions and perused the authorities cited by both sides. First and foremost it is to be seen whether the petitioner was originally appointed as Mechanical Engineer, it is no doubt true that he possessed the qualification of a Mechanical Engineer. When a post of Engineer (ADCS/Mech) was advertised in July, 1989, the petitioner had applied for the said post. He was interviewed, but he was offered the post of Marketing Officer in the time scale of Rs.960-50-1610 by letter dated 8-8-1989. A copy of the said order and Part-II Order No.97 of 1989, dated 15-9-1989 are filed and they categorically show that he was appointed as Marketing Officer with token No.095. Respondent No.3 did not place any material to show that he was appointed as Mechanical Engineer. Hence the contention that he was so appointed in the Mechanical Department and later on appointed as Marketing Officer does not appear to be correct.

17. Insofar as his appointment to the present post viz., Deputy Manager (Marketing) is concerned, there is no controversy. It is on record that he has been heading the marketing Department for 9 years with a qualification of MBA (Marketing).

18. Next aspect for consideration is whether the post of Deputy Manager (Marketing) and Deputy Manger (Mechanical) are inter se transferable. Having regard to the nature of functions and duties of the said post. It is averred by respondent No.3 that the Marketing Department has been set up to carry marketing activities, as the products which are manufactured by the company have to be sold and that the person who has to deal with marketing, must be aware of the products which are manufactures as well as the consumers who require those products and augment the sales and it requires extensive travel. As regards the post of Deputy Manager (Mechanical) it is said to be a stationary job of supervising the maintenance and smooth functioning of the machinery.

19. Then there is any amount of variation between the nature of functions and duties of Deputy Manger (Marketing) on one hand and the Deputy Manger (Mechanical) on the other. Deputy Manager (Marketing) need not know anything about the machinery or the manufacturing part of the job; whereas Deputy Manager (Marketing) comes into the picture after the manufacture of the product. In other words he is concerned with the sale of the products. In my view there is a marked variation in the functions and duties attached to these two posts.

20. It is another thing that they occupy the same status and carry the same scale of pay, but they cannot be said to be inter se transferable on that sole ground. It is well settled that a post must be inter se transferable or interchangeable for effecting transfer of an employee holding one such post to the other.

21. The petitioner has been working in the Marketing Department right from the beginning. In fact he applied for the post of Engineer (Mechanical), but the Selection Committee thought it fit to appoint him as Marketing Officer. Later he was appointed as Senior Marketing Officer which appears to be a higher post in the same Department and thereafter he obtained MBA (Marketing) qualification and pursuant to an advertisement to fill up the post of Manager (Marketing), he applied for the same on the basis of his previous experience in the same organisation and MBA (Marketing) qualification. Respondent No.3-company chose to appoint him as Deputy Manager (Marketing) instead of Manager (Marketing). The petitioner contended himself with that appointment and continued to head the Marketing Organisation. Evidently he never worked on the mechanical side which involves maintenance of machinery and allied matters. From the available material it can be said that the petitioner has specialised the subject of Marketing and respondent No.3-company also in recognition of his experience and qualifications, appointed him as Deputy Manager (Marketing). In view of variance in the functions and duties of these two posts, I am unable to agree with Ms. Sudha that they are inter se transferable. On the contrary I am satisfied that they constitute different disciplines and specialists and hence the facts of T. Ramamurthy's case (supra) are almost identical and hence the ratio therein is applicable.

22. Ms. Sudha seeks to justify the transfer on the ground that the petitioner is a sickly person and he is unable to cope up with the stress and strain of Marketing Department and because of his frequent absence on leave, the interests of the company are suffering. She stated that he was on leave on various dates for a period of 94 days in a span of less than one year. Sri V. V.S. rAO contended that an employee is entitled for availment of leave subject to the Rules of the Company and the petitioner was accordingly sanctioned leave and hence he cannot be faulted. He added that there is no dispute about the petitioner being afflicted with Diabetis, High Cholesterol and Blood Pressure. It is true that the petitioner has availed leave on various dates. The company has sanctioned leave

on one hand and made it a ground for his transfer to another Department. It is not as though the exigencies of service demanded refusal of leave and in spite of refusal, the petitioner absented himself. If his continuous absence was really detrimental to the interests of the company, it was open to them to refuse leave and to direct the petitioner to report to duty and even initiate disciplinary action against him if the situation so demanded. It is nobody's case that there was any such situation or exigency. He was permitted to go on leave and later allowed to join duty. He was not served with any memo indicating that he was responsible for the so called loss of Rs.10 to 20 lakhs of business. In fact the contention is that the above business was recovered by another Deputy Manager (marketing) and hence it cannot be said that there was any loss. 1, therefore, do not see any substance in this contention of the learned Counsel for respondent No.3.

23. When the posts are not inter se transferable, the legal position appears to be settled that a person holding one post cannot be transferred to the other post and vice versa. I am fortified by my above view by the ratio in the judgment in Vice-Chancellor, Vice-Chancellor, L.N. Mithila University Vs. Dayanand Jha, ,

24. It is next contended by Ms. Sudha that clause 7 of the regional appointment order dated 8-3-1989 permits such a transfer and the petitioner had agreed to the said terms and conditions. I perused the same, It is no doubt true that the said clause shows that the employee will be liable to serve in any position, Department or shift as he may be assigned from time to time. It is noteworthy that the above order pertains to his appointment as Marketing Officer at the inception. It was a lower level post in which the petitioner resided till he was selected as Senior Marketing Officer in 1991. It is not as though the petitioner was promoted from the post of Marketing Officer to Senior Marketing Officer. The fact that there was an advertisement and pursuant to that advertisement, the petitioner had applied and thereafter he has been selected as Senior Marketing Officer in which post he completed probation and confirmed. The Deputy Manager (Marketing) is yet another post to which he was again selected by the Selection Committee after interviewing the petitioner. Thus, it is seen that these 3 posts viz., Marketing Officer, Senior Marketing Officer and Deputy Manager (Marketing) are three different posts. It is to be borne-in-mind that the higher posts are not promotional posts, but they are independent posts. When he was appointed as Deputy Manager (Marketing), which is an independent post, the terms and conditions including clause 7 do not appear to have been communicated to the petitioner. If at all clause 7 is applicable, it is relevant to the post of Marketing Officer only, but not to the Deputy Manager (Marketing). Neither there is any such stipulation in the appointment order of the petitioner dated 10-3-1994 nor there is anything to show that these three posts are inter-related one being the promotional post of the other. Hence, in my view clause 7 is not applicable.

25. It is also urged that the transfer has come into effect with the issue of communication and that it is not necessary that the order should be served upon the employee and hence the writ petition has become infructuous. Reliance is

placed upon the judgment in Delhi Development Authority v. H.C. Khurana (SC) 1993 (2) SLR 509, and K. Seetharama Prasad v. Andhra Bank Limited (supra).

26. In the judgment Delhi Development Authority cited (supra), it is held-

"Issue" of the charge-sheet in the context of a decision taken to initiate the disciplinary proceedings must mean, as it does, the framing of the charge-sheet and taking of the necessary action to despatch the charge-sheet to the employee to inform him of the charges framed against him requiring his explanation; and not also the further fact of service of the charge-sheet on the employee....."

It is further held -

"The issue of a charge-sheet, therefore, means its despatch to the Government servant, and this act is complete the moment steps are taken for the purposes, by framing the charge-sheet and despatching it to the Government servant, the further fact of its actual service on the Government servant not being a necessary part of its requirement".

In the judgment cited K. Seetharama Prasad (supra) it is held-

"It is only when a charge memo in a disciplinary proceedings or a charge-sheet in a criminal prosecution is issued to the employee it can be said that the departmental proceedings/criminal prosecution is initiated against the employee and the Sealed Cover Procedure is to be resorted to only after the charge memo or charge-sheet as the case may be, is issued. The word "issued" is required to be understood to mean "despatched" in the case of departmental proceedings. Issuance of a charge-sheet is satisfied if the charge-sheet is filed in the concerned criminal Court before the DPC meets and considers the case of the employee."

27. Although both the above authorities do not deal with the cases of transfer, Ms. Sudha seeks to take support from the same. She may be right in contending that mere issue of transfer order is sufficient, but there are some intervening circumstances in this case. The petitioner filed WPMP No.18484 of 1998 seeking suspension of the operation of the impugned order dated 18-3-1998 and this Court by order dated 11-6-1998 directed that the status quo as on the date of the order be maintained. Since the impugned transfer order was already issued, the status quo as on the date of the order was sought to be interpreted against the petitioner and it was sought to be contended that he has already been relieved. In those circumstances he filed WPMP No.21096 of 1998 and sought for a positive direction that he may be continued as Deputy Manager (Marketing). My learned Brother J. Chelameshwar, J., passed the following order on 8-10-1998.

"None appears for the respondent. Prima facie it appears that a person recruited directly for discharging certain functions as Deputy Manager (Marketing) could not be posted to some other Department. In the circumstances there shall be interim direction as prayed for."

28. It is evident from the above order that the petitioner is being continued in the post of Deputy Manger (Marketing) by virtue of the said order. In these circumstances I fail to understand as to how this writ petition can be said to have become infructuous.

29. For all the reasons given above, I find that the petitioner cannot be transferred from the post of Deputy Manger (Marketing) to the post of Deputy Manger (Mechanical) and hence the impugned transfer order and consequential Part-11 order are liable to be quashed.

30. In the result, the writ petition is allowed, but without costs.