
(1979) 08 MP CK 0023
In the Madhya Pradesh High Court

Prakash Chandra Saxena

APPELLANT

Vs

State of M.P. and Others

RESPONDENT

Date of Decision : 01-08-1979

Acts Referred:

Civil Procedure Code, 1908 (CPC) — Order 39 Rule 1, Order 39 Rule 2

Citation : (1980) JLJ 370 : (1980) 2 LLJ 322 : (1980) MPLJ 251

Hon'ble Judges : A.R. Naokar, J

Bench : Single Bench

Judgement

A.R. Nakar, J.

This is a revision against the order dated 16-5-1979, passed by the First Additional District Judge, Gwalior in Civil Miscellaneous Appeal No. 29 of 1979, against the order passed by the Seventh Civil Judge, Class II, Gwalior on 1-5-1979.

The facts of the case are that the plaintiff Prakash Chandra Saxena has filed a suit for declaration and cancellation of the order of his transfer dated 3-1-1979 with the allegation that he is in permanent Government service since 1948. He is a gazetted officer since 1962 and he was transferred as gazetted Government servant to different places. The record of his service is clean and without blemish. He was transferred on 31st August, 1977 on the post of the Principal, Government Higher Secondary School, J. A. Sindh, Lashkar, Gwalior, on humanitarian grounds. He alleges that Madhya Pradesh Government, under the pressure of the Sindhi Society, by its order dated 27-10-1978, with an intention to give undue advantage to one Sumanlal Purswani, who was Principal of the Higher Secondary School, Gormi, was transferred to Lashkar. The Madhya Pradesh Government who is defendant No. 2, without any reason, transferred the plaintiff as Principal, Higher Secondary School, Taksal, Gwalior. It is also submitted that no consent for transfer was taken from the Collector, Behind or the Collector, Gwalior. This is essential under G.A.D. Memorandum No. 10983-C.R. -361, dated 24-8-1957. Defendant No. 2, on 3-11-1978, has again

transferred the plaintiff to Bhitwar. Prior to getting this order on 4-11-1978, the plaintiff presented himself at Taksal School at Gwalior.

With a view to accommodate one Shri P.D. Shrivastava (non-applicant No. 5) for which there was no cause, the Government passed the order dated 3-11-1978 and then stayed the operation of the order dated 28-10-78 through defendant No. 3. Defendant No. 3 is the Divisional Superintendent of Education, Gwalior. The plaintiff alleges that this order is beyond the powers of defendant No. 3. The order that the plaintiff should remain at the Higher Secondary School, Taksal, clearly shows that the order of stay was mala fide and it was passed with an ulterior motive to accommodate Shri P.D. Shrivastava. This stay order was dated 10-11-1978 and it was again vacated by an order dated 1-12-1978. By an order dated 3-1-1979, the plaintiff was again transferred to Gormi and the order of transfer of Shri P.D. Shrivastava to Gormi was cancelled. The mention in the transfer order that it is in the interest of public is a colourable one. In fact, this order was passed only to accommodate Shri P.D. Shrivastava. Plaintiff's submission in the plaint is that the transfer order given to him were mala fide and were to harass him when the defendants knew that one of the wives of the plaintiff is suffering from brain tumour and the other is suffering from diabetic ulcer and both of the wives are under the treatment of eminent doctors at Gwalior, If the plaintiff is transferred, he will suffer irreparable loss, So also, his allegation is that by this transfer, the plaintiff is not getting any higher post and it is a practice that no one is transferred before completion of three years from one place to the other place. But, all these things have taken place just to accommodate Shri P.D. Shrivastava, who is very near to the Divisional Superintendent of Education, Gwalior.

Along with the plaint, an application under Order 39, Rules 1 and 2 of the CPC is filed and that application is supported by an affidavit. The allegations made in the plaint are again repeated in the application under Order 39, Rules 1 and 2, CPC as well as in the affidavit,

P.D. Shrivastava, who is also a defendant, has, in his written statement, stated that he has not in fact received the transfer order. He admitted in his written statement that the plaintiff did present himself at Taksal School, but as no order of transfer was received in the said School, the plaintiff could not join there. He has denied all the allegations made in the plaint that the orders were passed to accommodate him. He raised an objection regarding jurisdiction of the civil Court to entertain the said suit. He also submitted that no mandatory injunction can be granted in favour of the plaintiff. These objections are repeated in the reply to the application under Order 39, Rules 1 and 2, CPC and it is also supported by an affidavit. The M.P. Government has filed an affidavit through Shri J. P. Tiwari, Divisional Superintendent of Education, Gwalior, to the effect that he had no knowledge of the order dated 28-10-1978 and because of that the plaintiff was transferred by order dated 3-11-1978. He has also denied that the orders were passed to accommodate Shri Shrivastava. He further goes to say that on

9-11-1978, he received a call from the Hon'ble Education Minister to the effect that the transfer order dated 28-10-1978, passed by the Government is stayed. In between, Shri Puruswani presented himself to the place to which he was transferred. The transfer of the plaintiff is done keeping in view the exigencies of Government work. Rest of the allegations were denied generally. It is also added that now the posts of the principal at both the places are not vacant and as such, no injunction can be granted. The plaintiff as well as the defendants have filed documents to substantiate their claim. The trial Court passed an order on 1-5-1979 in the following terms (if translated in English):

I order that till the disposal of this case, the plaintiff should be posted on the post of the Principal, Government Higher Secondary School, Taksal.

Against the order passed by the trial Court, the State has not preferred any appeal at all. P.D. Shrivastava has filed the appeal and that the appeal has been allowed and the order dated 1-5-1979, passed by the trial Court was set aside and the application for temporary injunction stood dismissed. Against that, the present revision is filed.

The arguments of the learned Counsel centered mainly on the point whether the civil Court has jurisdiction to interfere in such matters. On one side, it was submitted that the order is not justiciable before the civil Court when it is passed taking into consideration the exigencies of the Government work. On the other hand, it was argued that if the order is manifestly mala fide then certainly, the civil Court has jurisdiction to entertain the suit and give its finding whether the order is mala fide or not.

In any service when the relationship is that of a master and servant, transfer, promotion, retirement, etc., are the incidence of service. Usually, the master has full power to transfer his servant wherever he wanted, because transfer is made, looking to the character and the quality of the work, the servant does. Therefore, if a master wants that at a particular place, a particular servant is required, then certainly, he has a right to transfer his servant from one place to another. This is the general idea behind the powers which are given to a master to transfer his servants at his will. That, however, does not mean that this power is absolute and a master has a right to transfer his servants capriciously. When it was enquired from Shri M.A. Sha, learned Deputy Government Advocate, appearing for the State whether there are any rules regarding the transfer of the Principals of the Higher Secondary Schools in the Education Department, he submitted that there are none.

In *In The Management of the Syndicate Bank Ltd. Vs. The Workmen*, , the question of transfer was considered and it was held as under:

There is no doubt that the Banks are entitled to decide on a consideration of the necessities of banking business whether the transfer of an employee should be made to a particular branch. There is also no doubt that the management of the Bank is in the best position to judge how to distribute its employees between the

different branches. We are, therefore, of opinion that the Industrial Tribunals should be very careful before they interfere with the orders made by the Banks in discharge of their managerial functions. It is true that if an order of transfer is made mala fide or for some ulterior purpose, like punishing an employee for his trade union activities the Industrial Tribunals should interfere and set aside such an order of transfer, because the mala fide exercise of power is not considered to be the legal exercise of the power given by law. But the finding of mala fide should be reached by Industrial Tribunals only if there is sufficient and proper evidence in support of the finding.

From the above observations, I can deduce that if the transfer is made mala fide or for some ulterior purpose for punishing the employee, then certainly the civil Court has jurisdiction to interfere in the matter and set aside such order of transfer.

I may refer to The Municipality of Bhiwandi and Nizampur Vs. Kailash Sizing Works, , in which the meaning of "good faith" and "mala fide" was considered. It has laid down as under:

An authority is not acting honestly where an authority has a suspicion that there is something wrong and does not make further enquiries. Being aware of possible harm to others, and acting in spite thereof, is acting with reckless disregard of consequences. It is worse than negligence, for negligent action is that, the consequences of which the law presumes to be present in the mind of the negligent person, whether actually it was there or not. This legal presumption is drawn through the well known hypothetical reasonable man. Reckless disregard of consequences and mala fides stand equal, where the actual state of mind of the actor is relevant. This is so in the eye of law, even if there might be variations in the degree of moral reproach deserved by recklessness and mala fides.

The expression done in good faith has been defined in the Bombay General Clauses Act, 1904 and in the General Clauses Act, 1897, to mean, done honestly, whether done negligently or not, but negligence does not necessarily imply mala fides. For an action to amount mala fide something more than negligence is necessary, so as to impose liability on the actor.

From this I deduce that where an authority is not acting honestly and when it has a suspicion that there is something wrong and it fails to make further enquiry, then its action cannot be regarded to be bona fide.

I will have to judge the action of defendants Nos. 2 and 3 in the light of deductions I have made above.

In Smt. Pushpika v. State of West Bengal (1972) S.L.R 910, the question before the Court was that when an officer is transferred simply to retain another officer, whether the Court is competent to interfere even though no civil or evil consequence would follow from such an order. It was held in that case as under:

The petitioner was transferred with the object of accommodation "A" at a particular station for undisclosed reasons. The order was not for public interest nor it was for administrative purposes. The order, therefore, was for collateral purpose and was mala fide and could not be sustained. It was a fit case where the order of transfer should be interfered even though no civil or evil consequence would follow from such an order.

Orders of transfer of Government servants like any other Government administrative or executive orders are passed invariably for administrative purposes or in public interest. Such orders normally are outside the purview of examination by Courts of law. But an executive decision or action or an administrative decision is liable to be struck down if it is used mala fide or for a collateral purpose.

From the above observations, it becomes clear that if an order of a transfer is to accommodate some other officer and not for any public or administrative purpose, then such an order is certainly mala fide and to see whether the order is of this nature or not, the civil Court has jurisdiction to go into the merits even though no civil or evil consequences are followed from such an order. Merely saying in the reply that the transfer of the plaintiff was for an administrative purpose is not sufficient. It is not shown by defendants Nos. 2 and 3 by any document or by an affidavit as to what was the administrative convenience or administrative exigencies, so that the plaintiff should have been transferred from place to place.

Whether by merely mentioning that the order is for administrative purpose, the jurisdiction of the Court to see the nature of the order is ousted? This point came before the Calcutta High Court in *N.N. Sinka v. General Manager* (1973) 1 S. L. R 1153. That Court has observed as under:

Such transfers relate to management and control of establishment and offices of the railway as matters of administration. The authorities in charge are the sole judges about the propriety, necessity or the desirability of such transfers. Such orders cannot also be interfered with if they are found to be not in excess of powers under the law and the authorities passing the order are competent in law to pass such orders. Such orders again are not challengeable if they do not involve any penal consequences in employees in respect of their emoluments, prospect in service and the like. Unless there is in the impugned orders any violation of the provision of the Constitution or statute or rules founded on them having the force of law or such orders are in excess of powers of the issuing authority under the law, the Court cannot probe into the orders to enquire their propriety or necessity and question the order to substitute its judgment in place and stead of the decision taken by the said authorities who are the best judges of the situation and legally competent to pass such orders.

At the same time it may be obvious or apparent on the facts evident, admitted or established, that the orders of the authorities though otherwise legal and valid

have not been issued for the professed purposes as in public or administrative or in the exigencies of service but they are only passed for other purposes in the garb of ostensible purposes. The Court of law in such cases has thought it fit and competent for itself to probe in and scrutinise such orders to see if they have been passed for other purpose under colourable exercise of powers or if such orders are accordingly mala fide.

The judgment further goes on to say that "the administrative orders, not otherwise justiciable, thus come under Court's scrutiny if there are allegations of mala fides or colourable exercise of powers behind such orders, even though they are free from violation of any Constitution or statutory provisions. Such orders again are liable to be interfered with if the allegations noted above are established or evident on materials on record in absence of any rebuttable evidence. From this again, it becomes clear that the civil Court has jurisdiction to scan the orders of transfer to see whether they are mala fides or colourable exercise of powers behind such order even though they are free from violation of any constitutional or statutory provisions.

Shri R.C. Lahoti, learned Counsel appearing on behalf of Shri P.D. Shrivastava, tried to distinguish the cases cited before me by saying that in those cases mala fide was apparent on the face of the record, namely, the employees were transferred because they are taking part in trade union activities and, therefore, the Court quashed the order of their transfers. But, in this revision, I have only to decide whether the plaintiff is entitled for injunction order or not and I am not deciding the case on merits at all. Therefore, it cannot be said that the cases referred to above are not applicable to the present case because of the said distinction pointed out to me by the learned Counsel.

From the rulings cited above, the position which emerges is that civil Court certainly has power to see whether the transfer order is passed mala fide or with an ulterior purpose. Therefore, the objection of the learned Counsel, appearing on behalf of the non-applicants that the orders are not justiciable, cannot be accepted,

Now, it is to be seen whether there is some proof to show that the order is mala fide or not, because it is for the civil Court to come to a definite conclusion when both the parties lead evidence as to whether the order passed was mala fide or not. In an application under Order 39, Rules 1 and 2, Civil Procedure Code, it is always better not to express any opinion regarding the issues which are in dispute between the parties. Therefore, I refrain from giving any findings regarding the disputed points. The only question I have to see is whether the plaintiff has been able to prove a prima facie case in his favour. Before giving a finding regarding prima facie case, I have to decide whether the action of defendants Nos. 2 and 3 can be said to be in the interest of exigencies of Government work or whether it is taken by defendants Nos. 2 and 3 without considering the consequences of the order they have passed,

In the reply and the affidavit filed by Shri J.P. Tiwari, Divisional Superintendent of Education it is submitted that because of a telephonic order passed by the Hon"ble Education Minister, the order of transfer was stayed. It is not clear as to when this order was passed. No document has been produced to show that there was such an order by the Hon"ble Education Minister. It is also not clear whether all the facts of the case were put before the Education Minister and he has passed the stay order after considering them. Added to this, it is mental exigencies as to transfer the applicant from place to place by so many orders. The applicant (Prakash Chandra Saxcna) was present at the Taksal School, Kashkar and he has taken charge of his post himself and a report was sent to the superior officer to that effect. P.D. Shrivastava was attached for more than a month in the Office of the Divisional Superintendent of Education, Gwalior. It is very difficult to understand as to how the orders passed with respect to P.D. Shrivastava could not be communicated to him even though he was attached to the Office of Defendant No. 3. Therefore, his affidavit that he did not know of the orders passed by defendant Nos. 2 and 3 is very hard to believe. It creates a doubt in my mind that the orders of transfer of the plaintiff were made just to accommodate Shii P.D. Shrivastava and not for any administrative purpose. Because of all these circumstances, there is ample ground to come to a conclusion that the plaintiff has a substantial point to canvass before the trial Court regarding the orders of transfer passed by the Government in the case of the plaintiff. There is irreparable injury to him if he is transferred from Gwalior. He has also substantiated that point by giving an affidavit and the balance of convenience is certainly in his favour. Therefore, looking to all these facts, I am of the opinion that an injunction order should have been granted in favour of the plaintiff. The order passed by the trial Court, therefore, I think, is correct.

The result, therefore, is that the revision deserves to be allowed and it is allowed. The order passed by the appellate Court is set aside and that of the trail Court is confirmed. As the point is debatable one, I feel, the parties should bear their own costs.