
(2019) 10 MP CK 0083

In the Madhya Pradesh High Court

Case No : Writ Petition No. 12994 Of 2019

Rajesh Kumar S/O Suresh Chnadra Jain

APPELLANT

Vs

State Of Madhya Pradesh And Ors.

RESPONDENT

Date of Decision : 17-10-2019

Acts Referred:

Constitution Of India, 1950 — Article 162
Consumer Protection Act, 1986 — Section 16

Citation : (2019) 10 MP CK 0083

Hon'ble Judges : Vandana Kasrekar, J

Bench : Single Bench

Advocate : Amit Agrawal, Arjun Agrawal, Vinay Gandhi, Pushyamitra Bahrgava

Final Decision : Disposed Of

Judgement

Vandana Kasrekar, J

1. The petitioner has filed the present petition challenging the order dated 5/07/2019, passed by the respondent no.3, thereby transferring the services of the petitioner from Indore to Gwalior.

2. The petitioner was initially appointed on the post of District Commandant on 2/02/2008 and is working on the said post as such. While serving as District Commandant, the petitioner was posted at Jabalpur and by order dated 31/07/2017, the petitioner was transferred from Jabalpur to Indore. In pursuance of the said order, the petitioner gave his joining at Indore on 27/08/2017.

3. Since 27/08/2017 the petitioner is working at Indore and has completed less than 2 years service at Indore. To the utter shock and surprise of the present petitioner, the petitioner has been transferred from Indore to Gwalior vide order dated 5/07/2019. Being aggrieved by the said order, the petitioner has filed the present petition.

4. Learned Senior Counsel appearing on behalf of the petitioner submits that the said transfer order is illegal and contrary to the transfer policy. He further argues that the impugned order has been passed with a view to accommodate respondent no.4, who has been transferred from Ujjain to Indore in place of petitioner. He submits that the respondent no.4 has been working at Ujjain for about 8 years and now just to accommodate him at Indore, the present petitioner has been thrown away to Gwalior. He further submits that the place where the petitioner has been transferred, its distance is more than 500 km. Being aggrieved by the said transfer order, the petitioner has submitted a representation to the respondents. However, no action has been taken in the matter. It has further been submitted that the father of the petitioner is 75 years and is suffering from heart problems, arthritis and other medical ailments and the petitioner is getting better medical treatment and facilities for his father at Indore. He further submits that the wife of the petitioner is presently working as Assistant Commissioner, Tribal Welfare Department and is presently posted at District Betul and in case the petitioner is transferred to Gwalior, the family of the petitioner would suffer as the distance between Gwalior to Betul is more than 600 km.

5. The respondent nos.1 to 3 have filed their reply and in the said reply the respondents have stated that the petitioner has completed more than 2 years at the present place of posting. He further submitted that there is no prohibition in the Transfer Policy which prohibits the transfer of employee on administrative exigencies before expiration of three years period. He has further submitted that the Hon'ble Apex Court as well as this Court in catena of judgments has held that Transfer Policy is not mandatory and the State Government is free to transfer any employee looking to administrative exigency.

6. So far as the contention of the petitioner that he has been transferred to very far place at Gwalior and his wife, who is working as Assistant Commissioner, Tribal Welfare Department is posted at Betul, hence, it would be very difficult for them to relish their matrimonial life as distance from Betul to Gwalior is almost 600 km is concerned, the respondents in their reply has stated that even Indore is 400 km away from Betul and the petitioner till date has not moved any application for his posting alongwith his wife as also provided in the Transfer Policy which clearly goes to show the intention of petitioner to be remain posted at Indore.

7. So far as other ground raised by the petitioner that the transfer order has been passed with a view to accommodate respondent no.4 is concerned, the respondents have stated that the respondent no.4 in compliance of the transfer order, has joined at Indore on 6/07/2019. Further, the transfer of the respondent no.4 is also on the ground of administrative exigencies and, therefore, the same cannot be said to be malafide. So far as ailment of father of the petitioner is concerned, the respondents have stated that these are the family difficulties for which the transfer order cannot be interfered with.

8. The respondent no.4 has also filed their reply and in the said reply the respondent no.4 has stated that in compliance of the transfer order dated 5/07/2019, the respondent no.4 has been relieved from Ujjain and he joined at Indore on 6/07/2019. He has already taken the charge of the Drawing and Disbursing Authority. Even in the Bank, the record has been updated in the name of respondent no.4.

9. Learned counsel for the respondent no.4 submits that the respondent no.4 was posted at Ujjain vide order dated 15/07/2012. Thereafter, he has completed almost seven years at Ujjain. As the respondent no.4 is transferred to Indore, therefore, the wife of the respondent no.4, who is working in the Commercial Tax Department of the State Government also requested for transfer at Indore. Considering the request of posting the husband and wife at same place in accordance with the Transfer Policy, the wife of the respondent no.4 has also been transferred to Indore on her own expenses vide order dated 5/07/2019. They have also admitted their children in school at Indore. It is also denied that the petitioner has been frequently transferred as he has been transferred within 3 years. It is submitted that the petitioner has completed almost two years at Indore and completion of three years at one place is not mandatory. It is further submitted that the petitioner has been transferred on administrative exigency and the provisions of posting at one place for 3 years is not mandatory. He further submits that the scope of judicial review in the transfer matters is very limited as the Courts cannot substitute their own decisions in the matter of transfers because the same may cause prejudice to the administrative functions.

11. Heard learned counsel for the parties at length and perused the record.

12. The petitioner, who is working on the post of District Commandant, Home Guard has filed the present petition challenging the order dated 5/07/2019 by which his service has been transferred from Indore to Gwalior before completion of two years of his tenure at Indore. The said transfer order has been challenged by the petitioner firstly, on the ground that the petitioner has not completed normal tenure of three years at present place of posting and, thus, this amounts to a frequent transfer. Secondly, he submits that the impugned transfer order has been issued looking to the administrative exigency, but the respondents have failed to show any reason regarding administrative exigency for transferring the service of the petitioner before expiry of three years.

13. That this Court, while passing the interim order, has directed the State Government to explain the administrative exigency for transferring the service of the petitioner before completion of period of three years. However, the entire reply filed by the State Government is silent on this aspect and no plea of administrative exigency has been pleaded much less established by the State Government.

14. That, it is apparent from the impugned order dated 5. 07.2019 that the petitioner has been transferred within less than 2 years of his posting at Indore

against the guidelines of the transfer policy which amounts to frequent transfer as it is without any rhyme or reason and inspite of direction by this Hon'ble Court to seek instructions, the State Govt. has not been able to establish the alleged administrative exigency. The practice of abrupt and frequent transfer by abuse of power by State Govt. has been depreciated by the Hon'ble Supreme Court in the matter of B. Varadha Rao V. State of Karnataka reported in (1986) 4 SCC 131 wherein the Hon'ble Court has held that an employer can transfer the employees to meet bonafide exigency of administration but if the transfers are done frequently without any cogent reason of administrative exigency then such transfers are liable to be struck down.

15. Again in the matter of Somesh Tiwari V. Union of India reported in (2009) 2 SCC 592 the Hon'ble Supreme Court has held that though transfer is an incident of service and cannot be interfered with often but if the order of transfer is based on irrelevant ground or without any rhyme and reason it becomes malafide and constitutes 'malice in law'. Relevant extract of the aforesaid judgment is reproduced herein for ready reference.

16. Indisputably an order of transfer is an administrative order. There cannot be any doubt whatsoever that transfer, which is ordinarily an incident of service should not be interfered with, save in cases where inter alia mala fide on the part of the authority is proved. Mala fide is of two kinds-one malice in fact and the second malice in law. The order in question would attract the principle of malice in law as it was not based on any factor germane for passing an order of transfer and based on an irrelevant ground i.e. on the allegations made against the appellant in the anonymous complaint. It is one thing to say that the employer is entitled to pass an order of transfer in administrative exigencies but it is another thing to say that the order of transfer is passed by way of or in lieu of punishment. When an order of transfer is passed in lieu of punishment, the same is liable to be set aside being wholly illegal.

16. Following the aforesaid judgment of Somesh Tiwari (Supra) this Hon'ble court in the matter of Swati Singh V. M.P.K.V.V. Co. Ltd. reported in 2014 (1) M.P.L.J. 308 has held that malice in law means something which is done without lawful excuse. In the present case also the impugned transfer order is made on the ground of alleged administrative exigency, but the respondent State has miserably failed to establish alleged administrative exigency which constitutes malice in law and makes the impugned order Annexure P/4 bad in law. Relevant extract of the judgment of Swati Singh (Supra) is reproduced herein for ready reference:-

22. In the opinion of this court, there is a difference between malice in fact and malice in law. Malice in fact means express or actual malice, ill-will towards a particular person; an actual intention to injure. It implies desire or intent to injure while malice in law or implied malice means wrongful act done intentionally without just cause or excuse (See: Black's Law Dictionary-Sixth Deluxe Edn.). Malice in fact or actual malice relates to the actual state or

condition of mind of the person who did the act. Malice in fact is where the malice is not established by legal presumption or proof of certain facts, but is to be found from the evidence in the case [See (2003) 8 SCC 567 (Chairman and MD, BPL Ltd. v. S.P. Gururaja)]. Malice in its legal sense means malice such as may be assumed for a wrongful act done intentionally, but without just cause or excuse or one of reasonable or probable cause. The term "malice in fact" would come within the purview of the said definition. [see AIR 2006 SC 2912 (R.S. Garg v. State of U.P.) and AIR 1991 SC 1260 (State of Bihar v. P.P. Sharma).

23. This is settled in law that exercise of power for an extraneous or ulterior purpose amount to "malice in law". These are cases where, though the authority has no corrupt motive or personal malice against the party affected, yet the law will impute a fraud on the statute, if he has exercised the power for a purpose other than that for which the enabling provision conferred the power or discretion. Legal malice or malice in law means something done without lawful excuse. In other words, it is an act done wrongfully and willfully without reasonable or probable cause, and not necessarily an act done from ill-feeling and spite. It is a deliberate act in disregard of the rights of the other (See: State of A.P. v. Goverdhanlal Pitti (2003) 4 SCC 739). Where government action is unreasonable or lacking in quality of public interest, though different from that of mala fides, it may in a given case furnish evidence of mala fides (See: Kasturi Lal v. State of J & K (1980) 4 SCC 211). Even if an order is found to be not vitiated by malice in fact, but still can be held to be invalid, if the same is passed for unauthorized purpose as it would amount to malafide in law [see: (2005) 6 SCC 776 (Punjab State Electricity Board v. Zora Singh)]. Interference of mala fides can be drawn by reading in between the lines and taking into consideration the attendant circumstances [see (1994) 6 SCC 98 (N.K. Singh v. Union of India)]. In (2009) 2 SCC 592 (Somesh Tiwari v. Union of India) it is opined that transfer order will be bad in law, if it is issued not based on any factors germane to the passing of an order of transfer and based on irrelevant grounds.

24. At the cost of repetition, in my opinion the transfer order can be passed only in administrative exigency and in public interest. On the basis of aforesaid judgments, it is clear that transfer order can be passed only on the said relevant consideration and purpose. The appreciation letter Annexure P/17 leaves no room for any doubt that the petitioner's continuance at Gwalior was neither against administrative exigency nor public interest. The word "administrative Exigency" and "public interest" are not magic words nor these are 'mantras' which can serve the purpose in any circumstances. These words have definite meaning and in a given case the employer must show the reason for transferring the employee. Reasons must be deservable. Putting it differently, the said words are not like a carpet under which anything can be swept. On the basis of pleadings, material and antecedents facts of this case, in the opinion of this Court, transfer order is passed for extraneous and irrelevant considerations other than the reasons for which valid transfer order can be passed. Such exercise of power amounts to colourable exercise of powers. In (1991) 1 SCC 212 (Kumari

Shrilekha Vidyarthi v. State of U.P.) the Apex Court opined that it is in consonance with the Court's commitment to openness which implies scrutiny of every State action to provide an effective check against the arbitrariness and abuse of power. The Court would much rather be wrong in saying so rather than be wrong in not saying so. Non-arbitrariness, being a necessary concomitant of the rule of law, it is imperative that all actions of every public functionary, in whatever sphere, must be guided by reason for not humour, whim, caprice or personal predilections of the persons entrusted with the task on behalf of the State and exercise of all power must be for public good instead of being an abuse of the power.

17. That, another submission made by the respondents is that though the transfer policy contemplates that ordinarily transfer of employees should not be done before expiry of 3 years but since the transfer policy not having statutory flavor it is not binding. This contention of the Respondents lacks weightage as it is settled position of law that a field which is not occupied by statutory rules can be governed by executive instructions.

Meaning thereby the State Government can fill up gaps and cover areas which otherwise have not been covered by statutory provisions. The aforesaid principle has been laid down in the matter of Union of India V. Central Electrical and Mechanical Engineering Services (CE & MES) Group A (Direct Recruits) Assn. and Others reported in (2008) 1 SCC 354 in Para 10 as under:-

10. It is now a well-settled principle of law that an executive order must be passed in conformity with the rules. Power of the State Government to issue executive instructions is confined to filling up of the gaps or covering the area which otherwise has not been covered by the existing rules. See Sant Ram Sharma v. State of Rajasthan [AIR 1967 SC 1910] and DDA v. Joginder S. Monga [(2004) 2 SCC 297] . Such office orders must be subservient to the statutory rules.

18. Similar question came up for consideration before the Hon'ble Apex Court in the matter of State of M.P. V. S.K. Dubey reported in (2012) 4 SCC 578, wherein the Hon'ble Supreme Court has specifically held that executive powers of state extends to matters with respect to which the legislature of the State has power to make laws. Article 162 of the Constitution gives State Executive coextensive powers with that of the State Legislature and therefore, the transfer policy framed by the State Govt. cannot simply be washed away treating it to be not binding on the State Govt. Relevant extract of the aforesaid judgment is reproduced herein for ready reference:-

30. The moot question that falls for determination in this appeal is: whether in the absence of any express rule in the State Rules, was it open to the State Government of Madhya Pradesh to have provided by way of an executive Order dated 5-4-2002 that the service rendered by the respondent as President of the State Commission would be counted as pensionable service? The incidental

question is: whether such order is inconsistent with Section 16(2) or the State Rules?

31. Subject to the provisions of the Constitution, the executive power of a State extends to the matters with respect to which the legislature of the State has power to make laws. This is what is provided in Article 162 of the Constitution. In other words, the executive power of the State executive is coextensive with that of the State Legislature.

32. In *Sant Ram Sharma* [AIR 1967 SC 1910] this Court negated the arguments advanced on behalf of the appellant therein that in the absence of any statutory rules governing promotions to selection grade posts the Government cannot issue administrative instructions and such administrative instructions cannot impose any restrictions not found in the rules already framed. The Court stated: (AIR p. 1914, para 7)

"7. ... It is true that the Government cannot amend or supersede statutory rules by administrative instructions, but if the rules are silent on any particular point the Government can fill up the gaps and supplement the rules and issue instructions not inconsistent with the rules already framed."

The above legal position has been followed and reiterated by this Court time and again.

33. The Constitution Bench of this Court in *Lalit Mohan Deb* [(1973) 3 SCC 862 : 1973 SCC (L&S) 272] said: (SCC p. 867, para 9)

"9. It is true that there are no statutory rules regulating the selection of assistants to the selection grade. But the absence of such rules is no bar to the administration giving instructions regarding promotion to the higher grade as long as such instructions are not inconsistent with any rule on the subject."

In *Union of India v. Central Electrical & Mechanical Engg. Service (CE& MES) Group 'A' (Direct Recruits) Assn., CPWD* [(2008) 1 SCC 354 : (2008) 1 SCC (L&S) 173] , this Court held that the executive instructions could fill in gaps not covered by the rules but such instructions cannot be in derogation of the statutory rules.

19. The aforesaid proposition of law again came up for consideration before the Hon'ble Supreme Court recently and in the matter of *State of Karnataka V. Krishna Kumar and Others* reported in AIR 2019 SC 3133 the Hon'ble Supreme Court has held that in the absence of statutory provisions the executive functions would have force of law. Relevant extract of the aforesaid judgement is reproduced herein for ready reference:-

9. Even assuming that the provisions of the Act of 2007 and rules thereunder are applicable, since there is no provision to the contrary therein, the provision in question providing for mutual transfer could have been carved out by issuing executive instructions contained in Memo dated 7. 4.2010. No such provision in

the Act and rules has been pointed out with respect to mutual transfers. Particularly when the provisions of 'mutual transfer' which is made in Office Memorandum of 2010, depends on the volition of an employee, there is no compulsion, it cannot be said to be arbitrary. It is ordered only when two incumbents opt for mutual transfer. Thus, Office Memorandum dated 07.04.2010 could not be said to be in violation of the provisions of the Act of 2007 and rules. The Tribunal and the High Court both have misdirected themselves in this regard.

10. In our considered opinion, the provisions of mutual transfer does not militate against the provisions of the Act and rules framed thereunder and particularly, when it was with respect to SSA Scheme, it was open to making certain provisions by way of Office Memorandum dated 07.04.2010. Mere reference to the Act and the rules framed in the same does not mean that the provisions have been adopted for all the purposes. In the same Memo the provisions have been carved out for mutual transfer. In the absence of statutory provision, the executive instructions would have force of law, more so when the SSA is an independent scheme. The SSA Scheme is funded by the Central Government and considering its exigency, independent provisions could have been carved out which is not to be found in the Act of 2007 and the rules framed thereunder.

20. That, the Respondent No. 4 while opposing the petitioner's submissions relied on 2 judgments of the Supreme Court reported in (2004) 4 SCC 245 and (2001) 8 SCC 574 and stated that scope of interference in matters of transfers is limited and prayed for the dismissal of the present petition. True it is that scope of interference in transfer is limited but after considering the aforesaid two judgments relied by the Respondent no. 4 the Hon'ble Supreme Court in the matter of Kendriya Vidhyalaya Sangathan V. Damodar Prasad Pandey reported in (2004) 12 SCC 299 has held that if the order of transfer is vitiated by malafides or made in violation of any operative guidelines the court certainly has the power to interfere with such unbribelled and arbitrary use of power in the cases of transfer. Relevant extract of Kendriya Vidhyalaya Sangathan (Supra) is reproduced herein for ready reference:-

4. Transfer which is an incidence of service is not to be interfered with by courts unless it is shown to be clearly arbitrary or visited by mala fide or infraction of any prescribed norms of principles governing the transfer (see Abani Kanta Ray v. State of Orissa [1995 Supp (4) SCC 169 : 1996 SCC (L&S) 175 : (1996) 32 ATC 107] . Unless the order of transfer is visited by mala fide or is made in violation of operative guidelines, the court cannot interfere with it (see Union of India v. S.L. Abbas [(1993) 4 SCC 357 : 1994 SCC (L&S) 230 : (1993) 25 ATC 844 : AIR 1993 SC 2444]). Who should be transferred and posted where is a matter for the administrative authority to decide. Unless the order of transfer is vitiated by mala fides or is made in violation of any operative guidelines or rules the courts should not ordinarily interfere with it.

21. The aforesaid enunciation of law makes it clear that as a noon day, the impugned transfer order is based on the ground of alleged administrative

exigency which the State Govt. has failed to establish and clearly the impugned transfer order Annexure P/4 is violative of guidelines contained in Transfer Policy which certainly has force of law as demonstrated above and also amounts to "Malice in Law".

22. Therefore, in the light of aforesaid facts and circumstances, the petition filed by the present petitioner is allowed. The impugned order dated 05/07/2019 Annexure P/4 as far as it relates to the petitioner is, hereby, quashed.