
(1997) 03 GAU CK 0028
In the Gauhati High Court
Case No : Writ Appeal No. 168 of 1997

Ramzan Ali Ahmed

APPELLANT

Vs

Taiyab ali ahmed and Others

RESPONDENT

Date of Decision : 27-03-1997

Acts Referred:

Citation : (1998) 2 GLT 242

Hon'ble Judges : V.D. Gyani, Acting C.J.; D.N. Chowdhury, J

Bench : Division Bench

Advocate : S.A. Laskar, J. Mollah and Z. Ikbal, for the Appellant; A.S. Choudhury, I. Hussain and S. Seal, for the Respondent

Final Decision : Allowed

Judgement

V.D. Gyani, Actg. C.J.

1. This Writ Appeal arises out of judgment and order dated 10.3.97 passed by a learned Single Judge of this Court in Civil Rule No. 424 of 1997 thereby dismissing the same. The writ Petitioner/Appellant, who is a teacher, had challenged his transfer order dated 16.1.97 (Annexure-O) from one school to another, on the ground of mala fides and also as violative of established norms, but by the impugned order the same has been dismissed mainly for the reason that the authorities against whom mala fides have been alleged were not made parties to the petition. Hence this appeal.

2. Learned Counsel appearing for the Appellant reiterated the same grounds, with a little more elaboration, as to how the impugned order of transfer is detrimental to Appellant's interest, who is transferred from a planned school to a non-planned school, having direct bearing on tenure of service.

3. Learned Counsel for the caveator-Respondent, on the other hand, placing reliance on the following judgments urged that the impugned judgment does not call for any interference, after all, transfer is an incident of service.

(1) Abani Kanta Ray Vs. State of Orissa and Others,

It was a case of transfer of Registrar alleging malice on the part of the Chairman without any supporting material.

(2) Balwant Singh and another Vs. State of Punjab, holds that transfer made by a competent authority for administrative reasons is not subject to judicial review. The allegation was that transfer was made because of trade union activities, again not supported by any material, therefore. Tribunal's order was set aside.

(3) In N.K. Singh v. Union of India and Ors. (1994) SCC 98, the Apex Court indicated that even while examining the question of malice, the Court will look into record only and not enter into a roving inquiry. It may be noted that the Appellant was occupying a very sensitive post in charge of investigations against some top leaders of the country.

(4) Yohana v. State of Karnataka 1987 (1) SLR 58 (Karnataka H.C.), a Single Bench judgment, holds that even oral instructions given by a higher authority to subordinate officer if reduced to writing and communicated to the concerned authority becomes an order of the authority. It was a case where the Chief Minister had directed the Deputy Commissioner to transfer the Respondent No. 5, not on ground of malice, but on the ground of difficulties felt by him as represented to the Chief Minister by his wife. But, it may be noted that while upholding the transfer order based on oral instructions, the Court observed:

However, it is necessary to make it clear that the aforesaid conclusion does not and shall not be construed to mean that the practice of issuing oral instructions in matters like this, is approved by this Court. It is always better that the instructions are issued in writing in some form or the other, which the authority issuing instructions may find it convenient to adopt. Such a course eliminate the possibility of misuse of the authority by the persons to whom the instructions are issued.

4. The principles and propositions laid down by the Supreme Court are well settled. What we are concerned with, in the instant case, is absence of parties against whom mala fides were attributed, as noted by the learned Single Judge. It is mainly on this ground that the petition was dismissed. As a normal rule, the person or authority against whom malice is alleged should be impleaded as a party. There can be no quarrel with the proposition. Let us now turn to the Appellant's case.

5. The writ Petitioner Appellant has made the following averments in paragraphs 6, 8, 9, 10 and 11:

6. That the Petitioner begs to state here that long after his upgradation as stated above, Respondent No. 3, Sri Taiyab Ali Ahmed, subject Teacher of English in Satrasal Higher Secondary School once approached the Petitioner and requested him for effecting mutual transfer, in other words, he wanted to come to Agomoni Higher Secondary School and Petitioner was requested to go to Satrasal Higher

Secondary School procuring mutual transfer from the authority concerned. But the Petitioner could not and did not concede to that request of the Respondent No. 3. Shortly thereafter, a few young boys belonging to same clubs and political party of the locality threatened the Petitioner to leave Agomoni Higher Secondary School taking transfer therefrom.

8. That after enquiry being made, the Petitioner found that an allegation/complaint petition dated 4.12.96 was lodged before the Director of Secondary Education, Assam, Kahilipara, Guwahati-19 with the prayer for transfer of the Petitioner to Satrasal Bidyapith Higher Secondary School and for transfer of Respondent No. 3 i.e. Shri Taiyab Ali Ahmed to Agomoni Higher Secondary School. Then the Petitioner immediately obtained a copy of the above said complaint petition dated 4.12.96.

9. That having obtained and after going through the complaint/transfer petition dated 4.12.96, the Petitioner finds that some of the signatories are the young boys who earlier threatened the Petitioner to leave Agomoni Higher Secondary School by taking transfer therefrom as stated above. These boys belong to some so called clubs and political party. They are neither guardians of the students nor have they any contribution and/or interest in the school.

10. That the Petitioner begs to state that he has sufficient reasons to believe that the above said complaint/transfer petition dated 4.12.96 has been signed and filed by the signatories therein at the instance of the Respondent No. 3 himself. Earlier also, the Respondent No. 3 patronised some of the boys to threaten and force the Petitioner to leave the School taking transfer. Filing which, the Respondent No. 3 has made the boys to file this allegation/complaint petition dated 4.12.96 for transfer of the Petitioner.

11. That the Petitioner begs to state that everybody of the locality knows that the Respondent No. 3 has obnoxious political relation with the present local M.L.A. Mr. A. Sarkar which is reflected in the endorsement itself made by him in the complaint/transfer petition dated 4.12.96 to the effect - Recommended strongly for consideration with sympathetic order as prayed for by public". Not only this, he also helped in getting the petition endorsed by the Minister of Secondary and Elementary Education, Assam.

6. It is significant to note that nowhere in the petition, Petitioner has attributed the malice either to the M.L.A. or to the Minister-in-charge. The case as pleaded by him is one of colourable exercise of power and not malice or malafide against anyone. In paragraph 16, he has made the following statement:

16. That the Petitioner begs to state and submit that the authority has passed the above said impugned order dated 16.1.97 in view of the complaint/transfer petition dated 4.12.96 without giving any opportunity of being heard to the Petitioner. As such, the impugned order has been passed in clear violation of the principles of natural justice and hence the same is liable to be set aside and quashed.

7. Although the word malafide has been used in paragraphs 22, 25 and 26, it is altogether a different context assailing the transfer order as malafide without imputing any malice or malafide to any particular individual much less to the MLA or the Minister. These paragraphs 22, 25 and 26 are also reproduced below for ready reference:

22. That the Petitioner submits that the impugned transfer order dated 16.1.97 has been passed not for professed purposes such as in normal course or in public or administrative interest or in exigencies of service but for other purpose that is to accommodate the Respondent No. 3 for undisclosed reasons which is absolutely malafide, arbitrary, illegal and without jurisdiction . Hence it is a fit case which warrants Your Lordship's prompt interference by passing appropriate interim order of stay etc.

25. That the impugned order dated 16.1.97 has been passed with malafide intention not in public interest, but to accommodate the Respondent No. 3 in violation of administrative procedure established by law.

26. That the records on production would clearly show and establish that the impugned order has been passed with malafide intention and for extraneous consideration.

8. It is significant to note that while the Respondents State did not file any affidavit-in-opposition, it was the Respondent No. 3, Taiyab Ali Ahmed who moved an application for vacating the stay order dated 29.1.97. While denying the allegations made by the Petitioner about his relationship with the local M.L.A. and Association with club, the Respondent No. 3 in his application dated 24.2.97 has charged the writ Petitioner with having not come to the Court with clean hands, paragraph 5 of the application is quoted below:

5. That the applicant states that the writ Petitioner has not approached this Hon"ble Court with clean hands. He has made allegations that the transfer order was issued in pursuance of the representation filed at his (applicant"s) instance. But the writ Petitioner himself persuaded some of the public to file a representation to the Director of Secondary Education, Assam to stay the transfer order (Annexure-8 to the writ petition) unless a person comes with a clean hands, he cannot expect proper justice.

It is he (Respondent No. 3) who is defending the transfer order, the authorities concerned have not come forward with any affidavit-in- opposition although the leameci Government Advocate had accepted the notice on behalf of Respondents 1 and 2.

9. The Writ Petitioner-Appellant in his affidavit-in-opposition sworn and filed on 3.3.97, all that he has stated in paragraph 5 is reproduced below:

Moreover, the representation was strongly recommended by the local M.L.A. Mr. A. Sarkar who belongs to political party, namely, C.P.I, who also got the representation endorsed by the Minister of Secondary Education, Assam. On

17.12.96 pursuant to which my transfer order dated 16.1.97 has been issued. So, I clearly indicates that the transfer order was issued under political pressure, not in public interest and this political pressure was generated by the Respondent No. 3.

He has also filed a copy of the Resolution No. 5 passed by the Managing Committee of Agomoni H.S. School held on 12.2.97 which runs as follows:

Resolution No. 5.

Today's meeting discussed the transfer of subject teacher Sri Ramjan Ali. Said Sri Ramjan Ali has been transferred as per order of the Director of Secondary Education, Assam and the Principal has released Sri Ramjan Ali from this School on 20.1.97 as per that order. But Sri Ramjan Ali has approached High Court instead of joining at Satrasal School.

Under this circumstances, the meeting resolves that if Sri Ramjan Ali brings any order for re-joining, then the Principal will convene the meeting of the Managing Committee.

10. The Writ Petitioner-Appellant's case was that the impugned order of transfer was passed on extraneous consideration and made under political pressure. It was neither in public interest, nor passed on administrative consideration or grounds as rightly argued by the learned Counsel for the Appellant.

11. The Rules governing transfer whether statutory in character or whether administrative instructions norms or guidelines. No doubt vest to power to pass order of transfer either in the Government or in the appropriate authority, this power to transfer is not disputed. What is disputed is whether the power has been exercised for the purpose for which it is conferred. True it is, as pointed out by the learned Counsel for the Respondents that the impugned order of transfer itself recites that it was being passed in public interest. This recitation in the order does not ipso facto means that it was passed in public interest. It is not a shield against the court's enquiry. The question, therefore, is whether the impugned order of transfer as passed against the writ Petitioner-Appellant was a colourable exercise of power by the authority concerned other than which, it has been erroneously misconstrued as a case of malice or malafide imputed against either against the M.L.A. or the Minister-in-charge. In view of the pleadings as quoted above, the writ Petitioner Appellant came before this Court with a colourable exercise of power by the authority who passed the impugned order of transfer. As already noted above, the concerned authority has not come out with an affidavit justifying its action in public interest. Mere use of the expression "In public Interest" does not make the order as passed in public interest, more so in face of the facts as placed on records by the writ Petitioner-Appellant. His case is one of colourable exercise of power, the order of transfer was passed not in public interest, but under political pressure. What has brought to be seen in the case is not the imputations of malice as assumed, but not actually made against the M.L.A. or the Minister-in-charge. It is the colourable exercise of power by the

authority passing the impugned order of transfer. In such a case it was not necessary for the writ Petitioner to implead the Minister or the M.L.A. as they were not necessary parties. No allegations made against them much less any relief sought from or against them.

12. There are serious allegations were made in the writ petition in support of the plea that the order has been passed against the Petitioner was made in colourable exercise of power, the Court cannot omit to consider the plea. The proper approach in such a case is to consider the allegation to gather and find out whether those allegations of colourable exercise of power has been made out and whether the allegations are sufficient to prove extraneous consideration having gone into the decision making process of transfer order. In these view of the matter, it was for the authority concerned to come forward and say that while passing the impugned order of transfer, he was not influenced by any extraneous consideration, such as recommendation made by the political powers. In absence of such affidavit coming from the authority concerned, namely, the Respondent No. 2, the allegation of colourable exercise of power are amply made out when facts as alleged in the writ petition have gone uncontroverted by the concerned authorities, they can deemed to have been accepted. (See Smt. Naseem Bano Vs. State of U.P. and others,

13. The impugned judgment proceeded on erroneous assumption that it was a case of malafides imputed against the Minister-in-charge or the M.L.A. who were not made parties to the petition while in fact it is not so. The writ Petitioner Appellant has filed a copy of resolution dated 12.2.97 as passed by the Managing Committee, Annexure-1(I) and a photo copy of the letter dated 8.2.97, Annexure-I-H written by the Principal, Agomoni H.S: School to the Director of Secondary Education which is indicate of the minds of the autfiorities, despite this Court's stay order dated 29.1.97 suspending the operation of transfer order dated 16.1.97 the Principal of the School writes to the Director that the writ Petitioner was not allowed to join in the School as is evident from Annexure-I-H filed by the writ Petitioner in M.C. Case No. 137 of 1997 and the reason assigned for not allowing him to join is "as no information was received from the Director". The letter itself is reproduced below for ready reference:

With reference to your letter No. GB/EST/TRN/24/93/30 dated 16.1.97 Sri Ramjan Ali Ahmed, S.T. Agomani H.S. School has been released from this school on 20.1.97. But Sri Taiyab Ali Ahmed has not been released from Satrasal H.S. Vidyapith and could not join here till today. In the meantime Sri Ramjan Ali Ahmed has returned to this institution on 1.2.97 with Hon"ble High Court's order. He is not allowed to join this institution as no information has not yet been received from your end.

This is for your kind information and necessary action.

What more remains in the case to infer colourable exercise of power on the part of the authorities? The learnt Single Judge mistook it to be a case of malice

imputed against the MLA or Minister-in-charge which it was certainly not as has been pointed out by the Supreme Court in B. Prabhakar Rao and Others Vs. State of Andhra Pradesh and Others, merely because certain questions have to be determined incidentally in giving or not giving the relief asked for in the petition does not make each and every persons interested in such question necessary parties to such proceeding. In the instant case necessary parties, the authority passing the transfer order was very much there and it was for him to satisfy the Court that the impugned order of transfer was not made on any extraneous consideration or any colourable exercise of power, it was in fact public interest as professed in the order, but that has not been done. The impugned order is liable to be set aside on this count.

14. There is yet another aspect of the matter. The order of transfer jeopardises the Appellant's tenure of service. It is a transfer from non-plan to plan school.

15. In view of the foregoing discussions, this appeal deserves to be allowed, it is accordingly allowed. The impugned order under appeal is set aside. The writ petition. Civil Rule No. 424/97 is allowed and the impugned order of transfer dated 16.1.97, Annexure-3 is quashed. It is a case for imposition of cost. But we purposely refrained from imposing any cost in the hope that in future such colourable exercise of power should not be repeated. Appeal allowed.