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**(2010) 01 AHC CK 0261**  
**In the Allahabad High Court**

Santosh Kumar Bhardwaj

APPELLANT

Vs

Education Director (Madhyamik) and Others

RESPONDENT

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**Date of Decision :** 07-01-2010

**Acts Referred:**

**Citation :** (2010) 2 AWC 2044 : (2010) 2 UPLBEC 1293

**Hon'ble Judges :** Sudhir Agarwal, J

**Bench :** Single Bench

**Final Decision :** Allowed

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## Judgement

Sudhir Agarwal, J.—Heard learned Counsel for the petitioner, the learned standing counsel representing the respondent Nos. 1 to 4 and Shri Mohd. Zahid holding brief of Sri Ayub Khan who has appeared on behalf of the newly impleaded respondent No. 5.

2. With the consent of learned Counsel for the parties this writ petition have been heard and is being decided finally under the Rules of the Court.

3. The petitioner is aggrieved by the order dated 9.12.2009, passed by the Additional Director of Education, U.P., Allahabad transferring the petitioner in special circumstances and in the interest of students from Government Inter College, Bulandshahr to Government Inter College, Pahasu, Bulandshahr on the post of Lecturer (Hindi).

4. It is contended that the transfer of the petitioner is illegal having been made under the undue influence of respondent No. 5 inasmuch as the petitioner is going to retire on 30.6.2010 and there was no occasion to shift him in another college while he is making preparation of his retirement. It is also contended that the petitioner's three daughters are studying in Degree College, Bulandshahr and his lone elder son has died.

5. Learned standing counsel pursuant to this Court's order dated 5.1.2010 has produced the record showing the correspondence with reference to the transfer

of the petitioner and submits that since the petitioner was working against the post of Lecturer (Hindi), therefore, he was to be transferred to an Institution where the post of Lecturer (English) is available.

6. However, the newly impleaded respondent No. 5, i.e., Vishwapal Singh submitted that he is an Assistant Teacher and has recently been promoted to the post of Lecturer (Hindi) with the approval of the Public Service Commission and posted at Rajkiya Inter College, Bakner, Aligarh. He is also President of Rajkiya Shikshak Sangh, U.P., Meerut Mandal and President of Sahkari Samiti Vetanbhogi, Rajkiya Inter College, Bulandshahr which is an association of the teaching staff of the Government Colleges where he has been elected till 31.3.2012. Since he requested for the appointment and posting at Bulandshahr and, therefore, by order dated 9.12.2009 his order of transfer was modified posting him at Government Inter College, Bulandshahr and the petitioner has been transferred to Government Girls Inter College, Pahasu, Bulandshahr. It is submitted that the respondent No. 5 has already joined the Government College, at Bulandshahr pursuant to the transfer order dated 9.7.2009 and, therefore, no interference is called for.

7. I have perused the entire record and considered rival submissions. I am satisfied that the order of transfer of the petitioner is vitiated on account of malice in law and has been passed by the respondent No. 2 by not exercising power of transfer independently and in accordance with law.

8. It is evident that considering the family conditions of the petitioner he was transferred on his own request and posted as Lecturer (English) in Government Inter College, Meerut vide order dated 20.6.2008. Admittedly the petitioner is going to retire on 30.6.2010. There was no occasion for transfer of the petitioner just a few month prior to his retirement and it appears that the respondent No. 5 who was only an assistant teacher was transferred by order dated 5.10.2009 at Vikram Singh Rajkiya Inter College, Bakner, district Aligarh. He did not join thereat and instead pursued for change of place and succeeded in getting his posting at Bulandshahr. In this regard the Principal of Government Inter College, Bulandshahr sent a letter dated 12.10.2009 recommending posting of respondent No. 5 at Government Inter College, Bulandshahr as Lecturer (Hindi) against the vacancy of Lecturer (Physics) till 30.6.2010 and thereafter when the petitioner retire, to accommodate respondent No. 5 against the vacancy of Lecturer (Hindi). The respondent No. 2, however, by means of the impugned order sought to transfer the petitioner from Government Inter College, Bulandshahr to Government Girls Inter College, Pahasu and accordingly permitted respondent No. 5's transfer at Government Inter College, Bulandshahr. The only reason shown by respondent No. 2 vide letter dated 6.1.2010 which has been produced by the learned standing counsel before this Court that since the petitioner was working against the post of Lecturer (Hindi) therefore she did not find any justification for his continuance in the institution in question and thus he has been transferred. No other special reason regarding the

interest of the students has been explained by respondent No. 2.

9. I am satisfied that the impugned order of transfer has been passed under the influence of respondent No. 5 who was holding a political influence being President of Rajkiya Shikshak Sangh, U.P., Meerut Mandal and President of Co-operative Society of the Employees of Rajkiya Inter College, Bulandshahr, which is also evident from the letter of the respondent No. 3.

10. It is true that an order of transfer is not normally interfered unless it is shown to be violative of statutory rules or is without jurisdiction or is vitiated on account of mala fide. In the case in hand the earlier two factors are not existing but the impugned order of transfer is certainly vitiated on account of mala fide. It is not malice in fact but it is malice in law.

11. The order impugned in the writ petition sought to suggest as if there was some extraordinary circumstance which compelled the respondent No. 2 to transfer the petitioner but on closer scrutiny no such reason could be assigned by her. Even the Principal of Government Inter College, Bulandshahr had not found any such reason but he has simply stated that the petitioner may continue till 30.6.2010. The Principal of the Government Inter College has nowhere raised any complaint that on account of working of the petitioner at Government Inter College, Bulandshahr the studies of the students in any manner adversely affected or that it was causing any prejudice to the interest of the students. The respondent No. 2, however, has mentioned two reasons for transfer of petitioner, i.e., special circumstances and in the interest of the students. But both the said reasons, this Court finds non-est.

12. When an order is apparently sought to be passed on allegedly existence of certain facts or circumstances which in fact, does not exist it makes order passed not in a bona fide manner but for collateral purposes. An order which is not bona fide but has been passed for collateral purposes, amounts to exercise of power with malice in law. There is no manner of doubt that an order of transfer can be passed at any time in public interest and no employee has any right either to hold the post at a particular place or to claim that he/she should be posted at the place of his/her choice. Even in an ordinary course of business the administrative authority can always change the place of posting of its employees for various reasons but where an order of transfer is sought to be passed under the influence of certain factors which are not within the domain of administrative exigencies, for example, political consideration etc., such an order cannot be said to be an order of transfer in public interest and bona fide exercise of power on the part of competent authority. It would amount to an act tainted with malice in law.

13. The malice in law is quite a distinct factor to malice of fact. The power which is said to have been exercised on account of mala fide may be vitiated on account of either malice in fact or malice in law. In *Shearer v. Shields* (1914) AC 808 at 813, Viscount Haldane described "malice in law" as under:

A person who inflicts an injury upon another person in contravention of the law is not allowed to say that he did so with an innocent mind ; he is taken to know the law, and he must act within the law. He may, therefore, be guilty of malice in law, although, so far the state of his mind is concerned, he acts ignorantly, and in that sense innocently.

14. Again in *Pilling v. Abergele Urban District Council* (1950) 1 KB 636, Lord Goddard, C.J., said that where a duty to determine a question is conferred "on an authority which state their reasons for the decision, and the reasons which they state show that they have taken into account matters which they ought not to have taken into account or that they have failed to take matters into account which they ought to have taken into account, the Court to which an appeal lies can and ought to adjudicate on the matter.

15. Lord Esher M.R. in *Queen on the Prosecution of Richard Westbrook v. Vestry of St. Pancras* (1890) 24 QBD 371 at 375, said:

If people who have to exercise a public duty by exercising their discretion take into account matters which the Courts consider not to be proper for the guidance of their discretion, then in the eye of the law they have not exercised their discretion.

16. Thus, malice in its legal sense means malice such as may be assumed from the doing of a wrongful act intentionally but without just cause or excuse or for want of reasonable or probable cause.

17. The Apex" Court has summarised "malice in law " in (Smt.) Smt. S.R. Venkataraman Vs. Union of India (UOI) and Another, as under:

It is equally true that there will be an error of fact when a public body is prompted by a mistaken belief in the existence of a non-existing fact or circumstance. This is so clearly unreasonable that what is done under such a mistaken belief might almost be said to have been done in bad faith ; and in actual experience, and as things go, these may well be said to run into one another.

18. The Apex Court further in para 9 of the judgment in *S.R. Venkatraman* (supra) observed:

9. The influence of extraneous matters will be undoubted where the authority making the order has admitted their influence. It will therefore be a gross abuse of legal power to punish a person or destroy her service career in a manner not warranted by law by putting a rule which makes a useful provision for the premature retirement of Government servants only in the "public interest", to a purpose wholly unwarranted by it, and to arrive at quite a contradictory result. An administrative order which is based on reasons of fact which do not exist must, therefore, be held to be infected with an abuse of power.

19. In *Mukesh Kumar Agrawal v. State of U.P. and Ors.* JT 2009 (13) SC 643 :

2010 (1) AWC 537 (SC), the Apex Court said:

We also intend to emphasize that the distinction between a malice of fact and malice in law must be borne out from records ; whereas in a case involving malice in law which if established may lead to an inference that the statutory authorities had acted without jurisdiction while exercising its jurisdiction, malice of fact must be pleaded and proved.

20. In *Somesh Tiwari Vs. Union of India (UOI) and Others*, dealing with the question of validity of an order of transfer on the ground of malice in law, the Apex Court in para 16 of the judgment observed as under:

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.

21. In *H.M.T. Ltd. rep. by its Deputy General Manager (HRM) and Another Vs. Mudappa and Others*, , the Apex Court in paras 18 and 19 defined malice in law by referring to "Words and Phrases Legally Defined, 3rd Edn., London Butterworths, 1989" as under:

The legal meaning of malice is "ill-will or spite towards a party and any indirect or improper motive in taking an action". This is sometimes described as "malice in fact". "Legal malice" or "malice in law" means "something done without lawful excuse". In other words, "it is an act done wrongfully and wilfully 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 others.

19. It was observed that where malice was attributed to the State, it could not be a case of malice in fact, or personal ill-will or spite on the part of the State. It could only be malice in law, i.e., legal mala fide. The State, if it wishes to acquire land, could exercise its power bona fide for statutory purpose and for none other. It was observed that it was only because of the decree passed in favour of the owner that the proceedings for acquisition were necessary and hence, notification was issued. Such an action could not be held mala fide.

22. In brief the malice in law can be said when a power is exercised for an unauthorized purpose or on a fact which is claimed to exist but in fact, is non-existent or for the purpose for which it is not meant though apparently it is shown that

the same is being exercised for the purpose the power is supposed to be exercised. [See The Manager, Government Branch Press and Another Vs. D.B. Belliappa, Punjab State Electricity Board Ltd. Vs. Zora Singh and Others, K.K. Bhalla Vs. State of M.P. and Others, P. Mohanan Pillai Vs. State of Kerala and Others, M.P. State Co-op. Dairy Fedn. Ltd. and Another Vs. Rajnesh Kumar Jamindar and Others, Swaran Singh Chand Vs. Punjab State Electricity Board and Others, and Sri Yerneni Raja Ramchander @ Rajababu Vs. State of A.P. and Others,

23. In the case in hand, here also respondent No. 2 has sought to transfer the petitioner by observing that it is for special circumstances and in the interest of students. However, when the record was examined and the alleged special circumstances as also the interest of the students were sought to be clarified, what is borne out is that to accommodate respondent No. 5 who wields extra political power being office bearer of associations of teachers, the impugned order of transfer has been passed. The reasons which are assigned in the order of transfer are, in fact, non-est.

24. It is really surprising that the executive authority like respondent No. 2 who is supposed to exercise its power of transfer in a most responsible and bona fide manner has yielded to undue influence of respondent No. 5 and passed the order of transfer disturbing the petitioner just a few months prior to his retirement when he is in the midst of preparation for his retirement. At this stage an order of transfer, no doubt, is bound to cause some disturbance to his entire family and that too, when it is only for a few months. I have no hesitation in holding that respondent No. 2 has exercised her power in a most illegal and unwarranted manner and the impugned order is vitiated on account of mala fide, i.e., malice in law as discussed above.

25. In the result, the writ petition succeeds and is allowed. The impugned order of transfer dated 9.12.2009 is hereby quashed.

26. The petitioner shall be entitled to cost which is quantified to Rs. 25,000 qua respondent No. 2.