

(1999) 07 AHC CK 0128
In the Allahabad High Court
Case No : C.M.W.P. No. 15098 of 1999

Shashi Dutt Pandey

APPELLANT

Vs

Baleshwar Tyagi, Minister of State, Basic Education, U.P. and
others

RESPONDENT

Date of Decision : 15-07-1999

Acts Referred:

Constitution of India, 1950 — Article 226
Uttar Pradesh Basic Education Act, 1972 — Section 2, 9, 9(1), 9(3)

Citation : (1999) 4 AWC 2831 : (1999) AWC 2831

Hon'ble Judges : D.K. Seth, J

Bench : Single Bench

Advocate : Dinesh Dwivedi, for the Appellant; N.D. Rai, for the Respondent

Final Decision : Dismissed

Judgement

D. K. Seth, J.—Mr. Dinesh Dwivedi, learned counsel for the petitioner in support of his contention while challenging the order of transfer dated 8th February, 1999 contained in Annexure-4 to the writ petition, contends that the petitioner has been transferred by virtue of an order passed by the Minister of Basic Education, who is an authority outside the Board and cannot have passed the impugned order of transfer. The order of transfer has since been passed by the Board only at the dictate of the Minister. which is wholly impermissible. Neither a Minister could intervene nor the Secretary is bound by such dictates. According to him, though the order of transfer has been dressed as an independent order of transfer, but was prompted by the dictate of the Minister. According to him. there was no application of mind on the part of the Secretary of the Board in Issuing the order of transfer. He then contends that such transfer order could be passed only within the district and the petitioner having been appointed by the District Basic Education Officer and his seniority is being counted on the basis of the district itself, there was no scope for transferring him outside the district. Such transfer would affect the petitioner's service condition in that it will affect his seniority in other district and he will not be eligible to future promotions outside

the district. He next contends that it appears from the counter-affidavit that such transfer has been affected by reason of certain allegations against the petitioner, which is two years" old. Originally one order of transfer was issued against him on the basis of some allegations and, thereafter, the said order was recalled. There cannot be revival of the same order once again. On these grounds, he assails the order of transfer.

2. Mr. N. D. Rai, learned counsel for the respondents on the other hand points out from Annexure-C.A. 5, which is dated 25th July. 1996 that Instructions have been issued with regard to the fixation of seniority of persons transferred from one district to another district on administrative exigencies or on own request. Thus. It does not appear from the materials available before this Court that transfer of a staff from one district to another is prohibited. He also contends that there are serious allegations against the petitioner. which necessitated his transfer.

3. I have heard both the learned counsel at length.

4. According to Mr. Dwivedi, by reason of Section 9 of the U. P. Basic Education Act, there cannot be any transfer outside the district since the petitioner was an employee of the local body before his service was taken over by the Board. Unless the petitioner gives consent, it is not open to the respondents to transfer him outside the district.

5. In order to appreciate his contention, it is necessary to quote Section 9 as hereinafter :

"9. Transfer of employees.--(1) On and from the appointed day every teacher, officer and other employees serving under a local body exclusively in connection with basic schools (including any supervisory or inspecting staff) immediately before the said day, shall be transferred to and become a teacher, officer or other employee of the Board and shall hold office by the same tenure, at the same remuneration and upon the same other terms and conditions of service as he would have held the same if the Board had not been constituted and shall continue to do so unless and until such tenure, remuneration and other terms and conditions are altered by Rules made by the State Government in that behalf :

Provided that any service rendered under the local body by any such teacher, officer or other employee before the appointed day shall be deemed to be service rendered under the Board : -

Provided further that the Board may employ any such teacher, officer or other employee in the discharge of such functions under this Act as it may think proper and every such teacher, officer or other employee shall discharge those functions accordingly.

(2) Nothing in sub-section (1) shall apply to any teacher, officer or other employee, who by notice in writing in that behalf to the State Government within

a period of two months from the appointed day intimates his option for not becoming an employee of the Board, and where any employee gives such notice, his service under the local body shall stand determined with effect from the appointed day and he shall be entitled to compensation from the local body, which shall be as follows :

(a) in the case of a permanent employee, a sum equivalent to his salary (including all allowances) for a period of three months or for the remaining period of his service, whichever is less ;

(b) in the case of a temporary employee, a sum equivalent to his salary (including all allowances) for one month or for the remaining period of his service, whichever is less.

(3) Notwithstanding anything in sub-section (1), any person referred to therein, who becomes an employee of the Board shall be liable to be transferred from the school or from the local area in which he was employed immediately before the appointed day to any other school or institution belonging to Board or, as the case may be, to any local area at the same remuneration and on the same other terms and conditions of service as governed him immediately before such transfer : (until such tenure, remuneration and other terms and conditions are altered by the Rules referred to in sub-section (1) :

Provided that no teacher of a basic school which before the appointed day belonged to local body shall be transferred to a basic school belonging to any other local body except with his consent.

(4) if any question arises whether the services of any person stand transferred to the Board under sub-section (1) of as to the remuneration and other terms and conditions of service of such employee immediately before the appointed day. It shall be decided by the State Government whose decision shall be final.

(5) Any provident fund maintained by any local body for the employees referred to in subsection (1). along with all contributions of such employees as well as of the local body which ought to have been but have not been deposited therein before the appointed day, shall be transferred by the local body to the Board, which shall hold it in trust for the employees concerned in accordance with the terms and conditions governing such fund.

(6) The transfer of services of any employee to the Board under sub-section (1) shall not entitle any such employee to any compensation and no such claim shall be entertained by any Court. Tribunal or authority.

6. A plain reading of the said section shows that existing employees under the local body mentioned before the constitution of the Board, shall stand transferred to the Board and shall held office by the same tenure at the same remuneration and upon the same terms and conditions of service as he would have held if the Board was not constituted, unless the conditions are altered by rules made by the Government in that behalf.

According to Mr. Dwivedi, no rule has been framed prompting transfer of such employees of the Board outside the district. Pointing out from the U. P. Basic Education Staff Rules, 1973. he contends that the said rule does not provide for anything with regard to transfer from one district to the other. Therefore, according to him, he cannot be transferred anywhere.

But it is clear from sub-section (3) of Section 9 of the said Act that a person referred to in sub-section (1) who becomes an employee of the Board shall be liable to be transferred from the school or from the local area in which he is employed with immediate effect after the appointed day to any other school or institution belonging to Board or, as the case may be, to any local area at the same remuneration and on the same other terms and conditions of service as governed him immediately before such transfer unless altered by the Board. In the proviso, it has been provided that a teacher working before the appointed day in a school belonging to the local body shall not be transferred to a basic school to any other local body except with his consent.

7. Section 9, sub-section (1) does not say anything about the transfer of staff from one area to another. On the other hand. It prescribes the status of a person employed before the appointed date or constitution of the Board and it provides that a person who was appointed before the appointed day. his service shall be transferred to the .Board. Thus, even if he was employed before the appointed day, his service would stand transferred under the Board and not under the district authority any more, whereas subsection (3) makes it clear that his service can be transferred from one local area to another local area or to any other school or institution belonging to the Board. The only exception provided in the proviso is with regard to a person employed in a school under the local body. Admittedly, the petitioner is not employed in a School under a local body. He is an employee of the Board.

Mr. Dwivedi, however, contends that the petitioner had been working under the Zila Parishad. which is a local body. According to him, local body as defined u/s 2 (e) of the said Act includes Zila Parishad.

But then the contention of Mr. Dwivedi does not seem to contain any force since the embargo provided in the proviso relates to a teacher of basic school belonging to a local body. The petitioner is admittedly a staff and not a teacher. In order to come within the embargo provided in the proviso, two conditions are to be fulfilled that (1) he must be a teacher, (2) in a school under a local body. Admittedly the petitioner was employed in the office of the Zila Parishad, which used to deal with a school, as a staff. He is still working in the office of the District Basic Education Officer as staff. Since he is not a teacher, he cannot come within the purview of the said proviso. Then again, he is not being employed under a school of the local body, he cannot take advantage of the said proviso. Therefore, he can accordingly be transferred in terms of sub-section (3) of Section 9. Therefore, I am unable to accede to the contention of Mr. Dwivedi with regard to the prohibition of transfer from one district to another in the facts

and circumstances of the case, particularly when the petitioner is a clerk in the office.

8. The second contention of Mr. Dwivedi that at the dictate of Minister, no transfer order could be passed may, now, be examined.

9. Mr. Rai had relied on the Full Bench Decision in the case of Tara Prasad Misra v. State of U. P. and others 1990 2 UPBEC 905. wherein it was held that if there are complaints even at the dictate of a Minister, a person can be transferred. Mr. Dwivedi, however, contended that the said decision does not apply in the present case. Since it was in relation to the service of a Government employee. Whereas, there is a distinction between a Government employee and an employee of the Board. The Board is an independent authority and a distinct and different legal entity from that of a Government. The petitioner is not a Government servant. The Board has a separate existence from the Government. Therefore, the said decision cannot be attracted in the facts of the present case.

10. It seems that there might be some substance in the submission of Mr. Dwivedi. But at the same time, it may be remembered that it is the Government who has some amount of responsibility to control educational affairs of the State. It has general responsibility of the administration with regard to education throughout the State. Zila Parishad is a different entity and has its separate existence different from the State Government but it cannot be segregated on account of its separate entity altogether.

In the present case, there are, prima facie, certain allegations against the petitioner right from 1977. On one occasion, he was transferred and ultimately the order of transfer was recalled. Then again, such order of transfer has been passed. Documents disclosed in the counter-affidavit show particularly Annexure-C. A. 4A, which is dated 28th November. 1998, that there are some allegations against the petitioner which necessitated his transfer. Had there been no dictate of the Minister, even then it would have been open to the Board to transfer the petitioner outside the district by reason of such allegation. But then according to Mr. Dwivedi. the order of transfer has been prompted by reason of the dictate of the Minister.

However, as pointed out by Mr. Rai that the order of transfer does not indicate that it was being Issued in terms of the order of the Minister. On the other hand, it shows that it might have been passed on the report dated 28th November. 1998. contained in Annexure-C.A. 4A. Thus, it appears that even if there was a dictate of a Minister that whether the same has influenced or not is an abstract question. But still then from the record. It appears that there were some amount of application of mind on the part of the Board in transferring the petitioner. The allegations whether they are correct or not, they cannot be ascertained at this stage. But prima facie allegations that have been made appear to be of serious consequences and nature. which may even warrant transfer of such person outside district in administrative exigencies. But that is a question which cannot

be decided by this Court.

The observations made above, are not observations made by the Court with regard to the merits of the case. But it is only a tentative for the purpose to ascertain as to whether there was any application of mind on the part of the respondents to transfer the petitioner on administrative exigencies.

If there are administrative exigencies. It is open to the respondents to transfer a person. It is not for the Court to interfere with the sufficiency of such administrative exigencies. The Court cannot interfere at every stage of administration. Therefore, even if there was an order by a Minister, it cannot be said that the order of transfer was prompted by the order of the Minister alone. Even if there was an order by a Minister, the same might be respected by applying independent mind to the necessity of such transfer. If it is so done, it cannot be said that it was wholly done at the dictate of a Minister. On the other hand the Board had so applied its own mind to the facts and circumstances of the case.

11. The administration of the Government has its own set up. The entire administration has been divided in different departments. The different departments have been given under the charge of different Ministers. The Minister is responsible generally for the working of his department. He is accountable to the electorate who had returned him. He exercises overall supervision over the whole department. For the sake of convenience, one department may assign some of its responsibilities to some autonomous bodies. Such autonomous bodies are autonomous in the matter of its administration. But then it has general accountability to, the department under which it runs. Autonomy of an autonomous body is not independent to the extent that it is free from the advice of the head of the department. The head of the department may not interfere with the day to day running of the autonomous body. But in the case of necessity apart from deciding or laying down policies, it may advise such autonomous bodies. Such advices may not be directives or commands but still then these advices require to be respected and cannot be ignored altogether. If it is necessary in the interest of the department such advices have some importance as a guidance for such autonomous body. However, such advices may not be treated as dictates. The Minister may not be a dictator. But as a paterfamilias, he has every right to issue instructions/ advices.

12. However, such instructions or advices, whether are dictates or commands, are open to scrutiny, if challenged, in Court through judicial proceeding. In such circumstances, the Court cannot reverse such advices or instructions in limine without applying its mind. The Court has to examine or scrutinise the advice and its necessity and the manner in which it has been acted upon. It has to find out whether it is a dictate or command and such autonomous bodies had carried out the same without applying its mind. The Court may also examine whether such orders are administrative or apolitical. In order to establish that the order is an administrative one, a nexus to the administrative necessity is to be traced out

from the materials or records available. If it is found that it is so necessary in the general administration and well being of the department as a whole or if such order has the Impact of furthering the object of maintaining efficiency or transparency of the administration, in that event, the instruction or advice of the Minister cannot be thrown out. If there is no mala fide or high-handedness in the matter or the advice in that event, the same cannot be interfered with by the Court, if at each stage, the Court interferes in that event, it would be extremely difficult for the administration to run it. The jurisdiction of the Court is limited to the extent of examining the advice or instruction as to whether the same suffers from malice or mala fide or perversity or high-handedness. If there are materials on which it is possible to conclude that there were administrative necessity or administrative exigency which necessitated to issue of the instruction or the advice. Even if the Court is of different view on the basis of such materials, it will not interfere unless malice, mala fide, highhandedness and perversity or any one of it writ large on the face of it. The Court does not run the administration and it does not propose to interfere at every stage of the administration at the throw of a hat. It acts only as a sentinel that the authorities are acting bona fide and in the Interest of the administration itself.

13. Then again the same principle, as has been laid down by the Full Bench in the case of Tara Prasad Misra (*supra*) can also be applied in the present case to the extent that having general responsibility of administration, a Minister may also advise. It is open to the Board to act upon it or to send a report indicating its Inability. If the Board acts upon it applying its own mind, the same may not be prejudicial simply on the ground that there was some amount of advice from the Minister.

14. Whether these allegations are correct or incorrect, is a question which is yet to be determined. Since there are certain allegations, the respondents may take appropriate steps if so advised. The order of transfer as it appears *prima facie*. does not seem to be so adverse as to be struck down in the facts and circumstances of the case and on the basis of the materials placed before this Court.

15. In that view of the matter, I do not see any reason to interfere. The Writ Petition therefore, falls and is accordingly, dismissed. No costs.