

(2014) 04 PAT CK 0012

In the Patna High Court

Case No : Civil Writ Jurisdiction Case No. 21860 of 2013

Sheikh Kalam

APPELLANT

Vs

The Union of India

RESPONDENT

Date of Decision : 25-04-2014

Acts Referred:

Administrative Tribunals Act, 1985 — Section 19
Constitution of India, 1950 — Article 226, 311(2)

Citation : (2014) LabIC 4183 : (2015) 1 PLJR 405

Hon'ble Judges : S.P. Singh, J;I.A. Ansari, J

Bench : Division Bench

Advocate : Chittranjan Sinha, Sr. Advocate, Sudhir Singh and Raghwanand,
Advocate for the Appellant; N.A. Shamsi, A.S.G, Advocate for the Respondent

Judgement

I.A. Ansari, J.—Whether an order of transfer, which appears to be innocuous in nature, is sustainable in law if the order, though apparently innocuous, is, in reality, an order of transfer made as a measure of penalty or is, in effect, stigmatic in nature? This is the moot question, which has been raised in the present writ petition made under Article 226 of the Constitution of India. In this writ petition, the petitioner has sought for quashing of the order, dated 18.09.2013, passed, in O.A. No. 380 of 2013, whereby the learned Central Administrative Tribunal, Patna Bench, has refused to interfere with the order, dated 19.06.2013, where-under the petitioner has been transferred.

2. In a narrow compass, the material facts, which have given rise to this writ petition, may be set out as under:--

(i) The petitioner herein, Sheikh Kalam, came to be posted, on 15.02.2013, as Superintendent of Post Offices (in short, "SPOs"), Begusarai Division. Before completing a period of four months as SPOs, Begusarai Division, the petitioner, on 19.06.2013, has been transferred and posted as Deputy Chief Postmaster (M & T), Patna G.P.O. By the same order, dated 19.06.2013, aforementioned, it is the respondent No. 7, namely, B.D. Singh, who has been posted, on his own

request, against the said post of SPOs, Begusarai Division. The order, dated 19.06.2013, transferring the petitioner, made it, however, clear that so far as the posting of B.D. Singh was concerned, the same would be made separately and, on 19.06.2013 itself, an order was made transferring B.D. Singh, who was A.D. (Mails), C.O., Patna, as SPOs, Begusarai, which post had fallen vacant, because of transfer order of the petitioner from the post of SPOs, Begusarai Division.

(ii) The petitioner made his representation, dated 19.6.2013, itself, against his transfer order seeking cancellation thereof on several grounds including the ground that he had barely completed four months as SPOs, Begusarai Division.

(iii) Thereafter, the petitioner filed an application, under Section 19 of the Administrative Tribunal Act, 1985, before the learned Central Administrative Tribunal, Patna Bench. This application came to be registered as Original Application (in short, "O.A") No. 380 of 2013. By the O.A. aforementioned, the petitioner sought for setting aside and quashing the impugned order of transfer, dated 19.06.2013, whereby the petitioner, as indicated above, has come to be posted as Deputy CPM (M & T), Patna G.P.O.

(iv) The State-respondent resisted the O.A. by filing a written statement, wherein it was stated, inter alia, as under:

".....As a Divisional Head, apart from his statutory function and day to day administration, it was also expected from him to give his attention to monitoring the various parameters fixed for above mentioned project and bring about improvement in it. However, the results are as below:

1. The target/tolerance level for missents articles is 5% but as on 19.6.2013 it was 42% in Begusarai Division.

2. Target/tolerance level for undelivered articles is 5% only. It was 16% as on 15.2.13 which was increased upto 49% as on 19.6.2013 in Begusarai Division.

3. The applicant failed to make the speed net booking and delivery of office operational in all computerized POs under his control. The target for making them operational was 43 and 39 respectively but it could be made operational only at 26 POs respectively by him as on 19.6.13.

4. Interest posting work for the year 2012-13 was due to be completed by April, 2013. But this work was found incomplete in 20 Post Offices under his control as on 19.6.13.

5. The applicant failed to make functional all modules/software relating to e-payment and e-MO in all 43 computerized Post Offices under his control

6. That it is also not out of place to state here that within a short span of posting of months, complaints against the applicant regarding alleged irregular activities started coming, though those have not been enquired into.

7. x x x x x x x x x

8. That keeping in view the above facts, the applicant was transferred from the post of SPOs, Begusarai Division to the post of Dy. CPM. (M & T) Patna GPO vide Annexure-1/6 and Sri B.D. Singh has been posted as Suptd. of Post Offices, Begusarai Division, who has already joined on 20.06.2013 F/N as SPOs, Begusarai and as such, the application under reply have no legs to stand. However, para-wise reply of the application is given as under."

(v) By its order, dated 18.9.2013, the learned Central Administrative Tribunal, Patna Bench, dismissed the O.A. In its order, dated 18.09.2013, aforementioned, the learned Tribunal noted the contentions of the applicant (i.e., the writ petitioner herein) that he had been transferred out of Begusarai not in the interest of service, but to accommodate respondent No. 7, namely, Shri B.D. Singh and, hence, the action of the State-respondent is bad in law. At paragraph 3 of its order, dated 18-9-2013, the learned Tribunal also noted the case of the respondents as reflected in their written statement.

(vi) For better appreciation and determination of the correctness of the learned Tribunal's order, dated 18.09.2013, aforementioned, we reproduce here in below the relevant portions of the learned Tribunal's said order, which culls out the case of the respondents, as had been set up by the respondents in the written statement:

"3. The respondents, through their written statement, have submitted as below:--

(i) The applicant who was working as ASP at Begusarai Division was given ad hoc promotion to PS Group "B" cadre for a period not exceeding 11 months or until further order and was posted as Superintendent of Post Offices, Begusarai Division, Begusarai, vide order dated 15.02.2013 as a Divisional Head. It was the responsibility of the applicant to ensure that the various computerization and modernization programs of the department are expeditiously and efficiently administered/executed. However, during the short tenure of the applicant there were several shortfalls in achievements as also failure in rationalisation/execution/implementation of various programmes/schemes/initiatives. In addition a complaint against the applicant (Annexure R/1) was also received, though no enquiry was initiated till the time of filing of the written statement.

(ii) The post of Dy. CPM (M & T), Patna GPO, to which the applicant stands transferred is of the same grade/status and without the pressures which the applicant has been incapable of handling.

The post of Dy. CPM (M & T) was felt to be better suited to the applicant's competency and skill levels.

(iii) That keeping in view the above facts, the applicant was transferred from the post of SPOs, Begusarai Division to the post of Dy. CPM (M & T), Patna GPO vide Annexure A/6 and Shri B.D. Singh was posted as Superintendent of Post Offices, Begusarai Division. The latter has already joined on 20.06.2013 F/N as SPOs, Begusarai."

(vii) Having considered the averments made in O.A. and the written statement, the learned Tribunal noted thus:

"(f) The respondents have argued that the applicant's performance during his short tenure as Superintendent of Post Offices, Begusarai was characterised by a series of short falls in achievements, as also failure in the handling of various programmes/schemes/initiatives. Further that there was also a complaint (though not inquired) against the applicant. It has also been argued by the respondents that the applicant was the junior most IPO line official initiating in P.S. group "B" cadre on ad hoc basis and that his movement was also initiated because one Shri L.K. Sinha, SSPO, Chapra had been reverted from JST group "A" to P.S. Group "B". In his defence, through rejoinder, the applicant has argued that a stay of four months is too short to assess his performance as poor. However he has not challenged the veracity of the facts and figures quoted by the respondent in para 5 of the written statement. Instead the applicant has relied upon statistic at Annexure A/12 series and argued that his performance was better when compared to several other divisions.

(g) Without going into the merit of the submissions made on this issue by either side, suffice is to say that even if four months period is considered brief to assess performance, the short falls noted in para 5 of the written statement seem to argue against the applicant's capabilities. Further, the poor performance of others does not obliterate the applicant's failures, as noted by the respondents. In addition, it is noted that the applicant has also not denied the existence of complaint against him but has argued that it cannot be treated as a basis for his transfer. While this argument has been acknowledged on the basis of established facts in some rulings, it is equally true that in certain situations it has been held that it is administratively appropriate to shift an official even before/while a complaint is looked into. In this case the respondents have not disguised the fact that the complaint against the applicant has not been inquired into. However, perusal of the complaint at Annexure R/1 also gives an impression that the allegations are substantive, even if no value judgment about their merit can be made at this stage."

3. What becomes transparent from the consideration of the written statement of the State-respondents and the learned Tribunal's conclusions is that, according to the respondents, and also the learned Tribunal, the present petitioner's performance, during his brief tenure as Superintendent of Post Offices, Begusarai, was characterized by a series of shortfalls in achievements as also failure on the part of the petitioner in handling various programmes/schemes/initiatives. This apart, there was a complaint received against the petitioner, though the same had not been enquired into. Further case of the respondents, as noted by the learned Tribunal, was that the petitioner was the junior most IPO in P.S. Group "B" cadre and that his movement was also initiated, because one Shri L.K. Sinha, SSPO, Chapra, had been reverted from JST Group "A" to P.S. Group "B".

4. It is pertinent to note that though the learned Tribunal has observed, in its order, dated 18.09.2013, that the facts aforementioned have not been disputed by the applicant-petitioner herein, the fact remains that the learned Tribunal itself has noted that the applicant (i.e., the petitioner herein) relied upon the statistics, as provided by Annexure A/12 series, and argued that the performance of the petitioner was better when compared to several other Divisions.

5. Having noted in its order, dated 18.09.2013, aforementioned, every aspect of the respondents' case, whereby the respondents sought to prove inefficiency and demerit of the petitioner, the learned Tribunal has derived its conclusion by observing that even if the period of petitioner's posting for four months, at Begusarai, was a short period, the fact remains that the poor performance of others does not obliterate the petitioner's failures, which have been indicated above, and, in addition thereto, the petitioner has not denied existence of complaint, received against him, though it has been argued by the applicant (i.e., the petitioner) that such a complaint cannot be treated as a basis for his transfer. According to the learned Tribunal, as discernible from the order, dated 18.09.2013, aforementioned, it is administratively appropriate to shift, in certain circumstances, a Government employee even before or while a complaint, received against him, is looked into. What is also curious to note is that the learned Tribunal has observed in its order, dated 18.09.2013, aforementioned, that though the respondents have not made any enquiry into the complaint, which has been received against the applicant (i.e., the petitioner), the fact remains that perusal of the complaint gives an impression that the allegations are substantive, though the merit thereof is not determined.

6. From what have been pointed out above, there can be no escape from the conclusion that in the light of the learned Tribunal's order, dated 18.09.2013, the State-respondents have transferred the applicant-petitioner on the ground that the applicant-petitioner has been found not only unsuitable, but incompetent inasmuch as the applicant-petitioner, according to the respondents, failed to perform to the requisite degree of efficiency, which his office needed, and that there has been noticeable failures on the part of the petitioner on many aspects of the functioning of his office. This apart, the respondents have also referred to the complaint received against the applicant-petitioner. Surprisingly enough, without making any comment, on the merit of the said complaint, the learned Tribunal has quoted, at paragraph 8(iii) of its order, dated 18.09.2013, that the applicant's performance, as Superintendent of Post Offices, Begusarai Division, was found wanting on several counts and thereby calling into question his capabilities and, then, complaint had also been received against him, though that complaint had not been enquired into, and, for these reasons, the impugned order of transfer of the applicant has been made.

7. From the justifications, which have been given by the respondents for making the impugned transfer order and the conclusions, which the learned Tribunal has drawn, it becomes transparent that the applicant-petitioner was found unworthy

of the post, which he had been occupying at Begusarai Division.

8. The accusations, which have been made against the applicant-petitioner, are, undoubtedly, stigmatic in nature and if the allegations are true, the same would make the petitioner liable to demotion.

9. The reasons, which the State-respondents have assigned and the learned Tribunal has accepted, would, if allowed to remain good on record, make the impugned order of the petitioner's transfer not only stigmatic, but penal too.

10. Above all, the applicant-petitioner, as has been contended by the respondents, too, could have been transferred, because of the complaint, though the truth or veracity of the allegations, made in the complaint, had not been determined. On the basis of unproved allegations made in the complaint, the petitioner could not have been transferred, for, such a transfer would be penal and stigmatic in nature.

11. The Supreme Court, in *Somesh Tiwari Vs. Union of India (UOI) and Others*, , has held as follows:

"16 Indisputedly an order of transfer is an administrative order. There cannot be any doubt whatsoever that transfer, which is, ordinarily, an incidence 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."

(Emphasis is added)

12. From the decision in *Somesh Tiwari Vs. Union of India (UOI) and Others*, , it becomes crystal clear that an order of transfer cannot be made by way of, or in lieu of, punishment and when an order of transfer is found to be in lieu of punishment, the same, being wholly illegal, is liable to be set aside.

13. While considering the present writ petition, it is also noteworthy that in *S.R. Tewari Vs. District Board Agra and Another*, , while dealing with a writ petition, made under Article 226 of the Constitution of India, by an Engineer, whose employment under a District Board was terminated by the Board after having given him salary for three months in lieu of notice, the Supreme Court pointed out in *S.R. Tewari (supra)*, that the form of the order, whereunder employment of a servant is determined, need not be conclusive of the true nature of the order. The Supreme Court, therefore, pointed out in *S.R. Tewari (supra)*, that the form may be merely to camouflage an order of dismissal for misconduct and it is

always open to the court before which the order is challenged to go behind the form and ascertain the true character of the order and if the Court holds that the order, though in the form merely of determination of employment, is, in reality, a cloak for an order of dismissal as a matter of punishment, the Court would not be debarred merely because of the form of the order in giving effect to the rights conferred by statutory rules upon the employee.

14. The relevant observations, appearing in this regard, at paragraph 13, in S.R. Tewari Vs. District Board Agra and Another, , read as under:

".....It is settled law that the form of the order under which the employment of a servant is determined is not conclusive of the true nature of the order. The form may be merely to camouflage an order of dismissal for misconduct, and it is always open to the court before which the order is challenged to go behind the form and ascertain the true character of the order. If the Court holds that the order though in the form merely of determination of employment is in reality a cloak for an order of dismissal as a matter of punishment, the Court would not be debarred merely because of the form of the order in giving effect to the rights conferred by statutory rules upon the employee."

(Emphasis is supplied)

15. Even in the case of Anoop Jaiswal Vs. Government of India and Another, , an IPS Officer, who has been undergoing training on probation, was discharged and though his writ petition, made under Article 226 of the Constitution of India, was dismissed, the Supreme Court, while allowing the appeal, pointed out that where the form of the order is merely a camouflage for an order of dismissal for misconduct, it is always open to the Court before which the order is challenged to go behind the form and ascertain the true character of the order and if the court holds that the order, though, in the form merely a determination of employment, is, in reality, a cloak for an order of punishment, the court would not be debarred merely because of the form of the order in giving effect to the rights conferred by law upon the employee.

16. The Supreme Court pointed out, in Anoop Jaiswal Vs. Government of India and Another, , that even though an order of discharge may be non-committal, it cannot stand alone and where the report/recommendation of the superior authority is the basis or foundation for the order, report/recommendation should be read along with the order for the purpose of determining its true character and, upon reading the two together, the court reaches the conclusion that the alleged act of misconduct was the cause of the order and that but for that incident, it would not have been passed, then, it is inevitable that the order of discharge should fall to the ground, where the aggrieved officer is not afforded a reasonable opportunity to defend himself as provided in Article 311(2) of the Constitution of India.

17. The relevant observations appearing, in this regard, at paragraphs 12 and

13, read as under:

"12. It is, therefore, now well settled that where the form of the order is merely a camouflage for an order of dismissal for misconduct it is always open to the Court before which the order is challenged to go behind the form and ascertain the true character of the order. If the Court holds that the order though in the form is merely a determination of employment is in reality a cloak for an order of punishment, the Court would not be debarred, merely because of the form of the order, in giving effect to the rights conferred by law upon the employee.

13. In the instant case, the period of probation had not yet been over. The impugned order of discharge was passed in the middle of the probationary period. An explanation was called for from the appellant regarding the alleged act of indiscipline, namely, arriving late at the Gymnasium and acting as the ring leaders on the occasion and his explanation was obtained. Similar were called for from other probationers and enquiries were made behind the back of the appellant, only the case of the appellant was dealt with severely in the end. The cases of other probationers who were also considered to be ring leaders were not seriously taken note of. Even though the order of discharge may be non-committal, it cannot stand alone. Though the nothing in the file of the Government may be irrelevant, the cause for the order cannot be ignored. The recommendation of the Director which is the basis or foundation for the order should be read alongwith the order for the purpose of determining its true character. If on reading the two together the Court reaches the conclusion that the alleged act of misconduct was cause of the order and that but for that incident it should have been passed then it is inevitable that the order of discharge should fall to the ground as the appellant has not been afforded a reasonable opportunity to defend himself as provided in Article 311(2) of the Constitution."

(Emphasis is added)

18. Though the case of S.R. Tewari Vs. District Board Agra and Another, and Anoop Jaiswal Vs. Government of India and Another, dealt with the question of termination of service, what clearly follows from the decisions, in S.R. Tewari (supra) and Anoop Jaiswal (supra), is that the form of an order, whereunder a Government employee is transferred, may not, in a given case, be conclusive of the true nature of the order inasmuch as the form may be merely a camouflage for an order of punishment and it is always open to the Court before which such an order is challenged to lift the veil and go behind the form of the order and ascertain the true character of the order and if the Court holds that the order, though in the form of merely administrative order, is, in reality, a cloak for an order of punishment, the Court would not be debarred from interfering with such an order merely because the form of the order is not punitive in nature. The Court, in a given case, thus, can go through the records, where the basis or the foundation of the order stands laid, and, then, determine if a transfer is a transfer simpliciter or a transfer is penal in nature. This apart, when a transfer order is stigmatic in nature, such a transfer order, too, cannot be sustained if the

order has been made without giving any opportunity to the affected employee to have his say in the matter.

19. In the backdrop of the position of the law, as has been discussed above, when we turn to the factual matrix of the present case, we notice that the accusations, made by the respondents against the applicant-petitioner's limitations in merit and efficiency in justification of making the transfer order, reflect that the petitioner has been, in effect, punished for his alleged demerit and inefficiency without, however, giving any opportunity to him of either showing cause or of hearing. Such an order of transfer, which is apparently innocuous, but, in substance and truth, penal and stigmatic, cannot be sustained in the light of the law, which has been discussed above.

20. It has been submitted, on behalf of the respondents, that the transfer of a public servant, made on administrative grounds or on public interest, should not be interfered with unless there are strong and compelling grounds rendering the transfer order improper and unjustified. Reference, in this regard, has been made to the case of Chief General Manager (Telecom), N.E. Telecom Circle and another Vs. Rajendra Ch. Bhattacharjee and others, .

21. There could be no doubt that a transfer order shall not be, ordinarily, interfered with in the absence of strong and compelling grounds. When, however, an order of transfer is found penal or stigmatic in nature, such a transfer order ought to be interfered with if no opportunity of hearing has preceded such an order of transfer before the transfer order was made.

22. No doubt, a transfer, if made, as a measure of penalty, sticks as stigma on the transferred employee. In such circumstances, the transfer order would be illegal if no opportunity was given to the employee concerned to have his say in the matter before the transfer was made. In the present case, the impugned transfer order had, admittedly, not been preceded by any enquiry nor was the petitioner given an opportunity to have his say in the matter before the transfer order was made.

23. Reference has also been made, on behalf of the respondents, to the case of Union of India and Others Vs. S.L. Abbas, , wherein the Supreme Court has held that unless an order of transfer is mala fide or in violation of the statutory rules, the Court must not interfere with the transfer order. Neither the proposition, which has been so advanced by Mr. N.A. Shamsi, learned Assistant Solicitor General, appearing on behalf of the respondents, nor his reliance, in this regard, on S.L. Abbas (supra), is misplaced.

24. In the case of Md. Abu Muzaffar Nawaz Vs. Uttar Bihar Gramin Bank and Others, , this Court, as rightly pointed out by the learned counsel for the applicant-petitioner, has held as under:

"26. The law is well settled that although transfer even if it appears on the face of it innocent but in fact it was affected by way of punishment has to be quashed

by courts and there is ample evidence to show that the impugned order has been passed more as a punishment than for administrative necessity. This court has arrived at the aforesaid finding only after considering the various circumstances which have been brought on record in the writ petition, its counter affidavit and petitioner's reply to the counter affidavit and the said affidavits along with its annexures fortify the conclusion that the impugned order also suffers from the vice of mala fide exercise of power. The impugned order clearly shows that through it the authority sought to achieve something which they could not have otherwise achieved if an enquiry/proceeding had been initiated against the petitioner. Hence the petitioner was quite justified in seeking help of this court in his unequal contest with the respondents as a transfer can uproot a family, cause irreparable harm to an employee and drive him into desperation."

(Emphasis is supplied)

25. The Kerala High Court, in the case of P. Pushpakaran Vs. Coir Board and Another, , has held as follows:

"25.....An employee will not be lightly taken when orders of transfer are challenged. The whole difficulty arises when under the cover of ordering a transfer, an employer seeks to achieve something, which he cannot otherwise achieve. In such cases, the employees in distress seek the assistance of Courts in their unequal contest with their employers. A transfer can uproot a family, cause irreparable harm to an employee and drive him into desperation. It is on account of this that transfers, when affected by way of punishment, though on the face of it may bear the insignia of innocence, are quashed by Courts."

(Emphasis is added)

26. From the narration of facts and the proposition of law, which we have discussed above, there can be no escape from the conclusion that the impugned order of transfer, dated 19.06.2013, ought to have been interfered with by the learned Tribunal inasmuch as the impugned transfer order, when dispassionately analyzed, clearly comes out to be an order, which is both, punitive as well as stigmatic in nature. Such a transfer order ought to have been interfered with by the learned Tribunal. Non-interference in a grossly illegal order of transfer shakes the confidence of the employees in the ability of the Courts to keep the employer within the ambit of law and to ensure that no transfer order, punitive or stigmatic, be made by the employer without giving an opportunity of showing cause against the materials, which form the basis for transfer.

27. Because of what has been discussed and pointed out above, the order, dated 18.09.2013, passed by the learned Tribunal, is hereby set aside. We also set aside and quash, for the foregoing reasons, the impugned order of transfer, dated 19.06.2013, with direction to the respondents to do the needful in accordance with law.

28. In terms of the above observations and directions, this writ petition shall

stand disposed of. There shall be no order as to costs.