

(2010) 09 SIK CK 0004
In the Sikkim High Court

Shri Gurmit Bhutia and Others

APPELLANT

Vs

The State of Sikkim

RESPONDENT

Date of Decision : 06-09-2010

Acts Referred:

Citation : (2010) 09 SIK CK 0004

Hon'ble Judges : P.D. Dinakaran, C.J.;Sonam Phintso Wangdi, J

Bench : Division Bench

Judgement

P.D. Dinakaran, C.J.—The petitioners are language teachers. They are challenging the impugned proceeding dated 13.03.2010 passed by the Special Secretary, Human Resource Development Department, Government of Sikkim, Gangtok, which in our considered opinion, on the face of it, is an order of transfer simpliciter, as there is nothing mala fide or arbitrary in it.

2. However, Ms. Doma T. Bhutia, the Learned Counsel appearing for the petitioners invites our attention to the notesheet dated 13.03.2010, the relevant portion of the same reads hereunder:

In continuance of the above proposal at prepage, we have received another recommendation for transfer and posting of Language Teachers from the office of the Hon"ble Minister WS & PHED and Transport Department, Government of Sikkim, along with the recommendation of Hon"ble MLA, 21, Gnathang Machong Constituency, which may be seen at cp-1-3.

2.1 It is true that the said note-sheet was not only signed by the Joint Secretary (Administration) but also approved by the Hon"ble Minister, Human Resource Development Department, Government of Sikkim.

2.2 Inviting our attention to the said note-sheet, the Learned Counsel for the petitioners contends that the impugned order of transfer was made only pursuant to and on the strength of such recommendation, referred to above, and is therefore mala fide, and that the petitioners have no grievance against the Hon"ble Minister, WS & PHED and Transport Department or against the Area

MLA, 21-Gnathang Machong Constituency, but are aggrieved by the Human Resource Development Department, which has acted arbitrarily against the petitioners.

3. In this regard, by an Order dated 03.09.2010, we had directed the Special Secretary, HRDD, to explain the circumstances under which the impugned order of transfer was made. Pursuant to the said direction, the Special Secretary, HRDD, Government of Sikkim, has filed an affidavit dated 04.09.2010, the relevant portion of the same is as under:

3. It is submitted that a recommendation for transfer and posting of language teachers were received from the office of the Minister, Water Security and Public Health Engineering Department and Transport Department and also from M.L.A., 21 Gnathang, Machung Constituency. The matter was deliberated amongst the officers concerned and it was decided that since the transfer to be affected was based on the recommendation of the area M.L.As and not on complaint against the said teachers, the proposal was put up before the Government for their consideration.

4. That this answering respondents would also like to place on record that the Department has not received any complaint against the petitioners as well as the respondents teachers either from the Minister concerned or from the MLA nor from public. The Department had mooted the proposal for transfer of the petitioners as being done in all other cases in a routine manner and not on the basis of any complaint or pressure from any authority.

5. As evident from the above, the said transfer was affected on the recommendation of the area MLAs and not based on complaint or on the direction/behest of higher authority. In other words, the transfer were affected in a routine manner and not arbitrarily or with mala fide intention as alleged by the petitioners.

4.1 Ms. Doma T. Bhutia, the Learned Counsel for the petitioners, in the light of the said affidavit dated 04.09.2010, derived strength and contends that the impugned order of transfer was based on the recommendations of the Area MLA and, therefore, the same is arbitrary and mala fide. She further contends that the impugned order of transfer is also contrary to the guidelines issued by the Government on 10.07.2009, as per which -

(i) The teachers who have crossed more than five years in a particular school may be transferred wherever required.

(ii) The teachers who are above 50 years of age will not be transferred.

(iii) The "first come first go" policy will be adopted in all cases.

(iv) The recommendation of Head of Schools is also needed in case of posting of excess teachers.

(v) Married teachers/husband/wife to be posted in nearby area.

4.2 The Learned Counsel for the petitioners further submits that the above guidelines should be strictly followed. In addition to the above contention, the Learned Counsel for the petitioners also complains that the petitioners have also been arbitrarily deprived of their Transfer Allowance (TA) and Dearness Allowance (DA), which are admissible under the Rules.

5.1 Per contra, Mr. J.B. Pradhan, learned Additional Advocate General fairly admitted that the impugned order of transfer issued by the Special Secretary, HRDD, was made on the recommendation of the Hon"ble Minister, WS & PHED and Transport Department and the Area MLA, 21 Gnathang Machong Constituency. It is also to be seen that it is not based on any complaint against the said teachers to attribute any mala fide against either of the recommending authorities, referred to above.

5.2 The learned Additional Advocate General submits that the petitioners have been given a fair opportunity to implead those persons, who alone can explain any element of mala fide, as alleged by the petitioners, but the petitioners have refused to avail of the opportunity, therefore, it is not possible for the Department to meet such allegations, when mala fide was alleged against individuals.

5.3 The learned Additional Advocate General also brought to our notice that the guidelines dated 10.07.2009 are applicable only to accord posting of excess teachers, and not with respect to the routine transfers. The learned Additional Advocate General also submits that all the petitioners were working in their respective previous station for more than 5 years, therefore, they cannot claim that they should not be transferred.

5.4 Mr. J.B. Pradhan, the learned Additional Advocate General further contends that the guidelines dated 10.07.2009, relied upon by the petitioners are only recommendatory and not mandatory binding on the Department. If the guidelines are to be strictly followed, as contended by the petitioners, the learned Additional Advocate General submits that the petitioners, who are working for more than 5 years in the previous station, could not resist the impugned transfer.

5.5 Mr. J.B. Pradhan, the learned Additional Advocate General, however, fairly submits that the Government has already decided to pay the TA and DA.

6. By way of reply, Ms. Doma T. Bhutia, the Learned Counsel for the petitioners contends that the first petitioner is being transferred almost every year, which is contrary to the Rules, and the said petitioner has already made a representation to the Government requesting for cancellation of his transfer order.

7. We have given our careful consideration to the submissions made by both the parties.

8.1 It is well settled law that transfers are incidental to the service conditions and it may not always be possible to interfere with such administrative orders of

transfer. The petitioners themselves are not willing to implead the individuals against whom they allege mala fide.

8.2 We also see in the affidavit filed by the Special Secretary, HRDD that the impugned order of transfer is only a matter of routine and it is not based on pick and choose basis, therefore, it is not arbitrary or mala fide.

9. It is true that it is impossible to demonstrate malice in fact with full and elaborate particulars, however, to draw reasonable inference of mala fide from the facts and circumstances of the case before us, such inferences must be based on factual matrix and in the presence of persons who have committed the malice, as alleged; otherwise the allegation of mala fide will be based on surmises and conjectures. If the wheels of administration should be allowed to run smoothly, this Court by exercising its power of judicial review under Article 226 of the Constitution of India, should not interfere with such administrative decisions of the Government without support of full facts by way of affidavit, facts and materials before us.

10.1 The learned Additional Advocate General has brought to our notice the stand of the Government in respect of TA and DA, the same is going to be paid to the petitioners. Further he has stated that the impugned order of transfer was nothing but a routine transfer, not based on any complaint, as alleged by the petitioners and the guidelines dated 10.07.2009 is applicable only with regard to the posting of excess teachers.

10.2 It may not be proper for us to arrive at a conclusion that the impugned order of transfer was passed mala fide particularly when the petitioners are not willing to implead the persons, alleged of mala fide.

10.3 However, taking into consideration the grievance of the petitioners that they have already made their representation on 27.04.2010 requesting for cancellation of the impugned order of transfer, but till date their representation has not been considered by the Secretary, Human Resource Development Department, Government of Sikkim, suffice it to permit the petitioners, in addition to the said representation, to make any further representation individually, if they are so advised, within a period of two weeks from the date of receipt of this order, setting out their grievances viz. that some of them have crossed more than 50 years of age, some of them have not crossed 5 years in a particular school, some of them on marital status, some of them having personal grievances, etc., and on receipt of such representation/representations, the Special Secretary Human Resource Development Department, Government of Sikkim shall consider the individual cases on merit and pass appropriate orders, without being influenced by any of the observations made in the present writ petition, within a period of four weeks thereafter.

The writ petition stands disposed of accordingly.