
(2012) 12 OHC CK 0020
In the Orissa High Court
Case No : Writ Petition (C) No. 11313 of 2012

Sk. Zafrullah and Ohters

APPELLANT

Vs

State of Orissa and Others

RESPONDENT

Date of Decision : 06-12-2012

Acts Referred:

Constitution of India, 1950 — Article 21A

Citation : (2013) 115 CLT 672 : (2013) 1 OLR 432

Hon'ble Judges : B.N. Mahapatra, J

Bench : Single Bench

Advocate : Amitav Das, H.K. Mahali, Smt. S. Das and M.M. Das in all the Cases Except W.P.C No. 11436 of 2012 and P.K. Mohapatra, S.K. Nath and S.C. Sahoo in W.P.C No. 11436 of 2012, for the Appellant; A.K. Pandey, A.S.C. for School and Mass Education Deptt., for the Respondent

Final Decision : Allowed

Judgement

B.N. Mahapatra, J.—All the above writ petitions except W.P.(C) No. 11436 of 2012 have been filed with similar prayer and ground of challenge, in W.P.(C) No. 11436 of 2012 in addition to prayer and grounds made/taken in other writ petitions, the petitioner being a Gana Sikshyak has taken some additional grounds. For the purpose of convenience, case of the petitioner in W.P.(C) No. 11313 of 2012 is taken for deciding the common issue involved in the above writ petitions.

This writ petition has been filed with a prayer to quash order dated 13.06.2012 (Annexure-I) passed by opposite party No. 4-District Inspector of Schools, Bhadrak-II, Bhadrak by which the petitioner has been transferred from Mirzapur Primary School, Mirzapur under Basudevpur Block to Bhagabanpur Primary School under Basudevpur Block on the ground that the said transfer order passed under Annexure-1 is illegal, arbitrary and bad in the eye of law and violative of the order/guideline dated 15.05.2012 issued under Annexure-2 in Department of School and Mass Education, Government of Orissa. Further prayer

of the petitioner is that opposite party No. 4 as well as the Transfer Committee be directed to transfer Sikhya Sahayaks/Junior Teacher/Elementary Teacher/Z.P. Teacher/Gana Sikshyaks as per the order/guideline dated 15.05.2012.

2. The petitioner was initially appointed as Sikhya Sahayak on 02.01.2008 in Mirzapur Primary School, Mirzapur under Basudevpur Block in the district of Bhadrak and continued in the said post without any interruption for three years. After three years, the petitioner became a Junior Teacher and at present is continuing as Sikhya Sahayak (Junior Teacher). The Right of Children to Free and Compulsory Education Act, 2009 (for short, "Act, 2009") has come into force with effect from 01.04.2010. The said Act envisages that appropriate Government and local authority shall ensure maintenance of the Pupil Teacher Ratio (for short, "P.T.R.") as per the norms and standard prescribed. The Government, in the Department of School and Mass Education on 21.04.2010 issued a letter to the Collector about rationalization of Elementary Teachers/Zilla Parishad Teacher/Sikhya Sahayaks for the year 2010-2011. Similarly, the Government of Orissa, School and Mass Education Department issued a guideline for nationalization of elementary teachers/Zilla Parishad, Teacher/Sikhya Sahayaks/Gana Sikhayaks in Government Primary and Upper Primary School during the academic session 2012-2013 vide order dated 15.05.2012 (Annexure-2).. In the said letter, it was stated that in order to arrive at a school wise P.T.R. of 30:01 at the Primary level and 35:01 at the Upper primary level with minimum 2 teachers per school rationalization of all category of teachers is required to be undertaken. To ensure fulfillment of requirement of the school-wise P.T.R. in education districts, transfer of all categories of teachers and Sikhya Sahayaks wherever necessary is required to be undertaken. So far P.T.R. of Mirzapur Primary School is concerned, in which the petitioner is continuing, the staffing pattern of the said School and the Roll strength clearly stipulate that the School is not coming within the Rationalization Scheme as much as Government guideline dated 15.05.2012. Apart from that, the petitioner is not the senior most teacher of the School. Therefore, if at all rationalization Scheme is applicable, then the petitioner is not entitled to be transferred. The purpose of making rationalization was to arrive at a School-wise P.T.R. which is based on roll strength of the School vis-?-vis existing strength of teachers. In the present case, 90 students are there in the school for whom 3 teachers are required as per rationalization policy. Since there are three existing staff, there was no necessity to transfer any staff from Mirzapur Primary School but opposite party No. 4 without any reason has transferred the petitioner.

In other connected writ petitions, there is violation of other provisions of the Guideline and therefore, it is submitted that transfer of these petitioners has been made in contravention of the Guideline dated 15.05.2012 for which the same should be quashed.

3. Mr. A.K. Pandey, learned Addl. Standing Counsel appearing on behalf of the School and Mass Education Department submitted that the impugned Notification

dated 15.05.2012 is in the nature of executive instruction, which cannot be challenged by the petitioner. In support of his contention, he relied upon the judgment of the Hon'ble Supreme Court in the case of The Chief Commercial Manager, South Central Railway, Secunderabad and Others Vs. G. Ratnam and Others, . Mr. Pandey further submitted that the higher authority may take action against the subordinate authorities if they have not abided by the executive instructions of the higher authority as per the impugned Guideline. The Government is yet to take a decision in the matter. Guideline dated 15.05.2012 is an interim arrangement of transfer and transfer is a condition of service. Therefore, there is no need to assign any reason in the transfer order.

4. The P.T.R. if at all is to be challenged; the same should be challenged by the pupil but not teacher of a school. Mr. Pandey further submitted that usually order of transfer should not be interfered with this Court unless the said order of transfer is passed without jurisdiction or mala fide. In support of his contention, Mr. Pandey relied upon the judgment of the Hon'ble Supreme Court in the cases of Mrs. Shilpi Bose and others Vs. State of Bihar and others, Addisons Paint & Chemicals Ltd. v. Worker, (2001) 2 SCC 289; Pearlite Liners Pvt. Ltd. Vs. Manorama Sirsi, State of U.P. and Others Vs. Gobardhan Lal, ; Major General J.K. Bansal Vs. Union of India (UOI) and Others,

5. Further, referring to the counter affidavit, Mr. Pandey submitted that the Guideline dated 15.05.2012 for rationalization of the elementary teacher/SS/JTs/ZPT/GS is strictly followed and the petitioner was transferred as per the P.T.R. The strength of the students in the School in question, as on the date of transfer is 87. The petitioner was transferred on administrative ground because of the allegation received against him. Moreover, the in-charge Headmaster had observed that most of the time the petitioner was not attending the classes for which imparting education to the students adversely affected. The enquiry was also conducted against him. In order to find out quality of education, opposite parties though realized the facts, but instead of taking severe action only a lenient view has been taken by transferring him within the block against another teacher Smt. Rashmibala Das, who had already joined and performed her duties. If the petitioner is allowed to continue, he will be treated as surplus teacher and there will be inadequacy of teacher i.e. single teacher in the school to which the petitioner has been transferred.

6. In reply, Mr. A. Das, learned counsel for the petitioner submitted that the Act, 2009 was enacted pursuant to Constitution (Eighty-sixth Amendment) Act, 2002 by introducing Article 21-A of the Constitution and the Guideline dated 15.05.2012 has been issued in consonance with the Act, 2009. The judgment of the Hon'ble Supreme Court in the case of G. Ratlam (supra), has no application to the present case. Therefore, the petitioners have locus standi to demand for implementation of the guideline/resolution dated 15.05.2012. Mr. Das, further submitted that Sections 35(2) and 25(1) and (2) of the Act., 2009 empower the State Government to formulate policy. He further submitted that the transfer of

the petitioner has been made on the basis of the Guideline and not on any allegation. Therefore, the opposite parties cannot take any such stand. u/s 24(2) of the Act, 2009, power is vested with the authority to initiate disciplinary proceeding if any fault is committed by the teacher.

7. On the rival contentions advanced by the parties, the questions that fall for consideration by this Court are as follows :

(i) Whether the Guideline dated 15.05.2012 issued under Annexure-2 by the Principal Secretary to Government, Department of School and Mass Education addressing to all the Collectors/CEOs, Zilla Parishads with copy to Panchayati Raj Department, SPD, OPEPA/Director, Elementary Education (O), All DPCs, SSA/All DIS/All BDOs. P.S. to Chief Minister/P.S. to Minister, S & ME/P.S. to Principal Secretary, S & ME Deptt. and Sr. Standing Counsel, S & ME Cell, Cuttack/ Standing Counsel, S & ME Cell, Bhubaneswar/Law Officer/Asst. Law Officer/All Sections of S & ME Deptt./Section-I is to be followed by opposite party No. 4 while transferring elementary teachers/Sikhya Sahayaks/Junior Teachers/Zilla Parishad Teachers/Gana Sikshyaks from one School to another?

(ii) Whether opposite parties can justify their order of transfer assigning any reason other than the reason (s) assigned in the order of transfer of the petitioner under Annexure-1?

(iii) What order?

8. So far question No. (i) is concerned, it is not in dispute that the Principal Secretary to Government of Orissa, Department of School and Mass Education vide letter No. I-SME-G-35/10(pt)-12644/SME dated 15.05.2012 communicated the Guideline to all the Collectors/CEOs, Zilla Parishads with copy to Panchayati Raj Department, SPD, OPEDA etc. wherein it is stated that the Government have been pleased to constitute the Transfer Committee in each Education District and the Transfer Committee will undertake the rationalization exercise strictly in accordance with the guidelines mentioned therein. For better appreciation, it is necessary to quote the relevant portions of the said Guideline:

In order to comply with the provisions of the Right to Children to Free and Compulsory Education Act, 2009 i.e. school-wise PTR 30:01 at the Primary level and 35:01 at the Upper Primary level with a minimum of 2 (two) teachers per school, rationalization of teachers is essentially required.

The matter regarding framing of detailed guidelines for undertaking the rationalization exercise was under active consideration of the Government. Government have now been pleased to constitute the Transfer Committee in each Education District in the following manner:

The Transfer Committee will undertake the rationalization exercise strictly in accordance with the following guidelines.

9. Thus, it is amply clear that in order to comply with Act, 2009 the above

Guideline has been issued by the Government in School and Mass Education Department. By virtue of the Constitution 86th Amendment Act, 2002, Article 21-A was introduced in the Constitution and the Act, 2009 is enacted in pursuance of the Article 21-A. Section 35(2) of the Act, 2009 reads as follows :

35. (2) The appropriate Government may issue guidelines and give such directions, as it deem fit, to the local Authority or the School Management Committee regarding implementation of the provisions of this Act.

Section 25(1) and (2) reads as follows :

25. Pupil Teacher Ratio - (1) Within six months from the date of commencement of this Act, the appropriate Government and local authority shall ensure that the Pupil-Teacher Ratio, as specified in the schedule, is maintained in each school.

(2) For the purpose of maintaining the Pupil-teacher Ratio under Sub-section (1), no teacher posted in a School shall be made to serve, in any other School or office or employees for any non-educational purpose, other than those specified in Section 27.

10. As per Guideline dated 15.05.2012, in order to comply with the provisions of the Right of Children to Free and Compulsory Education Act, 2009, i.e., School-wise PTR 30:01 at the Primary level and 35:01 at the Upper Primary level with a minimum of 2 (two) teachers per school, rationalization of teachers is essentially required. The matter regarding framing of detailed guidelines for undertaking the rationalization exercise was under active consideration of the Government. The Government have constituted the Transfer Committee in each Education District in the manner indicated in the Guideline above. Further in the said Guideline it is specifically stated that the Transfer Committee will undertake the rationalization exercise strictly in accordance with the Guidelines dated 15.05.2012. Thus the Guideline dated 15.05.2012 (Annexure-2) is a policy decision of the Government in School and Mass Education Department. It is not the case of the State that the notification in question does not hold the field in the matter of transfer. In that background, stand of opposite parties that the petitioner cannot approach this Court, if such Guideline is not followed does not merit consideration.

11. In the Guideline dated 15.5.2012 framed by the Government of Orissa in School and Mass Education Department it is specifically stated that the said Guideline has been framed in order to comply with the provision of the Act, 2009. Section 35(2) of the Act, 2009 provides that the appropriate Government may issue Guidelines and give such direction as it deem fit to the local authority or School Management Committee regarding implementation of the provisions of the Act, 2009.

12. The Hon'ble Supreme Court in the case of Pine Chemicals Ltd. and Others Vs. Assessing Authority and Others, held that if power to do an act or pass an order can be traced to an enabling statutory provision then even if that provision is not specifically referred to, the act or order shall be deemed to have been done

or made under the enabling provision.

13. The Hon''ble Supreme Court in the case of *Ramana Dayaram Shetty Vs. International Airport Authority of India and Others*, , held that the executive authorities are bound by the procedure which they themselves framed. The Government must adhere to the standard fixed by it.

14. In view of the above, the guideline dated 15.05.2012 under Annexure-2 issued by the Principal Secretary to Government in Department of School and Mass Education has statutory force and therefore the same is to be followed by opposite party No. 4 while transferring the elementary teachers/Sikhya Sahayak etc. and any transfer made contrary to the said guideline is not sustainable in law.

15. The following decisions relied upon by Mr. Pandey are of no help to opposite parties.

In *Shilpi Bose (Mrs) and others (supra)*, the Hon''ble Supreme Court has held that the Court should not interfere with a transfer order which is made in public interest and for administrative reasons unless the same is made in violation of any mandatory/statutory rule or on the ground of mala fide. The Hon''ble Supreme Court further held that even if a transfer order is passed in violation of executive instructions or orders, the Courts ordinarily should not interfere with the order instead affected party should approach the Higher Authority in the Department.

In *Gobardhan Lal (supra)*, the Hon''ble Supreme Court has also held that transfer is prerogative of the authorities concerned and Court should not normally interfere therewith, except when (i) transfer order shown to be vitiated by mala fides, or (ii) in violation of the statutory provision, or (ii) having been passed by an authority not competent to pass such an order.

There is no dispute over the above legal propositions settled by the Hon''ble Supreme Court but in the present case, transfer order has been passed in violation of the policy decisions of the Government taken under Annexure-2 which has statutory force for the reasons stated above. Further, in the said judgments the Hon''ble Supreme Court has not said that the High Court would not interfere with any transfer order. This is clear from the use of the expression in the judgment in *Shilpi Bose (Mrs) and others (supra)*, "the Courts ordinarily should not interfere with the order."

16. The decision of the Hon''ble Supreme Court in the case of *G. Ratnam (supra)*, is also of no help to the present case as the Guideline under Annexure-2 has been issued in exercise of power vested u/s 35(2) of the Act, 2009 in order to comply with the provisions of the said Act, and the impugned order of transfer has been passed in violation of such order.

17. In *Addisons Paint & Chemicals Ltd. (supra)*, the issue was what is the effect of an employee, who refused to accept the transfer order and refused to report for duty after his transfer? The facts of that case are different from the facts of

present case.

18. There is no dispute over the legal proposition laid down by the Hon''ble Supreme Court, in Pearlite Liners (P) Ltd. (supra), wherein the Hon''ble Supreme Court has held that the transfer order is a normal incidence of service unless there is a term to the contrary in the contract of service. This decision has no relevancy to the issue involved in the present case.

19. So far Question No. (ii) is concerned, it is necessary to refer to the order of transfer dated 13.06.2012 (Annexure-1) which is under challenge. Annexure-1 clearly shows that such order has been passed in pursuance of letter No. 1-SME/G-35/10(Pt)-12644/SME dated 15.05.2012 of the Govt. of Orissa, School and Mass Education Deptt., No. 8015 dt. 22.05.2012 of the Director, Elementary Education, Orissa, Bhubaneswar and Resolution No. 01 dated 05.06.2012 of the District Rationalization (transfer) Committee, Bhadrak. In the transfer order nothing has been mentioned regarding any allegation against the petitioner for which he has been transferred as contended in the counter affidavit.

20. The Hon''ble Supreme Court in Mohinder Singh Gill and Another Vs. The Chief Election Commissioner, New Delhi and Others, held as follows:

The second equally relevant matter is that when a statutory functionary makes an order based on certain-grounds, its validity must be judged by the reasons so mentioned and cannot be supplemented by fresh reasons in the shape of affidavit or otherwise. Otherwise, an order bad in the beginning may, by the time it comes to Court on account of a challenge, get validated by additional grounds later brought out. We may here draw attention to the observations of Bose J. in Commissioner of Police, Bombay Vs. Gordhandas Bhanji,

Public orders publicly made, in exercise of a statutory authority cannot be construed in the light of explanations subsequently given by the officer making the order of what he meant, or of what was in his mind, or what he intended to do. Public orders made by public authorities are meant to have public effect and are intended to affect the actings and conduct of those to whom they are addressed and must be construed objectively with reference to the language used in the order itself.

Orders are not like old wine becoming better as they grow older.

21. In view of the above, opposite parties cannot assign any new/fresh reason which has not been assigned in the transfer order. Moreover, Section 24(2) of the Act, 2009 gives power to the authority to initiate disciplinary proceeding against the employee for any default committed by him. The opposite parties without doing so, have transferred the petitioners from one school to another, which is not permissible under law.

22. Specific case of the petitioner in W.P.(C) No. 11436 of 2012 is that he cannot be transferred from Taliamala Primary School to Talapadia Project Primary School as he is in service as a Gana Sikhayak which is not transferable.

Learned counsel for the petitioner Mr. P.K. Mohapatra submitted that similar question arose in W.P.(C) No. 17336 of 2011 and the same was disposed of on 29.08.2011 with the observation that service of Gana Sikhayak is not transferable and the order of transfer is not sustainable in law. Further case of the petitioner is that the new place of posting as per Annexure-1 is 50 kilometers away from the earlier place of posting and therefore the order of transfer under Annexure-1 is violative of Rules and Guidelines of the Government regulating the transfer of Gana Sikhayak. As Gana Sikhayaks are not teachers, their job is not transferable as per office order No. 1771 dated 14.06.2012 (Annexure-1).

The Additional Secretary vide order dated 16.08.2011 has modified the order of transfer of Gana Sikhayak to the extent that Gana Sikhayak can be deployed in nearby schools in view of the rationalization to perform their duties as assigned, but they cannot be transferred as teachers.

23. In view of the order of this Court dated 29.08.2011 passed in W.P.(C) No. 17336 of 2011, and the order of Additional Secretary dated 16.08.2011, the petitioner being a Gana Sikhayak, he should not have been transferred to new place which is 50 km away from the existing posting.

24. In all other cases transfer orders have been passed contrary to Guideline and policy decision of the State dated 15.05.2012. This position is not disputed by Mr. Pandey. On the contrary, Mr. Pandey submitted that it is an internal arrangement and petitioners have no right to challenge their orders of transfer on the basis of such guideline. However, it is not said that the guideline in question does not hold the field.

25. In view of the above, orders of transfer in question are quashed. However, it shall be open to the authorities to pass such other order as would be permissible in law. In the result, the writ petitions are allowed. No order as to costs.