
(2008) 11 GAU CK 0002
In the Gauhati High Court
Case No : Writ Appeal No. 255 of 2004

Tohelisumi

APPELLANT

Vs

State of Nagaland and Others

RESPONDENT

Date of Decision : 20-11-2008

Acts Referred:

Citation : (2009) 2 GLT 956

Hon'ble Judges : Jasti Chelameswar, C.J;B.K. Sharma, J

Bench : Division Bench

Advocate : A.K. Goswami, M.H. Rajbarbhuya, B. Chakraborty and R. Chetri, for the Appellant; T. Khro and S.K. Deori, for the Respondent

Final Decision : Allowed

Judgement

B.K. Sharma, J.—The Appellant who was the writ Petitioner is aggrieved by dismissal of her writ petition, which was filed challenging the order of her transfer, which was admittedly issued in extraneous consideration to accommodate the Respondent. The learned Single Judge has declined to interfere with the order of transfer primarily on the ground that the political authority at whose behest the transfer order was issued was not party Respondent to the proceeding. The learned Single Judge has also referred to some authorities both of the Apex Court as well as this Court so as to highlight the principles relating to transfer of Government servants to sustain the impugned order of transfer. Being aggrieved, the Petitioner has filed the instant writ appeal.

2. We have heard Mr. B. Chakraborty, learned Counsel for the Appellant as well as Ms. T. Krow, learned State Counsel. We have also heard Mr. S.K. Deori, learned Counsel for the private Respondent.

3. The Appellant while was serving as Headmistress of Government High School, Asuto was transferred and posted as Deputy Inspector of Schools, Zunheboto against the vacancy occurred due to superannuation of the incumbent. While she was continuing as such, the Parliamentary Secretary, Industries and Commerce,

unconnected with the Education Department desired posting of the Respondent No. 4 as the Deputy Inspector of Schools, Zunheboto with immediate effect. The note furnished by him on 17.3.2008 to the Education Minister, Nagaland is reproduced below:

Honourable Shri Nyeiawang Konyak, Education Minister, Nagaland, Kohima. Mrs. Ati Yephthomi, Headmaster, Govt. High School, Satakha from my constituency. I want her to be DIS, Zunheboto with immediate effect.

Thanking you for your cooperation.

Dr. K.C. Nihoshe 17.3.08 Parliamentary Secretary, Industries and Commerce, Nagaland, Kohima

4. It is on the above basis the Respondent No. 4 was transferred and posted as DIS, Zunheboto at the cost of the writ Petitioner/Appellant. Although in the note there was no mention about the Appellant, but her transfer from Zunheboto was bound to follow since the desire of the Parliamentary Secretary was to have the Respondent No. 4 as the DIS, Zunheboto.

5. We have verified the file bearing No. EDS/P/AHM/HM/DIS/98 Vol.-I of the School Education Department. On perusal of the same, it appears that after the aforesaid note of the Parliamentary Secretary endorsed to the Education Minister, the process was initiated to implement the desire of the Parliamentary Secretary, as a consequence of which, the axe fell on the Appellant. Although, the file has revealed that certain re-shuffling was on the card, but till the desire expressed by the Parliamentary Secretary, there was no proposal for transfer of the Appellant from Zunheboto. It is an irony that such transfer of the Appellant vis-a-vis the Respondent has been described as the transfer "in the interest of public service". As to whether the Appellant in the process of reshuffling and in due consideration of the other attending facts and circumstances involving public interest and in the exigencies of service as they are understood in the common parlance, would have been transferred or not is altogether a different matter, but to transfer her just to accommodate the Respondent as per the desire of the Parliamentary Secretary, certainly cannot be said to be in the interest of public service.

6. In the aforesaid context, it will also be pertinent to note that when the writ petition was entertained with an interim order by way of directing the Respondents to maintain status quo as on the date of passing the interim order i.e. 21.4.2008, the aforesaid Parliamentary Secretary again stepped into the matter unauthorisedly issued the following direction on 10.6.2008:

Office Establishment of DIS.ZBTO is directed not to re-allocate assignment of files till the Court Case is settled in regards to transfer case of DIS.ZBTO. Incumbent officer holding office on stay order, as such status-qua will be maintained.

7. It was totally unwarranted and strange that the Parliamentary Secretary,

Industries and Commerce unconnected with the Education Department could dictate the terms in respect of transfer and posting of the officers of the Education Department and even could issue direction regarding movement of file etc. in respect of the incumbent holding the post of DIS. It was only after bringing such interference on the part of the Parliamentary Secretary in the matter to the notice of the Court, the aforesaid direction of the Parliamentary Secretary was withdrawn vide Annexure-GWT Message dated 22.7.2008.

8. From the aforesaid factual position, which has emerged and could be gathered on the basis of the materials available on records, there is no manner of doubt that the interest of public service which is said to be the foundation of the impugned order of transfer dated 15.4.2008 is a misnomer and in the form of a disguise. The real intent and purpose of issuance of the impugned order is the aforesaid desire of the Parliamentary Secretary to have the posting of the Respondent No. 4 as the DIS, Zunheboto, unmindful of the fact that materialization of such desire would affect the Appellant.

9. The learned Single Judge while discussing the general principles regarding transfer of Government officials leaned in favour of the impugned transfer order primarily on the ground that the Parliamentary Secretary being not party to the writ proceeding, it was difficult to establish malafide exercise of power on his part. At the same time, it has also been observed by the learned Single Judge that:

"in the present case also at the behest or rather vide the letter of the Parliamentary Secretary, Industries and Commerce, dated 17.3.2008, the transfer has been effected.

10. It is not a case of alleging any malafide against any particular person so as to contend that such malafide exercise of power is the foundation of the impugned order of transfer. The pleaded case of the writ Petitioner in the writ petition was that the impugned order had been issued at the behest of politician on extraneous consideration and that the official Respondents succumbed to the dictates of the politicians. It was the pleaded case of the Appellant that in the absence of any background foundation of Government policy, the cross transfer of the Appellant with the Respondent No. 4 was not the outcome of any public interest and that before accommodating the Respondent No. 4 as per the desire of the Parliamentary Secretary unconnected with the Education Department, the Appellant should have also be given an opportunity of being heard.

11. On the facts admitted in the present case, the Parliamentary Secretary, in our considered view was not a necessary party inasmuch as it was not a case of raising some disputed questions of fact alleging malafide on the part of the Parliamentary Secretary requiring his presence to answer the same. When the facts noticed above speak for itself and have been admitted by the Respondents, the grievance of the Appellant is to be judged on that basis. It is not a case that the Parliamentary Secretary could have defended his action towards issuance of

the impugned order of transfer. Moreover, the State was represented by the Chief Secretary. In such a situation, we are of the considered opinion that the reason assigned by the learned Single Judge is not sustainable on facts.

12. It is true that merely because some kind of interference of politicians in the matter of transfer is discernible, same by itself may not always lead to the inference of malafide exercise of power, but at the same time, such interference will have to be considered in the context of the fact situation involved in each and every case. The decisions on which the learned Single Judge has placed reliance are generally on the principles involved in the matter of transfer. There cannot be any quarrel with the propositions. However, the ratio of any decision must be understood in the background of facts of that case. It has been said long time ago that a case is only an authority, for what it actual decide and not what logically follows from it (See Lord Halsbury in *Quinn v. Leathern*, 1901 ACC 495).

13. The learned Single Judge has referred to two decisions of this Court in taking the decision not to interfere with the impugned order of transfer and they are as reported in *Kalyan Kumar Sarkar Vs. Alok Kanti Paul Choudhury and Others*, *M. Balakrishna Reddy Vs. Union of India (UOI) and Others*, . *Balakrishna Reddy v. Union of India*. In *Kalyan Kumar Sarkar*, the transfer order was not interfered with when the Petitioner failed to establish any malafide exercise of power. Unlike the said case, in the instant case, as noticed above, the facts are crystal clear. In the said case, only statement made in the writ petition was that the transfer order was passed because of action on the part of the Petitioner against the wife of the Respondent. Same is not the case in hand. In the said decision it has been observed that

at the same time it may not always be possible to demonstrate malice in fact with full and elaborate particulars and in appropriate case it may be permissible to draw reasonable inference of malafide from the facts pleaded and established.

In the instant case, no inference is required to be drawn that the impugned transfer order was issued as per the desire of the Parliamentary Secretary and the same stares on the face of it.

14. In *M. Balakrishna Reddy (supra)*, it was found that there was nothing to suggest even remotely that the transfer order was issued only to accommodate the Respondent No. 5 in the said proceeding. In the said decision, the Division Bench of this Court has referred to the observation of the Apex Court in *Mohd. Masood Ahmad Vs. State of U.P. and Others*, The observation is as follows:

After all it is the duty of the representative of the people in the legislature to express the grievance of the people and if there is any complaint against an officer, the State Government is certainly within its jurisdiction to transfer such an employee. There can be no hard and fast rule that every transfer at the instance of an MP or MLA would be vitiated and it will all depend on the facts and circumstances of individual case.

15. It is not a case of espousing the cause of the public by the Parliamentary Secretary. It is also not a case of transferring the Appellant on the basis of some complaint against her. It is pure and simple desire of the Parliamentary Secretary unconnected with the Education Department to have the Respondent No. 4 posted at Zunheboto, no matter what consequence would follow, which was the transfer of the Appellant to accommodate such desire of the Parliamentary Secretary. Not only that he even went to the extent of dictating terms regarding movement of file etc. which, however, was subsequently withdrawn, having brought to the notice of this Court.

16. In *Ramzan Ali Ahmed v. Taiyab Ali Ahmed* reported in 1998 (2) GLT 242, the Division Bench of this Court under similar circumstances interfered with the impugned order of transfer on the ground of colourable exercise of power. As in the instant case, in that case also, the learned Single Judge had dismissed writ petition primarily on the ground that the authorities against whom, malafide had been alleged were not made parties to the petition. On scrutiny, it was found that the case of the writ Petitioner was one of colourable exercise of power and not malice or malafide against any one. As in the instant case, in that case also the case of the writ Petitioner was that the impugned order of transfer was passed on extraneous consideration and made under political pressure and that it was neither in public interest nor passed on administrative consideration.

17. Noticing the aforesaid facts, the Division Bench of this Court while interfering with the impugned order of transfer observed thus:

The rules governing transfer whether statutory in character or whether administrative instructions norms or guidelines. No doubt vest to power to pass order of transfer either in the government or in the appropriate authority, this power to transfer is not disputed. What is disputed is whether the power has been exercised for the purpose for which it is conferred. True it is, as pointed out by the learned Counsel for the Respondents that the impugned order of transfer itself recites that it was being passed in public interest. This recitation in the order does not ipso facto means that it was passed in public interest. It is not a shield against the Court's enquiry. The question, therefore, it whether the impugned order of transfer as passed against the writ Petitioner-Appellant was a colourable exercise of power by the authority concerned other than which, it has been erroneously misconstrued as a case of malice or malafide imputed against either against the M.L.A. or the Minister-in-charge. In view of the pleadings as quoted above, the writ Petitioner Appellant came before this Court with a colourable exercise of power by the authority who passed the impugned order of transfer. As already noted above, the concerned authority has not come out with an affidavit justifying its action in public interest. Mere use of the expression "in public interest" does not make the order as passed in public interest, more so in fact of the facts as placed on records by the writ Petitioner-Appellant. His case is one of colourable exercise of power, the order of transfer was passed not in public interest, but under political pressure. What has brought to be seen in the

case is not the imputations of malice as assumed, but not actually made against the M.L.A. or the Minister-in-charge. It is the colourable exercise of power by the authority passing the impugned order of transfer. In such a case it was not necessary for the writ Petitioner to implead the Minister or the M.L.A. as they were not necessary parties. No allegations made against them much less any relief sought from or against them.

18. As in the instant case, in the said case also, the interim order passed by this Court suspending the operation of the transfer order, there was interference in respect of the same and the Petitioner was not allowed to join the institution. Noticing such facts, coupled with the colourable exercise of power clearly evident from this face of it, it was further observed as follows:

What more remains in the case to infer colourable exercise of power on the part of the authorities? The learned judge mistook it to be a case of malice imputed against the MLA or Minister-in-charge which it was certainly not as has been pointed out by the Supreme Court in *B. Prabhakar Rao and Others Vs. State of Andhra Pradesh and Others*, merely because certain questions have to be determined incidentally in giving or not giving the relief asked for in the petition does not make each and every persons interested in such question necessary parties to such proceeding. In the instant case necessary parties, the authority passing the transfer order was very much there and it was for him to satisfy the Court that the impugned order of transfer was not made on any extraneous consideration or any colourable exercise of power, it was in fact public interest as professed in the order, but that has not been done. The impugned order-is liable to be set aside on this count.

19. In *Jibeswar Thakuria v. State of Assam* reported in (1) GLT 347 noticing the fact that there was all round interference by political authorities in the matter of transfer orders, same were interfered with. It was found that taking the name "public interest the private interest of the recommending authorities, i.e., the Minister of other departments having no nexus with the department in question, had been given preference and the private Respondents had been accommodated as per their choice."

20. We have gone through records produced by the learned State Counsel. On perusal of the same, no public interest is discernible towards issuance of the impugned order of transfer. The personal desire of the Parliamentary Secretary cannot be said to be "the public interest". The concept of public interest so well cherished in the matter of transfer has been put to oblivion with the use of its form and not the contents. The officers occupying key positions just yielded to the pressure of the Parliamentary Secretary and gave way to his command. It is in this context the Apex Court in the case of *Tarlochan Dev Sharma Vs. State of Punjab and Others*, observed thus:

In the system of Indian democratic governance as contemplated by the constitution, senior officers occupying key positions such as Secretaries are not

suppose to mortgage their own discretion, volition and decision making authority and be prepared to give way or being pushed back or pressed ahead at the behest of politicians for carrying out commands having no sanctity in law. The Conduct Rules of Central Government Services command the civil servants to maintain at all times absolute integrity and devotion to duty and do nothing which is unbecoming of a Government servant. No Government servant shall in the performance of his official duties or in the exercise of power conferred on him, act otherwise than in his best judgment except when he is acting under the direction of his official superior. In *Anirudhsinhji Jadeja 2* this Court has held that a statutory authority vested with jurisdiction must exercise it according to its discretion; exercise under the direction or instruction of some higher authority is failure to exercise discretion altogether. Observations of this Court in *Purtabpore Co. Ltd.* are instructive and apposite. Executive officers may in exercise in their statutory discretions take into account considerations of public policy and in some context, policy of a Minister or the Government as a whole when it is a relevant factor in weighing the policy but they are not absolved, from their duty to exercise their personal judgment in individual cases unless explicit statutory provision has been made for instruction by a superior to bind them.

21. For all the aforesaid reasons, we are inclined to accept the appeal. Consequently, the appeal is allowed and the impugned judgment and order under appeal is set aside. Resultantly the writ petition being W.P.(C) No. 51(K)/2008 is allowed and the impugned order of transfer dated 15.4.2008 passed by the Principal Secretary to the Government of Nagaland in the Department of School Education is set aside and quashed with consequential benefits to the Appellant/writ Petitioner.

22. Before parting with the case record, we deem it appropriate to record the submission of the learned State Counsel that the Appellant and the Respondent No. 4 are otherwise also due for transfer on completion of the prescribed tenure of posting. While it need not be emphasized that the executive authority in the particular department in consideration of the matters pertaining to public interest and/or exigencies of service can transfer Government servant from one place to another, but the same must not be by way of yielding to the pressure of the political authority; on extraneous consideration and/or in colourable exercise of power. While exercising such power, it is expected that the said executive authority shall bear in mind the aforesaid observation of the Apex Court.

23. Writ Appeal is allowed, without, however any order as to costs.