

GAHC010188902023



THE GAUHATI HIGH COURT
(HIGH COURT OF ASSAM, NAGALAND, MIZORAM AND ARUNACHAL PRADESH)

Case No. : WA/328/2023

PANPONG TANGHA
S/O LATE N. TANGHA, PRESENTLY SERVING AS EXECUTIVE ENGINEER,
PWD, LONGDING DIVISION, DIST.- LONGDING, ARUNACHAL PRADESH.

VERSUS

THE STATE OF ARUNACHAL PRADESH AND 2 ORS. B
REP. BY CHIEF SECRETARY TO THE GOVT. OF ARUNACHAL PRADESH,
ITANAGAR, DIST.- PAPUMPARE, ARUNACHAL PRADESH

2:THE PRINCIPAL SECRETARY (PWD)
GOVT. OF ARUNACHAL PRADESH
ITANAGAR
DIST.- PAPUMPARE
ARUNACHAL PRADESH

3:HAGE TAJANG
EXECUTIVE ENGINEER
O/O CHIEF ENGINEER (HW) ZONE OFFICE
ITANAGAR
DIST.- PAPUMPARE
ARUNACHAL PRADESH

Advocate for the Petitioner : MR H K DAS

Advocate for the Respondent : GA, A P

BEFORE
HONOURABLE MR. JUSTICE LANUSUNGKUM JAMIR
HONOURABLE MR. JUSTICE KARDAK ETE

JUDGMENT

Date : 27-02-2024

[Kardak Ete, J]

Heard Mr. H.K. Das, learned counsel for the appellant/writ petitioner. Also heard Mr. B.D. Goswami, learned Additional Advocate General, Arunachal Pradesh and Mr. R.P. Sarma, learned Senior counsel assisted by Mr. S. Dihingia, learned counsel appearing for respondent No.3.

2. This Writ Appeal is directed against the order dated 17.08.2023 passed by the learned Single Judge in WP(C). 380/2023, whereby, while issuing notice upon respondents the learned Single Judge has refused to grant any interim relief. The appellant/writ petitioner is aggrieved by the impugned transfer order No. PWD-11011/4/2021-Estt-PWD/402, dated 19.07.2023, issued on 24.07.2023, by the Principal Secretary (PWD), Govt. Of Arunachal Pradesh, whereby the appellant/writ petitioner is sought to be transferred from PWD, Longding Division as Executive Engineer, to the Chief Engineer (HW) Zone Office, Itanagar, Arunachal Pradesh, vice Sri Hage Tajang, Executive Engineer, respondent No.3 and also consequential rejection of his representation vide order No. SPWD-1162/2022/201-205 dated 09.08.2023.

3. The fact of the case, in brief, is that the petitioner was initially appointed as Junior Engineer in the PWD, Government of Arunachal Pradesh and was promoted to the post of Assistant Engineer on 11.06.2001. Thereafter, he was further promoted to the post of Executive Engineer on 09.09.2020. The appellant/writ petitioner was transferred as Executive Engineer, Longding Division PWD, Longding from Itanagar vide order dated 06.10.2021.

4. While serving at Longding Division, Longding as Executive Engineer, the Principal Secretary, (PWD), Government of Arunachal Pradesh passed the impugned transfer order No. PWD-11011/4/2021-Estt-PWD/402, dated 19.07.2023, issued on 24.07.2023 whereby the petitioner is sought to be transferred from Longding Division, PWD, Longding to the Office of the Chief Engineer (HW) Zone, Itanagar and in his place the respondent No. 3 has been transferred.

5. The appellant/writ petitioner initially challenged the said impugned order of transfer dated 19.07.2023, issued on 24.07.2023, by filing a writ petition being WP(C) No. 346/2023 which was disposed of vide order dated 27.07.2023, directing the respondent authority to consider the representation of the petitioner on its own merit. However, the learned Single Judge recorded the finding on merit that no interference was called for to the impugned order of transfer dated 19.07.2023 even though, the petitioner may be retiring from his service in about a year's time. Pursuant to the said order dated 27.07.2023, passed in WP(C) No. 346/2023, the Principal Secretary (PWD) Government of Arunachal Pradesh vide order No.SPWD-162/2022/201-205, dated 09.08.2023, has rejected the prayer of the appellant/writ petitioner on the ground that the appellant was transferred out in the interest of public service and his transfer to Itanagar will facilitate preparation of his pension papers etc.

6. Being aggrieved, the appellant/writ petitioner preferred a writ petition being WP(C) No. 380/2023. The learned Single Judge while issuing notice upon the respondents vide order dated 17.08.2023, has refused to grant any interim relief, against which the present writ appeal has been preferred.

7. The contention of the appellant/writ petitioner is that the impugned transfer order dated 19.07.2023, issued on 24.07.2023 at the fag end of his service career is grossly illegal. The appellant/writ petitioner has completed only one and half years of service as Executive Engineer, PWD Longding Division as the normal tenure is two years. The further contention of the appellant/petitioner is that the impugned order of transfer dated 19.07.2023 has been issued in gross violation of clause 1(d) of the circular dated 02.06.1998, issued by the Government of Arunachal Pradesh, Department of Personnel. The Clause 1(d) in clear terms mandates that officers are not to be posted one year before retirement as it may affect preparation of their pension papers etc. The appellant/writ petitioner is due to retire from the service w.e.f. 26.06.2024 and he has only 10 (ten) months service left at the time of issuance of the impugned transfer order dated 19.07.2023.

8. It is further contended that appellant/writ petitioner has been sought to be transferred only to accommodate the private respondent No. 3 without there being any public interest or administrative exigency. The impugned transfer order dated 09.08.2023 and its consequential rejection order dated 09.08.2023 are in gross violation of the guidelines regulating the transfer and posting of the Officers/Officials in the State of Arunachal Pradesh.

9. Mr. H.K. Das, learned counsel for the appellant/petitioner, submits that despite being able to make out a *prima facie* case before the writ Court the learned Single Judge has failed to assign any reason while refusing to pass any interim order in favour of the petitioner. He submits that the impugned order and its consequential rejection order is a gross violation of the clause 1(d) of the circular dated 02.06.1998, issued by the Government of Arunachal Pradesh,

Personal Department. The circular categorically provided that the officers are not to be transferred one year before the retirement because it may affect the preparation of his pension papers etc. He submits that appellant/writ petitioner claims the benefit of the first part of the clause 1(d) because his displacement from Longding to Itanagar would affect his settlement of pension. He contends that when the Government of Arunachal Pradesh, Personnel Department concluded that such displacement would create complicity in preparation of pension papers, the respondents in PWD Department had no business and authority to tinker with such decision. He further submits that transfer of the appellant/petitioner one year before retirement would definitely jeopardise the process of pension and therefore, such action on the part of the respondent authority violates the said mandate in absence of any administrative exigency, as the impugned order dated 19.07.2022 and the subsequent rejection order dated 09.08.2023 did not disclose any administrative exigency in transferring the appellant to Itanagar except for mentioning that the appellant was transferred in the interest of the public service which is too vague a ground to sustain the transfer of the appellant/petitioner having only 10 months service left before his retirement.

10. Mr. H.K. Das learned counsel submits the impugned order dated 19.07.2023 as well as the subsequent rejection order dated 09.08.2023 suffers from arbitrariness as the respondent authority has violated the circular dated 02.06.1998 and the learned Single Judge has failed to appreciate such arbitrary action as well as violation of the said circular. Therefore, the impugned order dated 19.07.2023 as well as the subsequent rejection order dated 09.08.2023 are not sustainable. Mr. H.K. Das learned counsel while referring to the affidavit-in-opposition filed on behalf of respondent Nos. 1 and 2 submits that though the

respondent authority has sought to project that the transfer of the appellant to Itanagar would facilitate him in preparation and submission of pension papers for timely release of pensionary benefits after his retirement, the justification that there was administrative exigency to transfer out him from the district in the interest of public service/administrative convenience in the district and to further misuse of Government funds only on the basis of legal notice issued by a person from resident of Maharashtra alleging erecting road signs across the district with intent of promoting Christian religion and proselytized the public of Longding by undermining their indigenous faith by using Government Funds by PWD, is punitive in nature. Therefore, the impugned order of transfer dated 19.07.2023 and rejection order dated 09.08.2023 is not only in gross violation of circular dated 02.06.1998 but also punitive in nature which are not sustainable and are liable to be set aside and quashed.

11. Mr. H.K. Das has placed reliance on the Judgment of Hon'ble Supreme Court in the case of **Somesh Tiwari Vs. Union of India**, reported in **(2009) 2 SCC 529** to project that although power is vested upon the respondent authority to issue order of transfer in the exigency of service, however, the said power is circumscribed in the event, the same suffers from arbitrariness, malafide or is contrary to the statutory provisions and therefore, the action of the respondent authority, in the present case, in passing the impugned transfer order and the rejection order clearly attracts the principles of malice in law.

12. He further relied on the judgment on this Court in the case of **Gobinda Ch. Kalita Vs. State of Assam**, reported in **2015(6) GLR 547** in support of his submission that the allegation made against the appellant attracts the principles of malice in law as the reason for impugned transfer order and consequential

rejection order is not only gross violation of circular dated 02.06.1998 but the reason for transfer is on the allegation of misuse of Government funds while erecting road signs across the district of Longding, only on the basis of legal notice served to the Deputy Commissioner, Longding District by a person from the State of Maharashtra as clearly reflected in the affidavit-in-opposition filed by the respondent Nos. 1 and 2.

13. On the other hand, Mr. B.D. Goswami, learned Additional Advocate General representing the State, while referring to the affidavit-in-opposition filed on behalf of respondent Nos. 1 and 2, submits that the circular dated 02.06.1998 in clause 1(d) provides that the officers are not to be transferred before one year of retirement as it may affect preparation of his pension papers etc. It also provides that however, generally officer posted in the field/work division should be posted out to the office head quarter one year before the retirement. Hence, he submits, the appellant/writ petitioner was transferred to the head quarter which is located in the vicinity of the Office of the Director, Audit and Pension, wherein the pension matters of the retired Government servant are dealt with. Therefore, transfer of the appellant/writ petitioner to the head quarter at Itanagar would rather facilitate him in preparation and submission of his pension papers for timely release of his pensionary benefits after his retirement. The impugned transfer order dated 19.07.2023 issued on 24.07.2023, has been passed barely 19 days short of one year. That apart, circular dated 02.06.1998 is a guideline for transfer and posting of officers and officials in the State of Arunachal Pradesh which is not enforceable as the same is mere guidelines.

14. Mr. B.D. Goswami, learned Additional Advocate General, sensing that transfer order cannot be issued on allegation of misuse of Government funds

which may be punitive in nature, he made a vain attempt to disown the categorical statement on behalf of the State respondent at paragraph 5 of the affidavit-in-opposition wherein it is stated that there was administrative exigency to transfer out the appellant/writ petitioner from the district for the interest of public service/administrative convenience in the district and to avoid further misuse of government funds.

15. Having submitted above, learned Additional Advocate General, contends that neither the impugned order dated 19.07.2023 has been passed in violation of the transfer and posting guidelines nor it is punitive in nature. Therefore, the writ petition has no merit and same is liable to be dismissed.

16. Mr. R.P. Sarma, learned Senior Counsel, while defending the impugned transfer order dated 19.07.2023 and its consequential rejection order dated 09.08.2023, submits that the transfer and posting of a Government servant is an incident of service. The appellant/petitioner has no vested right to remain posted in one place as he held a transferable post and hence, the appellant/petitioner is liable to be transferred from one place to another. The impugned transfer order dated 19.07.2023 has been issued by the competent authority which did not violate any mandatory rule, therefore, there is no ground to interfere with the impugned transfer order.

17. The learned Senior Counsel further submits that the Court should not interfere with the transfer order which is made in public interest and for administrative reasons unless the transfer order is made in violation of any mandatory or statutory rules and/or on the ground of malafide. Even if the transfer order is passed in violation of any executive instructions or orders, the

Court ordinarily should not interfere as the executive instruction and guidelines are not legally enforceable. In the instant case, he submits, there is no allegation of malafide. If at all the petitioner alleges malafide, no one has been arrayed as a party against whom malafide is alleged. That apart, the petitioner has been transferred to the head quarter at Itanagar more or less within one year, so as not to effect preparation of his pension papers etc. as the circular dated 02.06.1998 provides that generally officers posted in the field/work divisions should be posted out to office head quarters one year before retirement. The petitioner has been transferred barely 20 days short of one year, which is in consonance with the mandates of circular dated 02.06.1998. He further submits that the respondent no. 3 has already joined in terms of the office memorandum dated 13.02.2007 wherein it is provided that when the relieved officer does not hand over the charge to the relieving officer when it comes to the relieving officer, he will assume charge of the office unilaterally so as to comply the Government order and to enable the officers to discharge his responsibilities without delay and the relieving officer will automatically be relieved when the relieving officer assume charge of the office. In the present case, the respondent No. 3 has joined as on 27.07.2023 on being released by the competent authority on 26.07.2023 pursuant to the transfer order dated 19.07.2023. Therefore, the learned senior counsel submits that the writ appeal as well as writ petition has no merit and prays for dismissal of the same and allow the respondent No. 3 to continue as Executive Engineer at Longing PWD Division at Longding.

18. Mr. R.P. Sarma, learned Sr. Counsel has placed reliance on the order of Hon'ble Supreme Court in the case of **Shilpi Bose (Mrs.) Vs. State of Bihar**, reported in **1991 Supp (2) SCC 659** to project that even if the transfer is made on

a request to avoid hardship, same is reasonable and unassailable unless a mandatory statutory rule is violated and an employee holding transferable post is liable to be transferred.

19. We have considered the submissions of learned counsel for the parties and examined the materials available on record.

20. The appellant/writ petitioner has filed the present writ appeal against the order dated 17.08.2023 of the learned Single Judge in refusing to grant interim relief as sought for by the appellant/writ petitioner on the ground that the learned Single Judge has failed to consider prima facie made out case of the petitioner that the impugned transfer order dated 19.07.2023, issued on 24.07.2023 and consequential rejection order dated 09.08.2023 are in gross violation of the circular dated 02.06.1998, which regulates the transfer/posting of officers/officials in the State of Arunachal Pradesh.

21. The appellant/writ petitioner has challenged his transfer and posting as Executive Engineer from PWD Longding Division, to the Chief Engineer, (HW) Zone Office, Itanagar on two grounds- one the transfer is punitive in nature and second that same violates the clause 1(d) of the Circular dated 02.06.1998. We deem it apposite to refer to the clause 1(d) of the circular No.RPPTT-19/90 dated 02.06.1998, which is reproduced herein below:

*“RPPTT-19/90 GOVERNMENT OF ARUNACHAL PRADESH
DEPARTMENT OF PERSONNEL
CIRCULAR*

Dated: Itanagar, the 2 June, 1998.

In supersession of all previous notifications / circulars, etc issued on the subject, the following policy guidelines on the transfer and posting of all

categories of officers and staffs in Arunachal Pradesh is approved by the Governor and is circulated for compliance by all concerned

1.a).....

b).....

c).....

d) *Officers are not to be transferred one year before retirement, as it may affect preparation of their pension papers etc,. However, generally officers posted in the field work divisions should be posted out to office headquarters one year before retirement”.*

22. On bare reading of the aforesaid circular, it transpires that the officers are not to be transferred one year before the retirement as the same may affect the preparation of their pension papers. The circular dated 02.06.1998 may be a policy guidelines having no statutory force but is a professed norms followed in the State of Arunachal Pradesh which regulates the transfer and posting of the officers and staffs in Arunachal Pradesh.

23. It is undisputed that the appellant/writ petitioner has been sought to be transferred vide impugned order dated 19.07.2023 from PWD Longding division to chief Engineer (HW) Zone Office, Itanagar before completion of normal tenure of 2 (two) years and before 11 (eleven) months from the due date of retirement which is stated to be 26.06.2024. On careful consideration of the submissions of the parties and materials available on record, we find that no public interest or administrative exigencies is discernable in issuance of the impugned order of transfer dated on 19.07.2023, issued on 24.07.2023. We also find that by the consequential rejection impugned order dated 09.08.2023 the respondent authority has sought to justify that the transfer and posting of the petitioner will facilitate the petitioner in submission of pension papers as the Directors of Accounts and Treasuries is also in the State Capital which is not supported by any material. Available materials on record does not reflect anything to such justification while issuing the impugned transfer order.

24. We find that the respondent authorities have filed the affidavit-in-opposition with the categorical statements that there was administrative exigency to transfer out the appellant from the district in the interest of public service and to avoid further misuse of Government fund. The respondent authority has also stated that any departmental action, at this stage, may cause serious hindrances in clearing his pension papers and hence, on humanitarian ground, no disciplinary action has been taken apart from transfer with a clarification that if any disciplinary action is at all require shall be initiated in due course of time, to which, in our considered view, amounts to punitive in nature as the employee cannot be transferred on such serious allegation of misuse of Government fund without recourse to the relevant proceedings under the law. Thus, we are of the view that the impugned transfer order dated 19.07.2023 has been issued by way of punishment which is not permissible under the law.

25. A profitable reference may be made to the case of **Somesh Tiwari (Supra)** wherein the Hon'ble Supreme Court has held that an order of transfer is an administrative order. Transfer, which is ordinarily an incident of service should not be interfered with save in cases where, *inter alia*, malafide on the part of authority is proved. Malafide is of two kinds- one Malice in fact and second Malice in law. The order in question would attract the principles 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 allegation made against the appellant in an 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 same is liable to be set aside being wholly illegal.

26. In the present case, no enquiry/proceeding was initiated against the appellant/writ petitioner. It appears that the impugned transfer order has been passed in lieu of punishment as the same can be clearly gathered from the categorical stand taken by the respondent authority at paragraph 5 of the affidavit-in-opposition filed on behalf of respondent No. 1 and 2. It suffers not only for non application of mind but also suffers from malice in law.

27. In our view, the impugned order of transfer dated 19.07.2023 and rejection order dated 09.08.2023 would attract the principles 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 allegation of misuse of Govt. fund made against the appellant/writ petitioner on the complaint/legal notice by a person from Maharashtra.

28. In **Shilpi Bose (supra)** the transfer was made on the request to avoid hardship which is held to be reasonable and unassailable as there is no violation of mandatory rules and the employee holding transferable post is liable to be transferred. Thus, in our view, same does not come to the aid of the respondent No. 3.

29. Having regard to the justification sought to be made by respondent authority that the transfer of the petitioner would facilitate the preparation of pension papers, we would refer to the case of **Mohinder Singh Gill and another -Vs- The Chief Election Commissioner, reported in (1978) 1 SCC 405** wherein the Hon'ble Supreme Court has observed and held 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. The Hon'ble Supreme Court had drawn the attention to the observations in Gordhandas Bhanji case wherein it has been observed that "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 acting 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.

30. On the perusal of the other case laws relied by the learned counsel for the appellant/ petitioner, we find no relevancy and, thus, inapplicable in the facts and circumstances of the present case as it relates to the provision of Article 25 of the constitution of India.

31. Reverting back to the present case, as noted above, the reasons of transfer and posting of the appellant/writ petitioner and sought to be justified by the respondent authority are two folds- firstly, that the petitioner has been sought to be transferred so as to facilitate him in preparation and submission pension papers for timely release of pensionary benefits after his retirement and secondly, that there was administrative exigency to transfer out the appellant from the district in the interest of public service, administrative convenience in the district and to avoid further misuse of government fund and no disciplinary action was taken on humanitarian grounds apart from transferring him out from

the Longding, with a clarification that if any disciplinary action at all requires shall be initiated in due course of time, to which, in our considered view, are contradictory to each other as the respondent authority has sought to justify that the transfer has been made to facilitate the preparation of pension papers at the same time he has been transferred out from Longding to avoid further misuse of Government funds and if necessary disciplinary action will be initiated in due course of time, which clearly amounts to passing of the transfer order by way of punishment and the same cannot stand scrutiny of law. We also take note of the fact that the circular dated 02.06.1998 may not have a legal enforceability, however, since it is the professed norms followed in the State of Arunachal Pradesh regulating the transfer and posting of the officers and staffs, same cannot be lightly discarded on the ground of legal enforceability. More so, it is nobody's case that the even if there is a violation of policy guidelines, it does not have any legal enforceability. Rather, the learned counsels for the parties have contended and attempted to interpret the clause 1 (d) of the Circular dated 02.06.1998 in support of their respective cases.

32. In view of the above discussion, we are of the considered view that the impugned transfer order dated 19.07.2023, issued on 24.07.2023, and its consequential rejection order dated 09.08.2023 have been passed in violation of the circular dated 02.06.1998 and amounts to an order in lieu of punishment or punitive in nature and as such same are not sustainable.

33. Consequently, the impugned order 19.07.2023, issued on 24.07.2023, and its consequential rejection order dated 09.08.2023 are hereby set aside and quashed.

34. The Writ Appeal and the WP(C) No.380/2023 are allowed and disposed of accordingly. No order as to costs.

JUDGE

JUDGE

Comparing Assistant