

GAHC010218612023



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

Case No. : WP(C)/5696/2023

ABDUL MOMIN SARKAR
S/O LT. SHAHA MOHAMMAD SARKAR R/O VIL. KHARNABANDHA PO
FEKAMARI P.S. SOUTH SALMARA DIST. SOUTH SALMARA MANKACHAR
ASSAM PIN 783135

VERSUS

THE STATE OF ASSAM AND 4 ORS H
REP BY THE COMMISSIONER AND SECRETARY TO THE GOVT. OF ASSAM
SOCIAL WELFARE DEPTT. DISPUR GUWAHATI 6

2:THE DIRECTOR OF SOCIAL WELFARE
ASSAM
UZANBAZAAR GUWAHATI 1

3:THE DISTRICT COMMISSIONER
SOUTH SALMAR MANKACHAR
PO. HATSINGIMARI P.O. AND DIST. SOUTH SALMARA MANKACHAR
ASSAM PIN 783135

4:THE ADDITIONAL DISTRICT COMMISSIONER (W AND CD)
SOUTH SALMARA MANKACHAR
PO. HATSINGIMARI P.O. AND DIST. SOUTH SALMARA MANKACHAR
ASSAM PIN 783135

5:MD. MAHMUD AL HASSAN
S/O ZOSIZUL HOQUE R/O VILL. JHOWDANGA P.O. JHOWDANGA P.S.
MANKACHAR DIST. SOUTH SALMARA MANKACHAR ASSAM PIN 78313

Advocate for the Petitioner : MR. R K D CHOUDHURY

Advocate for the Respondent : GA, ASSAM

**BEFORE
HONOURABLE MR. JUSTICE SOUMITRA SAIKIA**

ORDER

16.05.2024

Heard Mr. R.K. Dev Choudhury, learned counsel for the petitioner. Also heard Mr. D. Bora, learned Government Advocate, Assam and Mr. R. Islam, learned counsel for the respondent no.5.

2] This writ petition is filed by the petitioner praying for setting aside the impugned transfer order dated 14.09.2023, whereby the petitioner and the private respondent along with another employee were transferred. The petitioner, who is working as a Statistical Assistant in the Office of the Child Development Project Officer (CDPO), was initially appointed in the Office of CDPO, Bilasipara ICDS project on 29.06.2013 and he, accordingly, joined in the said Office. Having worked there for only about 2 (two) months, he was transferred to Hailakandi ICDS project by order dated 03.09.2013. Subsequent thereto the petitioner was again transferred and posted to the ICDS project at Fekamari, South Salmara by the order dated 10.06.2015. He joined in Fekamari ICDS project on 16.06.2015. On the 15.10.2022, the petitioner was again transferred from Fekamari to ICDS project to Mankachar ICDS project. Thereafter, again by order dated 17.07.2023, the District Commissioner, South

Salmara, Mankachar had issued another order of transfer, however, the said order was not communicated to the petitioner and after modifying the said order dated 17.07.2023, the District Commissioner, South Salmara, Mankachar had issued the impugned transfer order dated 14.09.2023 transferring the petitioner from Mankachar ICDS project to South Salmara ICDS Project and the incumbent in South Salmara ICDS project, namely, one Sri Abu Hanif Mokaddimo Sardar, was transferred to Fekamari ICDS project and the private respondent who was posted in Fekamari ICDS project was transferred to Mankachar ICDS project. Being aggrieved the petitioner has approached and filed the present writ petition putting to challenge the said impugned transfer order dated 14.09.2023.

3] Learned counsel for the petitioner submits that a bare perusal of this order reflects that on 17.07.2023 the District Commissioner, South Salmara, Mankachar had issued a transfer order and thereafter, the same was modified and the impugned transfer order dated 14.09.2023 was issued. It is submitted that the earlier order dated 17.07.2023 was never served on the writ petitioner and to the best of the knowledge of the writ petitioner, the said order was modified and the impugned transfer order dated 14.09.2023 was issued for reasons which are not germane to public service. It is submitted that since his date of appointment, the petitioner has been transferred very frequently without

providing any proper reasons. The petitioner has accepted all the transfer orders. However, within a period of less than 1 (one) year, the petitioner is again now sought to be transferred out by the impugned order dated 14.09.2023. It is submitted by the learned counsel for the petitioner that although transfer is an incidence of service, however, the employer must not use his power of transfer for reasons which are not in support of public service and which are contrary to the guidelines and the procedure of law and thereby making it a *malafide* transfer. It is further submitted by the learned counsel for the petitioner that to the best of his knowledge, this transfer has been initiated by the District Commissioner, South Salmara, Makachar at the instance of the private respondent and therefore, in order to accommodate the private respondent the impugned order dated 14.09.2023 has been issued. That being the position, the impugned order dated 14.09.2023 cannot be said to be an order issued by the employer in public service and therefore, to that extent the same is contrary to the provisions of law and is *malafide* and therefore, the same is required to be interfered with, set aside and quashed.

4] This Court by order dated 27.09.2023 had issued notice to the respondents and granted *status quo* to be maintained till the next date of listing. The *status quo* order which was issued came to be extended from time to time and is still in force. Pursuant to the *status quo* order issued, the

petitioner continued in his present place of posting, which is Fekamari ICDS project of South Salmara, Mankachar district.

5] The private respondent, being aggrieved by the status quo order has filed an Interlocutory Application being I.A.(Civil) No.3145/2023 seeking vacation/modification/alteration/cancellation of the *status quo* order dated 27.09.2023. The learned counsel appearing for the private respondent and also for the applicant in the Interlocutory Application submits that the contention of the petitioner that he has been transferred frequently is not borne out by the records to the extent the private respondent is informed and furthermore, because of the *ex-parte* impugned order, the third person who has also been transferred by the same impugned order dated 14.09.2023 had already joined in the place of posting of the applicant. Presently, the applicant has no place to join and is without any posting. He therefore submits that the impugned *status quo* order dated 27.09.2023 should be vacated and the applicant should be allowed to join in his place of posting, which is Mankachar ICDS project, South Salmara, district and in which post the present petitioner is presently being posted by virtue of impugned *status quo* order dated 27.09.2023.

6] The Department has filed their affidavits in the writ petition as well as in the Interlocutory Application. It is submitted that the Deputy Commissioner,

South Salamara, Mankachar, is the competent authority to transfer only all employees belonging to Grade-III and IV from one place to another within the same district and the same Department for better delivery of public services. The impugned transfer order dated 14.09.2023, which is challenged in the present writ petition, was also issued in similar lines and therefore, there is no infirmity in the impugned transfer order dated 14.09.2023 issued by the Deputy Commissioner, South Salamara, Mankachar. Accordingly, learned Government Advocate submits that because of this reason the impugned transfer order dated 14.09.2023 should not be interfered with as the claim of writ petitioner is not made out in the present writ petition. The Director Social Welfare filed their affidavits in the writ petition and the respondent no.4, namely, the Additional District Commissioner (W&CD), South Salamara, Mankachar has filed an affidavit in the Interlocutory Application. The Director of Social Welfare submits that the writ petitioner was posted in South Salmara for several years and that apart, there are several complaints received against him. Furthermore, the Director in his affidavit submits that in terms of notification dated 09.09.2021, the Deputy Commissioners of all districts (excluding 6th Schedule Districts) are empowered to transfer Grade-III and IV staff of all categories from one place to another within the same district and the same Department in consultation with the District Head of the concerned line Department of the District so that there

is better delivery of public service. Since the affidavits filed by the Department did not satisfy the Court, the concerned records pertaining to the transfer of the petitioner was called for and directed to be placed before the Court. These records were placed before the Court and from the records it is seen that the impugned transfer order dated 14.09.2023 is a modification of the earlier transfer order dated 17.07.2023. However, the records revealed that the order dated 17.07.2023 transferring the petitioner or the private respondent was never issued by the Department. On the other hand, what is noticed is that there are complaints filed against the writ petitioner as well as the private respondent by a section of local people. That apart, the mother of the private respondent had filed an application which was placed before the concerned authority requesting the authority to transfer the private respondent from Fekamari ICDS project to Mankachar ICDS project as the mother as well as the father of the petitioner are suffering from health issues. This application was placed before the concerned authority and from the office record it is seen that the transfer order was prepared for the statistical assistance of ICDS projects of Mankachar and Fekamari as per the prayer petition of the private respondent, namely, the prayer petition issued by the mother.

7] Mr. D. Bora, learned Government Advocate, Assam, has clarified that there was no transfer order issued on 17.07.2023. Rather, the transfer order was

prepared and placed before the competent authority on 17.07.2023 and the same was subsequently modified and issued on the 14 .09.2023.

8] Having heard the rival submissions of the parties and upon careful perusal of the pleadings on records, it is seen that the records contain complaint petitions filed by the local residents against both the petitioner as well as the private respondent. But as on date, no enquiry or any departmental proceedings have been initiated by the Department against either of the persons. While there is no dispute with the proposition that the employer is within its rights to transfer an employee in exigency of services, the fact remains that the order of transfer has to be issued by the competent authority upon being seized of all relevant materials, facts and circumstances. The records reveal that the initiation of the transfer order was on the basis of an application preferred by the mother of the private respondent. Such initiation, *prime facie*, although cannot be termed to be *malafide* exercise of power but it cannot also be considered to be in exigencies of public service. If the Authorities want to consider the prayer of the private respondent on humanitarian grounds or any other personal grounds, then they are within their rights to pass effective orders, however, subject to the legal rights of other corresponding officers not being interfered with. This is not a transfer on mutual consent by and between both the petitioner and the private respondent.

9] Consequently, this Court is of the considered view that the manner in which the transfer order was initiated does not inspire confidence that the same was issued in exigencies of public service. *Prima facie*, it is evident that the transfer order was issued to accommodate the private respondent. Whether the Authorities are competent or are empowered to do so is a question which is required to be decided by the Authorities concerned. But on the facts and materials which are placed before the Court and upon due examination of the relevant reports, it cannot be held that this transfer order was issued in exigencies of public service, at least, insofar as, the petitioner and the private respondent are concerned. In this context, a reference may be made to the judgment referred to and relied upon by the Counsel for the petitioner rendered in *B. Varadha Rao vs. State of Karnataka & Others* reported in (1986) 4 SCC 131. The Apex Court in this judgment, while dealing with the transfer order, held that the power to transfer employees in a transferable post is unquestioned. But this power has to be exercised bona fide to meet the exigencies of service. If the power is exercised male fide, then obviously the order of transfer is liable to be struck down.

10] In view of the discussions held above, since this Court is of the considered view that the transfer order dated 14.09.2023 was not issued in *bona fide* exercise to meet the exigencies of public service, the matter is remanded back

to the Deputy Commissioner, South Salmara, Mankachar to redecide on the issue of transfer inter se the petitioner and the respondent no.5 and upon considering the matter in its entirety, the Deputy Commissioner, South Salmara, Mankachar is at liberty to pass appropriate orders. Till such a decision is taken by the Deputy Commissioner, South Salmara, Mankachar upon taking into consideration all the attending facts and circumstances, the *status quo* order passed on 27.09.2023 shall continue. The Deputy Commissioner, South Salmara, Mankachar is directed to pass appropriate orders within a period of 3 (three) weeks from the date of receipt of a certified copy of this order.

11] The writ petition stands disposed of in terms of the above.

The records called for are returned to the learned Government Advocate, Assam.

JUDGE

Comparing Assistant