

GAHC020007212022



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

Case No. : WP(C)/282/2022

SMTI. N. MONGYUNG PHOM
ASSISTANT PROFESSOR,
WANGKHAO COLLEGE, MON, NAGALAND

VERSUS

THE STATE OF NAGALAND AND 3 ORS
REPRESENTED BY THE CHIEF SECRETARY TO THE GOVERNMENT
OF NAGALAND,
NAGALAND, KOHIMA

2:THE SECRETARY

DEPARTMENT OF HIGHER AND TECHNICAL EDUCATION
DEPARTMENT
NAGALAND
KOHIMA

3:THE DIRECTOR

HIGHER EDUCATION NAGALAND

NAGALAND
KOHIMA

4:SMTI. SHUICHING KONYAK

ASSISTANT PROFESSOR

DIMAPUR GOVERNMENT COLLEGE

DIMAPUR

NAGALAND

Advocate for the Petitioner : WATI JAMIR

Advocate for the Respondent : GOVT ADV NL

Date of hearing : 16.05.2024.

Date of Judgment : 25.07.2024

**BEFORE
HON'BLE MR. JUSTICE BUDI HABUNG**

:: Judgment and Order ::

[CAV]

Heard Mr. Wati Jamir, learned counsel for the petitioner. I have also heard Mr. Moa Imchen, learned Senior Government Advocate for the State respondents and Mr. Moa Jamir, learned counsel for the respondent No. 4.

2. By this writ petition, the petitioner assailed the impugned transfer order dated 09.11.2022, in respect of serial no. 4 and 5 pertaining to the petitioner and the respondent no. 4 respectively.

3. The petitioner who was working as Assistant Professor in English Department being posted at Wangkhao College, Mon. While serving as such, by an order No. THE /HE/TRANSFER/13-8/2022 dated 10.10.2022 altogether 28 Associate Professors/ Assistant Professors under the Department has been transferred at different colleges. In the said transfer order, the petitioner's name has been reflected at serial no. 25 indicating that he has been transferred from Wangkhao College, Mon to

Dimapur Government College against Smti. Shuiching Konyak. By the said order Smti. Shuiching Konyak (respondent no. 4) has been transferred from Dimapur Government College to Wangkhao College, Mon against the petitioner. The said transfer and posting of officers has been initiated by way of general reshuffling in the department and the same transfer order dated 10.10.2022 was issued in public interest and administrative exigencies.

4. It is submitted that in view of the petitioner being transferred after serving for about 13 years the farewell program was also held on 14.10.2022 at Wangkhao College, Mon and her families also shifted to Dimapur to settle in the new place of posting. However, although the condition of the transfer clearly provides that handing over/taking over should be taken within 10 days from the date of the order, the Principal of Wangkhao College, Mon refused to issue release order stating that there is a specific instruction from the higher authorities not to issue release order to the petitioner due to which the petitioner could not join the new place of posting in terms of the order dated 10.10.2022.

5. It is further submitted that while the matter thus situated, the respondent authority issued another transfer order No. THE/HE/TRANSFER/13-8/2022/941 dated 09.11.2022 within a month from the issuance of the first transfer order dated 10.10.2022. By the said second transfer order dated 09.11.2022, purportedly issued in public interest, the petitioner has been transferred from Dimapur Government College to Sao Chang College, Tuensang and the case of the respondent No. 4 has been ordered to be retained at Dimapur Government College. No any reason has been assigned in the said impugned order for

modification of the earlier transfer order.

6. Aggrieved by the impugned second order dated 09.11.2022, transferring the petitioner in two different colleges within a period of one month without assigning any reason, the petitioner on 14.11.2022 submitted a representation and requested for cancellation/revoking of the second transfer order dated 09.11.2022 in respect of the petitioner. However, no any positive response was forthcoming. As such, having no alternative, the petitioner has filed this writ petition praying for setting aside and quashing of the said impugned order dated 09.11.2022 (Annexure-C) to the writ petition in respect of serial no. 4 and 5 pertaining to the petitioner and the respondent no. 4 respectively.

7. The learned counsel for the petitioner submitted that it is well settled principle of law that modification/cancellation or keeping an abeyance of transfer order must be supported with sufficient reasons as such transfers are always made for public interest and after elaborate exercise as to who should be transferred where in the exigency of the administration. Therefore, if a transfer order made in public interest is allowed to be taken away by another cryptic order of modification/cancellation or keeping in abeyance of the transfer order without assigning any reasons, it ceases to be in public interest. In the instant case, the transfer order dated 10.10.2022 which was issued in the public interest has been arbitrarily modified by the impugned order dated 09.11.2022 without assigning any reasons which cannot be termed to be issued in public interest. As such, the impugned order dated 09.11.2022 in respect of the petitioner and the respondent no. 4 is liable to be interfered with by this Court.

8. It is further submitted that the petitioner being a government servant is liable for transfer and posting in any place. However, such exercise of power of transfer should be in public interest and administrative exigencies. In the instant case, the petitioner was transferred to Dimapur Government College along with 27 other officers in the list. The said transfer order and posting has been made in public interest and in administrative exigencies of services by way of reshuffling in the department. However, within a period of one month, the transfer order which was issued in public interest has sought to be modified without assigning any reason by the impugned order dated 09.11.2022 and the petitioner has been transferred from Dimapur Government College to Sao Chang College, Tuensang. It is submitted that the impugned order dated 09.11.2022 has been issued based on extraneous consideration with malafide intention with a view to accommodate the private respondent no. 4 as such the same is liable to be set aside and quashed.

9. The learned counsel further submitted that the petitioner was transferred for the first time after 13 years of service at Wangkhao College, Mon by an order dated 10.10.2022, to Dimapur Government College and by the said order, the respondent no. 4 was also transferred to Wangkhao College, Mon which was made in public interest. However by the impugned order dated 09.11.2022, the place of posting in respect of the petitioner and the respondent no. 4 has been reversed. It is further submitted that the petitioner on enquiry has been informed that the impugned order dated 09.11.2022 has been issued at the behest of the respondent no. 4 and on the tactics of the higher ups with a view to accommodate the respondent no. 4 at Dimapur Government College.

Therefore, the impugned order dated 09.11.2022 is nothing but based on extraneous consideration with malafide intention and the same has been issued with personal liking so as to favour the respondent no. 4 and such decision cannot be said to have been taken in public interest. Therefore, the same is liable to be interfered with a set aside and quashed.

10. The learned counsel for the petitioner further submits that one vacant post of Assistant Professor in English Department at Dimapur Government College was lying vacant due to retirement of one Smti. I. Suzzana Yaden, Assistant Professor on 30.06.2022. The same was brought to the notice of the respondent authority to accommodate the respondent no. 4 without interfering in the original transfer order. However, despite of such facts, the impugned order dated 09.11.2022 is arbitrary and thereby discriminated the interest of the petitioner as such, the second transfer order dated 09.11.2022 is liable to be quashed and set aside.

11. In support of his submission, the learned counsel for the petitioner has relied upon the decision of the Hon'ble Supreme Court and High Court rendered in the following cases;

- (i) *Roukuolhoulie Angami Vs. State of Nagaland* reported in 1997 1 GLT 140;
- (ii) *DubomBagra Vs. State of Arunachal Pradesh and Ors* reported in 2013 (5) GLT 487;
- (iii) *Mrinal Chandra Das Vs. State Bank of India and Ors* reported in 2021 (5) GLT ;
- (iv) *Union of India and Ors Vs. S. L. Abbas* reported in (1993) 4 SCC 357,

12. On the other hand, the learned counsel for the State respondent submits that initially the transfer order dated 10.10.2022 was modified vide another order dated 09.11.2022 in respect of 9 officers and

in respect of respondent no. 4, the respondent received a forwarding letter from the Principal of Dimapur Government College on 14.10.2022 for retention of the service of the respondent no, 4 in Dimapur Government College on humanitarian ground. The authority accordingly examined the medical report submitted by the respondent no. 4 in respect of her child and it was found to be genuine as her child aged about 3 years old was a patient of Down Syndrome and Congenital heart defect (Atrial Septal Defect) who is in constant need of medical supervision and care which is available only in Dimapur. And because of the above reason, the authority considered the request of respondent no. 4 and passed the order dated 09.11.2022 and retained her services at Dimapur Government College on humanitarian ground. This was also done taking into consideration of the OM dated 08.10.2018 which provides that, "Exemption from the routine exercise of transfer/ rotational transfer." That as per Para 3 (iii) *The term 'Specified Disability' as defined herein is applicable as grounds only for the purpose of seeking exemption from routine transfer/rotational transfer by a government employee, who is a care-giver of dependent daughter/son/parents'/spouse/brother/sister as stated in Para 3(i) above*", and the modification of the transfer order dated 09.11.2022 was initiated for the interest of public and on humanitarian grounds with a valid reason.

13. The learned counsel for the private respondent no. 4 also while referring to the affidavit filed by respondent no.4 submits that it is a settled principle of law that court should not interfere with the transfer order which is made in public interest and for administrative reasons unless transfer orders are made in violation of any mandatory statutory

rules. He further submits that the transfer is an incident of service and the entire length of service of the government servant is at the disposal of the government unless there are exceptional circumstances to accommodate the government servant to avoid hardship. The learned counsel for the respondent no. 4 further denied that the impugned order dated 09.11.2022 was issued based on extraneous consideration with malafide intention at the behest of respondent no. 4 on the tactics of higher ups. It is submitted that the allegation of malafides are often more easily made than proved, and the various reasons of such allegation demands proof of a higher order of credibility. Mere use of the word "malafide" by the petitioner would not by itself make the petition entertainable. Malafides or malafide can only be associated from the records of the case in the fact of each case. In the instant case, there are no cogent material or evidence to attract the allegation of malafide for intervention of this Hon'ble court and hence, on this ground alone, the petition deserves to be dismissed.

14. It is further submitted that the respondent approached the authority with the purpose of retention on humanitarian ground that the deponent's only child (aged 3 years) has the condition called Down Syndrome who needs medical care and treatment including physiotherapy and occupational therapy. The child has also Congenital heart defect (Atrial Septal Defect) which needs constant medical supervision and care, which is not available in Mon town. While making such representation, the respondent no. 4 has enclosed all relevant documents. Hence, in view of the aforesaid medical condition of the child, the respondent no.4 was retained at Dimapur Government College by the impugned order dated 09.11.2022 and not on extraneous consideration and malafide intention as

alleged by the petitioner. The learned counsel for the respondent no. 4 further submits that it is a settled position of law that if the competent authority issued transfer order with a view to accommodate a public servant to avoid hardship, the same cannot and should not be interfered by the Court merely because the transfer order was passed on the request of the employee concerned.

15. The learned counsel for the respondent no. 4 submits that recently by an order dated 29.02.2023 the respondent authority considering the case of the respondent no. 4 has transferred her from Wangkhao College, Mon and attached her to Dimapur Government College against the vacancy created due to the study leave availed by one Shri. Lanunochit, and in pursuant to the said order, she has already joined the Dimapur Government College.

16. In support of his submission, the learned counsel for the respondent relied upon the following decisions of the Hon'ble Supreme Court in the following cases;

- (i) *State of UP and Ors Vs. Gobardhan Lal* reported in(2004) 11 SCC 402;
- (ii) *Shilpi Bose (Mrs) and Ors Vs. State of Bihar and Ors* reported in1991 (Suppl) 2 SCC 659;
- (iii) *Union of India and Ors Vs. S.L. Abbas* reported in(1993) 4 SCC 357;
- (iv) *Dharam Nath Giri Vs. Union of India Rep. by Secretary to the Govt. of India and Ors* reported in(2021) SCC Online Gau1309;
- (v) *Dr. Netramoni Kakati Vs. State of Assam and Ors* reported in(2019) SCC Online Gau 5649;
- (vi) *Union of India and Ors Vs. Ashok Kumar and Ors* reported in(2005) 8 SCC 760.

17. The learned counsel for the respondent no. 4 submits that the impugned order dated 09.11.2022 was issued based on the representation

submitted by the respondent no. 4 for consideration of her case for retaining her in Dimapur Government College in view of the physical difficulties of her lone child who requires regular care and for whose treatment it is available only at Dimapur and as such, there is no malafide in passing the impugned order retaining her at Dimapur. In support of his submission, the learned counsel for the respondent relied upon the decision in the ***State of UP and Ors Versus Gobardhan Lal*** reported in ***(2004) 11 SCC 402***, the relevant paragraphs 7 and 8 are reproduced below:

"7.It is too late in the day for any Government Servant to contend that once appointed or posted in a particular place or position, he should continue in such place or position as long as he desires. Transfer of an employee is not only an incident inherent in the terms of appointment but also implicit as an essential condition of service in the absence of any specific indication to the contra, in the law governing or conditions of service. Unless the order of transfer is shown to be an outcome of a mala fide exercise of power or violative of any statutory provision (an Act or Rule) or passed by an authority not competent to do so, an order of transfer cannot lightly be interfered with as a matter of course or routine for any or every type of grievance sought to be made. Even administrative guidelines for regulating transfers or containing transfer policies at best may afford an opportunity to the officer or servant concerned to approach their higher authorities for redress but cannot have the consequence of depriving or denying the competent authority to transfer a particular officer/servant to any place in public interest and as is found necessitated by exigencies of service as long as the official status is not affected adversely and there is no infraction of any career prospects such as seniority, scale of pay and secured emoluments. This Court has often reiterated that the order of transfer made even in transgression of administrative guidelines cannot also be interfered with, as they do not confer any legally enforceable rights, unless, as noticed supra, shown to be vitiated by mala fides or is made in violation of any statutory provision.

8. A challenge to an order of transfer should normally be eschewed and should not be countenanced by the Courts or Tribunals as though they are Appellate Authorities over such orders, which could assess the niceties of the administrative needs and requirements of the situation concerned. This is for the reason that Courts or Tribunals cannot substitute their own decisions in the matter of transfer for that of competent authorities of the State and even allegations of mala fides when made must be such as to inspire confidence in the Court or are based on concrete materials and ought not to be entertained on the mere making of it or on consideration borne out of conjectures or surmises and except for strong and convincing reasons, no interference could ordinarily be made with an order of transfer."

18. The learned counsel for the respondent no. 4 also relied upon the decision of the Hon'ble Supreme Court in the case of **Shilpi Bose (Mrs) and Ors Vs. State of Bihar and Ors** reported in **1991 Supp (2) SCC 659**, the relevant paragraphs 3 and 4 are reproduced herein below:

"3. After hearing learned Counsel for the parties and having considered the facts and circumstances of the case, we are of the opinion that the High Court committed serious error in interfering with the transfer Orders of primary school teachers. The High Court held that the District Education Establishment Committee had no jurisdiction to transfer the Primary School teachers on their request. We find no justification for this conclusion. There is no dispute that the District Education Establishment Committee is competent to transfer Primary School teachers from one place to the other but merely because such transfers were made on the request of teachers, the committee is divested of its jurisdiction. The Director of the Primary Education had issued directions that lady teachers posted in distant areas or rural areas may be accommodated to the place of their request to avoid hardship to them. These directions are reasonable, and the District Education Establishment Committee followed the same principles in transferring the appellants on their requests to avoid hardship with was being caused to them. The respondents challenged the validity of the transfer before the High Court on another

ground also that Primary School teachers posted in the urban areas were not liable to be transferred to rural areas though the State Government had issued circular on March 30, 1984 permitting transfers from urban areas to rural areas. The High Court did not interfere with the Order of the transfer on this ground instead it held that the transfer Orders were without jurisdiction as the same had been made on the appellants' request with a view of accommodate them. We fail to appreciate the reasoning recorded by the High Court. If the competent authority issued transfer Orders with a view to accommodate a public servant to avoid hardship, the same cannot and should not be interfered by the Court merely because the transfer Order were passed on the request of the employees concerned. The respondents have continued to be posted at their respective places for the last several years, they have no vested right to remain posted at one place. Since they hold transferable posts they are liable to be transferred from one place to the other. The transfer Orders had been issued by the competent authority which did not violate any mandatory Rule, therefore the High Court had no jurisdiction to interfere with the transfer Orders.

4. *In our opinion, the Courts should not interfere with a transfer Order which are made in public interest and for administrative reasons unless the transfer Orders are made in violation of any mandatory statutory Rule or on the ground of malafide. A Government servant holding a transferable post has no vested right to remain posted at one place or the other, he is liable to be transferred from one place to the other. Transfer Orders issued by the competent authority do not violate any of his legal rights. 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 authorities in the Department. If the Courts continue to interfere with day-to-day transfer Orders issued by the Government and its subordinate authorities, there will be complete chaos in the Administration which would not be conducive to public interest. The High Court over looked these aspects in interfering with the transfer orders."*

19. The learned counsel for the respondent no. 4 also relied upon

the decision of ***Dharam Nath Giri vs Union of India Rep. by Secretary to the Govt. of India and Ors*** reported in ***2021 SCC Online Gau 1309***, the relevant paragraph nos. 8 and 9 are reproduced herein below:

"8. In the case in hand, the petitioner has annexed a number of Office Memoranda and also Record Office Instruction, as have been indicated above. From the Record Office Instruction (supra), it transpires that if the husband and the wife are working in the same department, posting of both spouses together at the same station where required level of facilities are available, is to be considered to enable them to lead a normal family life and to look after the welfare of their children especially till the children attain 18 years of age. The Office Memorandum dated 06.06.2014 has formulated that Government employee who has disabled child, serve as the main care giver of such child and thus, any displacement of such Government employee will have a bearing on the systematic rehabilitation of the disabled child since the new environment/set up could prove to be a hindrance for the rehabilitation process of the child. In such situation, a Government servant who is also a care giver of a disabled child, may be exempted from the routine exercise of transfer/rotational transfer subject to the administrative constraints. The subsequent guidelines have also highlighted the same position. The Office Memorandum dated 08.10.2018 is on the subject : "Exemption from the routine exercise of transfer/rotational transfer". It mentions that a Government employee who is a care-giver of dependent daughter/son/parents/spouse/brother/sister with Specified Disability, as certified by the certifying authority as a person with Benchmark Page No. 5/6 Disability as defined under Section 2(r) of the Rights of Persons with Disabilities Act, 2016 may be exempted from the routine exercise of transfer/rotational transfer subject to the administrative constraints.

9. It appears from the documents annexed to this writ petition that the child of the petitioner, born on 11.03.2012, is suffering

from Down Syndrome associated with deficit hearing impairment (40%) with mental retardation and deficit in intellectual functioning. The petitioner and his wife are treating their child at different medical institutions including Lokpriya Gopinath Bordoloi Regional Institute of Mental Health, Tezpur and Composite Regional Centre (CRC), Guwahati. In the letter dated 20.04.2021, the Commandant, 17 Battalion, Assam Rifles while forwarding the representation of the petitioner, had also opined that the child of the petitioner required constant medication and supervision of the parents. He had also recommended for extension of the tenure of the petitioner for a further period of 1 (one) year to look after their mentally retarded son."

20. The learned counsel for the respondent No. 4 also relied upon the decision of ***Dr. Netramoni Kakati Vs. State of Assam and Ors*** reported in ***(2019) SCC Online Gau 5649***, the relevant paragraph nos. 18, 19 and 20 are reproduced herein below:

"18. Various other provisions have been incorporated in the Act to ensure that the persons with disabilities do not suffer from any disadvantage. It is in that context, the role of the parents become critical and crucial and important and in any way cannot be undermined. It is in that context, the service conditions of the employees more particularly those who are having physically challenged dependents relating to transfer, are sought to be governed by issuing the aforesaid Office Memoranda.

19. In view of above, this Court is of the opinion that even if the State of Assam has not framed any such Memoranda, rules or regulations, it would be under legal obligation to follow the principles mentioned in the aforesaid Memoranda in respect of their employees having similar problems.

20. Accordingly, this Court would hold that till such adoption or framing of any appropriate rules or Memoranda in this regard, the aforesaid Office Memoranda issued by the Central Government ought to be followed by the State Government, since, the aforesaid Memoranda Page No.# 10/11 had been

issued for effective implementation of the provisions of a parliamentary enactment, which is equally applicable to the State of Assam."

21. The learned counsel for the petitioner relied upon the decision of the Hon'ble Supreme Court in the case of ***Union of India and Ors Vs. S. L. Abbas*** reported in ***(1993) 4 SCC 357***, the relevant paragraphs 6 and 7 are reproduced herein below:

"6. An order of transfer is an incident of Government Service. Fundamental Rule 11 says that "the whole time of a Government servant is at the disposal of the Government which pays him and he may be employed in any manner required by proper authority". Fundamental Rule 15 says that "the President may transfer a government servant from one post to another". That the respondent is liable to transfer anywhere in India is not in dispute. It is not the case of the respondent that order of his transfer is vitiated by mala fides on the part of the authority making the order;- though the Tribunal does say so merely because certain guidelines issued by the Central Government are not followed, with which finding we shall deal later. The respondent attributed "mischief" to his immediate superior who had nothing to do with his transfer. All he says is that he should not be transferred because his wife is working at Shillong, his children are studying there and also because his health had suffered a set-back some time ago. He relies upon certain executive instructions issued by the Government in that behalf. Those instructions are in the nature of guidelines. They do not have statutory force.

7. Who should be transferred where, is a matter for the appropriate authority to decide. Unless the order of transfer is vitiated by malafides or is made in violation of any statutory provisions, the Court cannot interfere with it. While ordering the transfer, there is no doubt, the authority must keep in mind the guidelines issued by the Government on the subject. Similarly if a person makes any representation with respect to his transfer, the appropriate authority must consider the same having regard

to the exigencies of administration. The guidelines say that as far as possible, husband and wife must be posted at the same place. The said guideline however does not confer upon the government employee a legally enforceable right."

22. Heard both the learned counsel for the parties. I have also considered the pleadings and the contention made therein and the documents available on record.

23. Upon hearing the parties, it is seen that although the second transfer order has been issued within a period of one month, transferring the petitioner from Dimapur Government College to Sao Chang College, Tuensang, however, the petitioner could not prove the issuance of the said impugned order with a malafide intention or it was made in violation of any statutory rules in as much as the said modification transfer order was issued in consideration of the representation submitted by the respondent no. 4 as such no malafide intention as alleged by the petitioner is being made out.

24. Considering the entirety of the facts and circumstances of the case and as the petitioner failed to make out a case of malafide and violation of any statutory rules while passing the impugned order, I am not inclined to interfere with the impugned order dated 09.11.2022. Accordingly, this writ petition is dismissed.

25. However, since the respondent no.4 is already being accommodated by transferring her in the Dimapur Government College in place of one Mr. Lanunochit who has gone on study leave and also the representation submitted by the petitioner has not been disposed of by the respondent authority, the petitioner is at liberty to make a fresh representation before the respondent authority for consideration for his

retention at Dimapur Government College. And on such representation being made by the petitioner, the respondent authority in view of the changed circumstances may consider the representation of the petitioner and pass necessary order.

26. This writ petition stands disposed of.

JUDGE

Comparing Assistant