



WEB COPY

BEFORE THE MADURAI BENCH OF MADRAS HIGH COURT

Reserved on : 16.11.2016

Pronounced on : 01.12.2016

CORAM :

THE HON'BLE DR.JUSTICE S.VIMALA

W.P.(MD)No.15190 of 2016

& W.M.P.(MD) Nos.11193 & 11194 of 2016

V.Suresh

... Petitioner

vs.

1. The Director of School Education,
College Road, Chennai 600 006
2. The Chief Educational Officer,
Nagercoil, Kanyakumari District
3. Mr. V.Jeyakumar,
The Chief Educational Officer,
Nagercoil, Kanyakumari District
4. T.Radhakrishnan, Head Master,
Government High School,
Vellappallam, Fisher Colony,
Nagapattinam District

... Respondents

Petition filed under Article 226 of the Constitution of India, praying for the issuance of a Writ of Certiorari to call for the records relating to the impugned order of transfer issued by the first respondent, Director of School Education, in Na.Ka.No.114/C1/E1/2016, dated 11.08.2016 (served as 13.08.2016) and to quash the same.

For Petitioner : Mr. Issac Mohanlal, Sr. Counsel, for,
Mr. T.Cibi Chakraborty

For Respondents 1 & 2: Mr. V.R.Shanmuganathan, Spl.G.P.,

For Respondents No.4 :Mr.Subbiah

ORDER

The petitioner was appointed as B.T.Assistant in History in a Private Aided School, namely, A.V.Higher Secondary School, Sankarankoil, Tirunelveli District. Later, after twelve years, he was appointed as B.T.Assistant, in History, in Government Higher Secondary School, Sankarankoil, Tirunelveli District. He was promoted as Headmaster during 2013.

1.1. On 25.09.2014, he was appointed as Personal Assistant to the Chief Educational Officer, (CEO) i.e., in the cadre of High School Headmaster, in the office of the second respondent, namely, CEO, Nagercoil.

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1.2. The third respondent CEO sent a complaint to the Director (R-1) against the petitioner regarding misplacement of a



Certificate of Transfer of Charge (CTC), which was signed by the third respondent, when he was transferred and joined as CEO, on 04.06.2015, at the office of the second respondent.

1.3. On 10.06.2015, the first respondent Director issued a charge memo to the petitioner, in that regard, under Rule 17 (b) of the Tamil Nadu Civil Services (Discipline and Appeal) Rules, 1973. The petitioner submitted his explanation on 26.06.2015.

1.4. One Mr.A.Karuppasamy, the Joint Director of School Education, was appointed as Enquiry Officer. The petitioner received an enquiry notice, asking him to appear before the Enquiry Officer on 22.02.2016 at the Office of the CEO. The petitioner was asked to submit his written explanation. After enquiry, the Enquiry Officer submitted his report stating that the charges are proved. Neither the enquiry report contained the list of documents nor list of witnesses which were relied upon by the Enquiry Officer. The petitioner was neither permitted to cross-examine any witnesses nor permitted to use any documents.

1.5. After four months of this incident, the petitioner was prevented from entering into the office and he was also prevented from signing the attendance register and on questioning, he was informed that, he had been transferred. This has been done only to accommodate the fourth respondent, Mr.T.Radhakrishnan, in his place. Hence, the writ of certiorari has been filed challenging the impugned order of transfer by the first respondent.

2. The claim of the petitioner is resisted by respondents 1 to 3 on the following grounds:-

(i) On 13.08.2016 the fourth respondent was posted to the office of the CEO, as Personal Assistant to the CEO., and joined duty at Kanyakumari, thereby relieving the petitioner; the petitioner who was present at that point of time did not sign the Relieving Register nor acknowledged the order of transfer.

(ii) Just two months, prior to that, i.e., on 02.06.2015, one Mr.Radhakrishnan who was working as CEO, Kanyakumari, was transferred from Kanyakumari along with 12 other CEOs; on 04.06.2015, he got himself relieved and the new CEO, Mr.Jayakumar assumed office; as a mark of joining and relieving, both the CEOs were present at the office of the CEO, signed the CTC.

(iii) Mr.Radhakrishnan had challenged the order of transfer dated 02.06.2015 in W.P.No.8948 of 2015, which came-up for hearing on 04.06.2015; this Court granted interim order, stating that, the interim order will take effect, if he has not been already relieved; therefore, to facilitate, i.e., to aid the former CEO and to conceal the fact that he has already been relieved, the petitioner had handed over the CTC register to the former CEO, who got already relieved; thus, by suppressing the fact that he had already been relieved, the former CEO, moved an Application for Contempt, in Contempt Petition No.731 of 2015, before this Court

(iv) The said Mr.Radhakrishnan had already filed two writ



petitions, one challenging the order of punishment against him in W.P.(MD) No.8714 of 2015 and the second writ petition seeking promotion in W.P.(MD) No.8928 of 2015; both these writ petitions along with Contempt Petition were heard together; the order of punishment was set-aside and there was a direction for promotion, which was later confirmed by the Division Bench, but the writ petition challenging the transfer was dismissed, along with the Contempt Petition.

(v) The petitioner had, without any authority and without any permission from the new CEO, removed the public document from the office of the CEO and handed over it to the erstwhile CEO, who had already been relieved from the office and, for which, a charge memo was issued, explanation was received and enquiry was conducted; that enquiry has nothing to do with the present transfer.

(vi) The order of transfer is on the administrative grounds; the petitioner is not co-operating with the other officials and the staff at the office of CEO; he is quarreling and threatening the lower level office staff; he is interfering with the smooth functioning of the CEO; he is also delaying the processes; his continuance in the office is detrimental to the office; that is why, he was transferred; it is neither punitive nor motivated.

(vii) In case of transfer of the petitioner, i.e., in the vacancy arising in the place of the petitioner, the alternative choice was looked into and the fourth respondent who was working at Nagapattinam and who was asking transfer to his native district, Kanyakumari (on the ground of spouse priority and mentally disabled brother, etc.,) he was accommodated in the vacant place; it is only to fill-up the vacancy on account of transfer of the petitioner, the fourth respondent was transferred.

(viii) The petitioner is transferred to a place, which is 10 to 15 Kms away from his native place; the fourth respondent has already joined duty on 13.08.2016, but the petitioner did not join duty so far.

(ix) The post of Headmaster and Personal Assistant to the CEO are inter-changeable; once the petitioner is posted to High School, he could only be posted as its Headmaster; therefore there is no confusion in the impugned order.

(x) The transfer order has been made only in accordance with G.O.Ms.No.10, Personnel and Administrative Department, dated 07.01.1994 which is being amended from time to time; it is relevant to quote the exceptions to the General guidelines:-

(a) In cases where serious allegations are pending enquiry, when it is considered necessary in the public interest, and sufficient in lieu of suspension, the Officer may be transferred - in such cases, transfer shall be effected to a vacant post in another station or to the post where the junior most person of the same category is working.

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(b) Transfer shall not be effected on the basis of



allegations, unless the allegations are found to be prima facie true by a preliminary enquiry and it is decided by the transferring authority that the continuance of the Officer in the same station is injurious to public interest and that he can be transferred rather than suspended from service. When such transfers on complaints / allegations are made after preliminary enquiry, it should followed up by a detailed investigation and disciplinary action instituted on allegations finally found to be substantiated (See. Govt. Lr. No.86456/P&AR (Per.S)/93-7, dated 9.8.94".

(xi) The averments regarding the charges against the petitioner and the enquiry thereon have nothing to do with the transfer; there is no malafide or motive for the respondents 1 to 3 to pass the impugned order of transfer.

3. The contention of the learned counsel for the petitioner is that the transfer is motivated, malafide, actuated by extraneous considerations and therefore, it should be set-aside.

3.1. On the other hand, the contention of the learned Special Government Pleader appearing for the respondents is that the transfer is purely administrative and neither it is motivated nor malafide and therefore, it has to be sustained.

3.2. The learned Special Government Pleader for the respondents would further submit that in the event of the grave charges pending against the petitioner and when there appears to be prima facie materials to substantiate the allegations found in the prima facie enquiry, instead of suspending the petitioner it is permissible to make a transfer and thus the transfer is justified.

3.3. From the contentions raised, it is apparent that mutually contradictory stand has been taken by the respondents that, on one hand that the transfer has nothing to do with the pending enquiry and transfer is purely on administrative grounds and on the other hand that it is permissible to transfer when there is prima facie enquiry, disclosing truthfulness of serious allegations.

4. The learned counsel appearing for the petitioner relied upon the following decisions, in order to support the contention that the transfer, if tainted with malafides, extraneous considerations or motivated, it is liable to be set-aside:-

(i) (2009) 2 SCC 592 (Somesh Tiwari v. Union of India and others):-

"13. ... While striking down the order of transfer by invoking the principle of 'Wednesbury Unreasonableness', it was directed :-

"25. At this stage, it is to be noted that the petitioner in spite of being transferred from Bhopal to Ahmedabad has not gone and joined his place of posting till date and that there is an interim order of this Court preventing the



respondents from taking any disciplinary action against the petitioner for not joining his place of posting at Ahmedabad. Under the circumstances while we quash the order of transfer of the petitioner from Bhopal to Ahmedabad we feel constrained to direct that the petitioner shall not be entitled to salary for the period commencing fifteen days after the modified order of transfer to Ahmedabad i.e. the order dated 28.12.2005 till the date he again joins duties at Bhopal."

16. Indisputably an order of transfer is an administrative order. There cannot be any doubt whatsoever that transfer, which is ordinarily an incident of service should not be interfered with, save in cases where inter alia mala fide on the part of the authority is proved. Mala fide is of two kinds - one malice in fact and the second malice in law. The order in question would attract the principle 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 allegations made against the appellant in the 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, the same is liable to be set aside being wholly illegal."

(ii) (1997) 6 SCC 169 (Shri Arvind Dattatraya Dhande v. State of Maharashtra and Others):-

"In view of the unimpeachable and eloquent testimony of the performance of the duties, it will be obvious that the transfer is not in public interest but is a case of victimisation of a honest officer at the behest of the aggrieved complainants carrying on the business in liquor and toddy. Under these circumstance, as stated earlier, the transfer of the appellant is nothing but mala fide exercise of the power to demoralise honest officers who would efficiently discharge the duties of a public office."

(iii) 1989 (I) L.L.J. 139 (P.Pushpakaran v. Coir Board and another):-

"14. In Abdul Khader v. Regional Deputy Director 1967 K.L.T. 334, Mathew J., as he then was had occasion to consider the question of transfer. In that case, the transfer was of a teacher. The learned Judge observed that it is the inherent right of a Government to transfer its employees from one service to another. Normally, an



employee cannot complain about such transfer in Court. In deciding the question as to what was the motive operating in the mind of the authority while passing the order of transfer, one has to look into the circumstances under which the order of transfer was passed. If the dominant motive of the employer was to punish the petitioner, the transfer is bad. If it was to ensure efficiency in administration, the transfer has to stand. Considering the circumstances in that case, it was held that the transfer was to ensure efficiency of administration in the school and the challenge was not upheld.

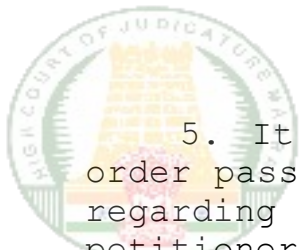
15. In Mathew Muthalali v. R.D.O. Calicut 1972 K.L.T. 54 Poti, J., was considering the transfer of a Government servant pending enquiry into misconduct in violation of administrative order of the Government. The learned Judge upheld that the order of transfer of a Government servant made for administrative reasons cannot be called in question merely because the order causes inconvenience to the Government servant concerned. Nor can it be said that it visists him with civil consequences. But if the order is really intended as a punishment, though apparently innocuous, it will be open to the Court to consider whether the order is vitiated either by mala fides or by non-compliance of the principles of natural justice."

(iv) 2014 (1) CWC 867 (Y.Jeyakumar v. Additional Director of Police):-

"16. Normally, the transfer orders, if made on administrative grounds, are not interfered with by this Court. However, if it is made as a punitive measure without affording an opportunity of hearing, this Court has interfered with the same only on the ground of violation of principles of natural justice."

(v) 1980 (I) L.L.J. 1 (C.Ramanathan v. Acting Zonal Manager, FCI, Madras and others):-

"12. ... Having regard to the specific allegation made in the counter affidavit by the first respondent we are going behind the apparent reasons given in support of the order of transfer and after appreciating all the circumstances in the case, we are of the view that the order of transfer though apparently innocuous was meant really to impose a punishment on the officer concerned. It appears to us to be a colourable exercise of power or an exercise of power surcharged with bad faith as irrelevant considerations motivated the passing of the challenging order. Instead of taking disciplinary action against the appellant, this order of transfer has been made in order to circumvent the prescribed process in an action ordinarily undertaken against a Government servant for misconduct."



5. It is necessary to look into the nature of the transfer order passed in this case. The impugned order carries the details regarding the pending disciplinary proceedings against the petitioner and it is also stated that the charges against the petitioner remain proved.

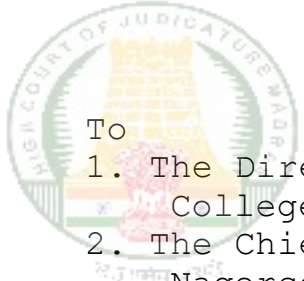
5.1. In the same order, in the second paragraph, an allegation has been made against the petitioner in which it is stated that he is not smoothly functioning with other colleagues and subordinates and if he is allowed to function there itself, then there is likelihood of the office process being slowed down and therefore, he has been recommended for transfer. Equally this order pays encomium to the incoming incumbent. Thus, it is clear that the order is not innocuous even apparently looking at the same. The real intention is to impose a punishment on the officer concerned. Therefore, it is a colourable exercise of power. The very fact that the transfer order carries allegations against the petitioner and that the petitioner cannot work with dignity in the transferred place itself is a punishment to the petitioner, if he has to work in the transferred place. There is no necessity to mention about the pending disciplinary enquiry, when no final orders have been passed. If it is a case of mal-functioning of the petitioner alongwith other colleagues, how he is fit enough to guide the students community as a Headmaster in a school is yet another question.

6. The post of Personal Assistant stands on a different footing, than that of other posts. The nature of job attached to the Personal Assistant involves maintaining confidentiality and working with commitment, devotion to duty and in a way, ensuring trust-worthiness at all times to the superiors. Therefore, this Court was of the view that it is very difficult to work as a Personal Assistant to the CEO, after all these bitter fights. Therefore, this Court also suggested some solutions, via media, which would be in the interest of both sides. But no solution could be arrived at. Hence, this Court has no option excepting to set-aside the order of transfer.

7. The very fact that mutually opposite defence has been taken by the respondents, before this Court as well as taking the same while passing the order of transfer itself, would go to show that the intention of the respondents in ordering transfer of the petitioner is not in public interest. Hence, the impugned order is liable to be set-aside.

8. In the result, the impugned order stands set-aside and the writ petition stands allowed. No costs. Consequently, the connected WMPs are closed.

Sd/-
Assistant Registrar(RECORDS)



To

1. The Director of School Education,
College Road, Chennai 600 006
2. The Chief Educational Officer,
Nagercoil, Kanyakumari District~.

+1cc to M/s.T.CIBI CHAKRABORTHY Advocate in SR. No.79202
JS/RSK/28.02.2017/8P-3C

Pre-Delivery Order in
W.P. (MD) No.15190 of 2016
& W.M.P. (MD) Nos.11193 & 11194 of 2016

01.12.2016