

HONOURABLE SRI JUSTICE S.V.BHATT

WRIT PETITION No.35439 OF 2016

ORDER:

Heard Mr.A.Satya Prasad and Mr.K.G.Krishna Murthy learned Senior Counsel for parties.

The petitioner challenges Office Order IRDA/HR/ORD/PER/191/10/2016 dated 3-10-2016 transferring the petitioner from Communications Wing, Hyderabad Head Quarters to Inspection, New Delhi, Regional Office, and the consequential relieving order dated 17-10-2016 as violative of Schedule VII of Insurance Regulatory and Development Authority Staff (Officers and other Employees) Regulations, 2016 illegal, arbitrarily and vitiated by malice in law.

The scope of judicial review against an order of transfer is no more *res integra*. However, the learned senior counsel appearing for the parties have made detailed submissions against the order of transfer and on the other hand, supporting the order of transfer.

It is admitted by both the parties that the respondents through Office Order Number IRDA/HR/ORD/PER/207/10/2016 dated 21-10-2016 have modified the impugned order, thereby for all purposes deferring implementation of order of transfer till 30th of April, 2017.

Keeping in view the Office Order dated 21-10-2016 and the rival submissions of learned counsel, I am satisfied that the Writ Petition can be disposed of by this order.

The petitioner presently is working as Assistant General Manager in 1st respondent organization. The petitioner along with a few other employees, challenging a few decisions taken by the management of first respondent organization filed W.P.No.18157 of 2013. On 26-6-2013, interim directions were issued by this court. The respondents challenged interim directions in Writ Appeal No.1684 of 2014 and batch etc., The pursuit of legal remedies did not stop with the disposal of Writ Appeals for the Writ Petitioners in W.P.No.18157 of 2013 were compelled to file C.C.No.1830/2016 on 17-8-2016 complaining disobedience of order in Writ Appeal No.1684 of 2014 dated 22-12-2014. Now in this background, the case of petitioner is that the respondents did not relish the action pursued by petitioner along with other petitioners in filing the Contempt Cases. Therefore to put the petitioner in a bind the transfer order impugned in the Writ Petition has been issued. This averment has been made the foundation for assailing transfer order. Perhaps the petitioner on advice has raised a few legal grounds on the transfer namely by referring to Schedule VII of Insurance Regulatory and Development Authority of India Staff (Officers and Other Employees) Regulations 2016. One of the grounds of challenge is that the transfer of an employee is contemplated as request transfer, administrative transfer and transfer in public interest. As a matter of

policy, all transfers shall be normally made or issued immediately coinciding with promotions to various grades every year and in any case not later than 31st March of the year. Therefore, the transfer order issued in the midst of academic year by including petitioner along with other employees who are promoted through Office Order dated 3-10-2016 is illegal and motivated.

The respondents filed counter affidavit, setting out in great detail the functions and duties of the respondent-organization preliminary objections against the maintainability of the Writ Petition against an order of transfer and also adverted specifically to each one of the allegations in the writ affidavit and stated its reply.

This court is compelled to observe that the learned Senior counsel though admitted that this court cannot sit as Court of Appeal on every circumstance inferred by the parties to examine the validity of transfer order, still the learned counsel have persuaded the court to go through every paper filed by their clients. Though the persuasion was irresistible, still this court bearing in view scope of judicial review, is not proposing to get into the issue on merits like an appellate authority or court.

The law on the scope of judicial review is accepted and is well settled. The decisions relied upon by the petitioner are to the same effect.

A decision of Honourable Supreme Court in *G.JAYALAL vs. UNION OF INDIA AND OTHERS*⁽¹⁾ reads as follows:

“17. The next limb of argument is that there was interference by the Government to take the decision in a particular manner. The said aspect is linked with legal malice and hence, it is necessary to deal with both the aspects in a singular compartment. The High Court has referred to the facts in detail after referring to the affidavit filed by the Officer on Special Duty. In the letter circulated on 21-3-2011 by the Officer on Special Duty, he had only suggested that the Board was required to shortlist the candidates in order of preference. The decision in entirety was left to the Board. No suggestion was given. Mr. Krishnamani has very fairly stated that the appellant does not intend to allege any kind of personal mala fides but legal malice as the suggestion had been given for short-listing the candidates which was absolutely unnecessary. In essence, the submission of the learned Senior Counsel is that the action of the authorities is not bona fide in law. In this context, we may refer with profit to the decision in State of A.P. v. Goverdhanlal Pitti ((2003) 4 SCC 739) wherein this Court has ruled thus: (SCC p. 744, paras 12-13)

“12. ... ‘Legal malice’ or ‘malice in law’ means ‘something done without lawful excuse’. In other words, ‘it is an act done wrongfully and wilfully without reasonable or probable cause, and not necessarily an act done from ill feeling and spite. It is a deliberate act in disregard of the rights of others’. (See Words and Phrases Legally Defined, 3rd Edn., London Butterworths, 1989.)

13. Where malice is attributed to the State, it can never be a case of personal ill-will or spite on the part of the State. If at all it is malice in legal sense, it can be described as an act which is taken with an oblique or indirect object.”

A similar view has been expressed in W.B. SEB v. Dilip Kumar Ray [(2007) 14 SCC 568] and Kalabharati Advertising v. Hemant Vimalnath Narichania [(2010) 9 SCC 437]”

“18. Tested on the anvil of the aforesaid principles of law, it cannot be said that any wrongful act has been done to inflict any legal injury on the appellant. It is difficult to hold that any act has

¹ (2013) 7 SCC 150

been done to disregard or defeat his legal rights. What has been stated by the OSD is basically requiring the Board to short-list the names in order of preference. The members of the Board could have reiterated that they had earlier recommended the names in accordance with preference. They, we are inclined to think correctly, did not say that the recommendations already made were in order of preference but gave the preference initially by circulation and when it was set aside by the Tribunal, thereafter, by deliberation. Thus, the submission pertaining to legal malice, being sans substratum, stands repelled."

A decision of the Honourable Supreme Court reported in *SOMESH TIWARI Vs. UNION OF INDIA AND OTHERS* ⁽²⁾ reads as follows:

"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."

To the same effect, are the decision relied on by the respondents.

The Honourable Supreme Court reported in *STATE OF HARYANA AND OTHERS Vs. KASHMIR SINGH AND ANOTHER* ⁽³⁾ held as follows:

² (2009) 2 SCC 592

“11. Thus, a plain perusal of the Punjab Police Rules shows that transfer can be done from one district to another district or even to another range, and there is no absolute prohibition for doing so. However, in such a case, the seniority of Constables and Head Constables at the district level and of ASIs and SIs at the range level is maintained in the parent district/range despite the transfer. Promotion/confirmation is also given strictly as per the seniority in the parent district/range level, as per Memo No. 43515-22/E-(III) dated 10-8-2010.

*12. Transfer ordinarily is an incidence of service, and the courts should be very reluctant to interfere in transfer orders as long as they are not clearly illegal. In particular, we are of the opinion that transfer and postings of policemen must be left in the discretion of the State authorities concerned which are in the best position to assess the necessities of the administrative requirements of the situation. The administrative authorities concerned may be of the opinion that more policemen are required in any particular district and/or another range than in another, depending upon their assessment of the law and order situation and/or other considerations. These are purely administrative matters, and it is well settled that courts must not ordinarily interfere in administrative matters and should maintain judicial restraint, vide *Tata Cellular v. Union of India* [(1994) 6 SCC 651]”*

A decision of the Honourable Supreme Court reported in

STATE OF U.P. AND OTHERS V. GOBARDHAN LAL (⁴)

“8. 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

³ (2010) 13 SCC 306

⁴ AIR 2004 SC 2165

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.

9. 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."

A decision of this court reported in *P.VENKANNA Vs. HINDUSTAN AERONAUTICS LIMITED REP. BY ITS CHAIRMAN & MD (CMD), BANGALORE AND FOUR OTHERS* ⁽⁵⁾ reads as follows:

⁵ 2016 (4) SLR 123 (Telan.& A.P.)

“9. The learned counsel appearing for the petitioner in support of his contention that this case clearly demonstrates a situation of malice in law relied upon the following judgments:

(a) Somesh Tiwari v. Union of India, (2009) 2 SCC 592 : [2009(5) SLR 506 (SC)], wherein the Supreme Court held as follows:

“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.”

(b) Kalabharati Advertising v. Hemant Vimalnath Narichania, (2010) 9 SCC 437, wherein the Supreme Court held as follows:

“Legal malice

25. The State is under obligation to act fairly without ill will or malice—in fact or in law. “Legal malice” or “malice in law” means something done without lawful excuse. It is an act done wrongfully and wilfully without reasonable or probable cause, and not necessarily an act done from ill feeling and spite. It is a deliberate act in disregard to the rights of others. Where malice is attributed to the State, it can never be a case of personal ill will or spite on the part of the State. It is an act which is taken with an oblique or indirect object. It means exercise of statutory power for “purposes foreign to those for which it is in law intended”. It means conscious violation of the law to the prejudice of another, a depraved inclination on the part of the authority to disregard the rights of others, which intent is manifested by its injurious acts.”

(c) Rajendra Roy v. Union of India, AIR 1993 SC 1236, wherein the Supreme Court held as follows:

“7..... It may not be always possible to establish malice in fact in a straight-cut manner. In an appropriate case, it is possible to draw reasonable inference of mala fide action from the pleadings and antecedent facts and circumstances. But for such inference there must be firm foundation of facts pleaded and established. Such inference cannot be drawn on the basis of insinuation and vague suggestions.”

12. In Rajendra Roy (supra), the Supreme Court clearly pointed out that for drawing inference of legal malice and malice in law, there must be facts pleaded and established and such inference cannot be drawn on the basis of insinuous and vague suggestions. Therefore, basing on the bare allegations levelled by the petitioner against the respondents 4 and 5 about their biased attitude against him, coupled with the suspension order passed against the petitioner on certain charges resulting in initiating disciplinary proceedings, it cannot be said that a strong prima facie case of legal malice has been made out by the petitioner. Further, on the ground that some hostile atmosphere prevailing in the unit between the petitioner and some others on one side and the respondents 4 and 5 on the other, on account of the representations sent by the petitioner and others against the respondents 4 and 5, the petitioner cannot take advantage of the situation and avoid transfer which is made purely out of administrative exigency. No firm foundation has been laid by the petitioner to establish malice in law from his pleadings in the writ petition. As pointed out by the Supreme Court, inference in relation to malice in law cannot be drawn basing on the mere insinuation and vague suggestions. This Court is of the view that the impugned transfer proceedings/job rotation is made by the 2nd respondent at Bangalore is administrative in nature and the petitioner is not able to establish that it is prompted by mala fides and is punitive in nature. The transfer may cause hardship and inconvenience to the petitioner. It may also cause dislocation in the family set up but on that score, this Court is not supposed to exercise the power of judicial review to set aside the transfer order.”

The transfer order under challenge is deferred by the respondents through office order dated 21.10.2016. The petitioner

has voiced a few grievances against the mode and manner of transferring the petitioner from Hyderabad to Delhi. For the present, what is in operation is the order dated 21-10-2016. This court is of the view that the respondents do have power and jurisdiction to transfer an employee from place to another place. But the power to transfer can neither be used as an uninformed tool of harassment and at the same time, the petitioner/employee shall not rely upon every circumstance that happens in the service to challenge an order of transfer passed by respondents. A balanced decision, both in the interest of organization and also individual is normally taken by the management. Though this court is not inclined to interfere with the orders challenged in the Writ Petition, however, since the order of transfer is postponed till 30th April, 2017 having regard to a few circumstances pointed by petitioner considers it appropriate to direct the respondents to objectively consider every circumstance and take a decision on the transfer order dated 03.10.2010 before 30th April, 2017.

The Writ Petition is disposed of. No order as to costs.

As a sequel to the disposal of this petition, the Miscellaneous Petitions, if any, pending, shall stand dismissed.

JUSTICE S.V.BHATT

Dated 11-4-2017.

Note:

Issue C.C. by 13-4-2017.

Dvs.

HONOURABLE SRI JUSTICE S.V.BHATT



WRIT PETITION No.35439 OF 2016

Dated 11-4-2017.

Dvs