

IN THE HIGH COURT OF JUDICATURE AT MADRAS

Reserved on : 02.09.2020

Pronounced on : 10.09.2020

CORAM:

THE HON'BLE MR. JUSTICE V.PARTHIBAN

WP No.7692 of 2020

and WMP Nos.9049, 9050 & 9051 of 2020

R.Subbuthai

.. Petitioner

Vs

1. The State of Tamilnadu rep. By its
Secretary to Government,
Municipal Administration and Water Supply
Department,
Secretariat, Chennai - 600 009.

2. The Commissioner of Municipal Administration,
No.75, Santhome High Road,
Raja Annamalaipuram,
Chennai - 600 028.

3. The Commissioner,
Avadi City Municipal Corporation,
Avadi, Chennai - 600 054.

4. M.Venkatesan .. Respondents

PRAYER: This Writ Petition is filed under Article 226 of the Constitution of India, praying for issuance of a Writ of Certiorarified Mandamus, calling for the records relating to the orders issued by the 1st respondent in GO (D) No.158(ME-3) Municipal Administration and Water Supply Department dated 08.05.2020 and the consequential orders issued by the 2nd respondent in Na.Ka.No.5703/2020/F4 dated 08.5.2020 and by the 3rd respondent in Na.Ka.No.2907/2070/CI dated 08.05.2020 and quash the same and consequently retain the petitioner in the 3rd respondent's Corporation, in accordance with the provisions under Section 9(6) of the Ordinance issued by the Government dated 17.6.2019, as per the provisions under Rule 110 of Fundamental Rules and Rule 38 of the Tamilnadu Municipal Corporations Service Rules, 1996.

For Petitioner : Mr.N.Balamuralikrishnan

For Respondents: Mr.P.S.Sivashanmugasundaram (for R1 & R2)
Special Government Pleader

Mr.P.Srinivas (For R3)
Standing Counsel for Avadi City
Municipal Corporation.
Mr.Ilamvazhudi (for R4)

O R D E R

This matter is taken up today, through Web hearing.

2. The writ petition has been filed seeking for the following prayer:

"for issuance of a Writ of Certiorarified Mandamus, calling for the records relating to the orders issued by the 1st respondent in GO (D) No.158 (ME-3) Municipal Administration and Water Supply Department dated 08.05.2020 and the consequential orders issued by the 2nd respondent in Na.Ka.No.5703/2020/F4 dated 08.5.2020 and by the 3rd respondent in Na.Ka.No.2907/2070/CI dated 08.05.2020 and quash the same and consequently retain the petitioner in the 3rd respondent's Corporation, in accordance with the provisions under Section 9(6) of the Ordinance issued by the Government dated 17.6.2019, as per the provisions under Rule 110 of Fundamental Rules and Rule 38 of the Tamilnadu Municipal Corporations Service Rules, 1996."

3. The petitioner is working as a Town Planning Officer Grade-I, in the Avadi Municipality. The Government has issued Ordinance No.2 of 2019, upgrading the Avadi Municipality as Avadi City Municipal Corporation and notified in the Tamil Nadu Government Official Gazette (Extraordinary) No.258 dated 17.06.2019, giving immediate effect to the Notification.

4. According to the Notification in the official Gazette and as per Section 9(6), it is stipulated as under:

"9(6). Notwithstanding anything contained in this Ordinance, every officer or employee who immediately before the date of commencement of this Ordinance, was in the service of the Municipality shall, on and from the date of such commencement, be deemed to be an officer or employee of the Corporation."

5. In terms of the above provision, according to the petitioner, she has submitted representations to the 2nd respondent through the 3rd respondent on 03.07.2019 and also on 26.08.2019, requesting the authorities to retain her in the Avadi City Municipal Corporation. However, as there were no orders passed on her representations for her retention in the Corporation, she appeared to have approached this Court in WP No.26470 of 2019, seeking to injunct the authority from transferring her out of the Avadi City Municipal Corporation. According to the petitioner, the writ petition was withdrawn on 06.09.2019, as this Court was not inclined to entertain the same, in the absence of any specific cause of action.

6. While the matter stood thus, the 3rd respondent by his proceedings in Na.Ka.No.2907/2020/C1 dated 08.05.2020 relieved the petitioner from Avadi Corporation on the same day on the basis of the order of the 1st respondent issued in G.O.(D) No.158 (ME-3) Municipal Administration and Water Supply Department dated 08.05.2020 and also on the basis of the 2nd respondent's Proceedings in Na.Ka.No.5703/2020/F4 dated 08.05.2020, transferring the petitioner to Kancheepuram Municipality, on deputation basis.

7. The above proceedings relating to the petitioner, are put to challenge in this writ petition.

8. The learned counsel Mr.N.Balamuralikrishnan, appearing for the petitioner, at the outset, would contend that the impugned order of the 1st respondent and the consequential orders of the 2nd and 3rd respondents are ultra vires to the statutory rules, being directly contrary to provisions contained under Section 9(6) of the Notification dated 17.06.2019, which provision is extracted supra.

9. The learned counsel would also contend that as per Rule 38 of the Tamil Nadu Municipal Corporations Service Rules, 1996 issued in G.O.(Ms.) No.237 MAWS Department dated 26.09.1996, appointment, promotion, transfer, etc, each Municipal Corporation is considered to be a separate Unit. The learned counsel would also rely on the said rule which provides as under:

"For the purpose of appointment, promotion, reversion, transfer and discharge from service, each Municipal Corporation shall be a separate Unit."

10. The learned counsel would also rely on Rule 110 of the Tamil Nadu Fundamental Rules, 1922 which states,

"No Government servant may be transferred to foreign service against his will".

11. According to the learned counsel, in the light of the above provisions contained in the rules, it is legally not permissible for the authority to transfer the petitioner from Corporation service to Municipality service and consequently, posting the petitioner to Kancheepuram Municipality, cannot be countenanced in law. Moreover, the learned counsel would also contend that besides violation of the rule position as pointed out, the transfer of the petitioner is also not for any administrative reasons, as claimed by the respondents.

12. In this regard, the learned counsel would submit that the 4th respondent, who has been accommodated in the place of the petitioner as Town Planning Officer in the Avadi Corporation was working as Town Planning Officer at Maraimalai Nagar Municipality, Kancheepuram District. If only there was an administrative necessity, which was the basis of the order

of transfer, the question of bringing in the 4th respondent in the place of the petitioner would not have arisen at all. Therefore, obviously the transfer order is necessitated only to accommodate the 4th respondent and in order to favour him, the petitioner has been unjustly shunted out, against the rules.

13. Notice was ordered and in response to the notice Mr.P.S.Sivashanmugasundaram, learned Special Government Pleader, has entered appearance for respondents 1 and 2. Mr.P.Srinivas, learned Standing Counsel appeared for the 3rd respondent/Avadi City Municipal Corporation and Mr.Ilamvazhudi, learned counsel appeared for the 4th respondent.

14. Counter affidavit has been filed on behalf of respondents 1 and 2 and also on behalf of the 4th respondent.

15. The counter affidavit filed on behalf of the 1st and 2nd respondents stated that the power to transfer employees from one Corporation to the service of the Municipality and vice-versa is very much available under Section 116 of the Coimbatore City Municipal Corporation Act, 1981 and according to the counter affidavit, the Coimbatore City Municipal Corporation Act, 1981 are made applicable to the Avadi City Municipal Corporation also.

16. The Section 116 of the Act, reads as under:

"116. Power of Government to transfer officers and servants of the corporation or municipalities:- Notwithstanding anything contained in this Act or in the Tamil Nadu District Municipalities Act, 1920 (Tamil Nadu Act V of 1920), the Government shall have power-

(a) to transfer any Officer or servant of the Corporation to the service of the Municipal Corporation of Chennai constituted under the Chennai City Municipal Corporation Act, 1919 (Tamil Nadu Act VV of 1919) or the Municipal Corporation of Madurai constituted under the Madurai City Municipal Corporation Act, 1971 (Tamil Nadu Act 15 of 1971) or any other Municipal Corporation constituted under any law for the time being in force, or

(b) to transfer any Officer or servant of the Municipal Corporation of Chennai constituted under the Chennai City Municipal Corporation Act, 1919 (Tamil Nadu Act IV of 1919) or the Municipal Corporation of Madurai constituted under the Madurai City Municipal Corporation Act, 1971 (Tamil Nadu Act 15 of 1971) or any other Municipal Corporation constituted under any law for the time being in force, to the service of the Corporation, or

(c) to transfer any Officer or servant of the Corporation to the service of any Municipality

constituted under the Tamil Nadu District Municipalities Act, 1920 (Tamil Nadu Act V of 1920) or

(d) to transfer any Officer or servant of any Municipality constituted under the Tamil Nadu District Municipalities Act, 1920 (Tamil Nadu Act V of 1920), to the service of the Corporation.

2. The Government shall have power to issue such general or special direction as they may deem necessary for the purpose of giving due effect to any transfer made under sub-section (1)"

17. It is also stated in the counter affidavit that the petitioner herein was transferred on deputation basis and a transfer order was in fact actuated by administrative reasons and exigencies. However, it is admitted that the petitioner had given her option to be retained in the Avadi Corporation itself. In the counter affidavit, it is further stated that the transfer was necessitated in view of the availability of vacancies in Kancheepuram Municipality and the posts needed to be filled up for carrying out the Town Planning duties in the said Municipality.

18. The counter affidavit also referred to that one Town Planning Inspector was caught red handed demanding and accepting illegal gratification and is arrested and remanded by the Directorate of Vigilance and Anti Corruption (DAVC) Department. The Town Planning Inspector referred to was also placed under suspension due to the arrest and detention. The counter proceeded to further state that the petitioner was imposed with punishments on more than one occasion in 2009 and 2013/2014, for certain acts of misconduct. There was also a reference in the counter affidavit about the action of the petitioner causing financial loss to the Corporation. However, no details have been furnished as to what charges are pending, as on date, in regard to the averment.

19. In the counter affidavit it is further stated that the option to remain with the Corporation being more than the sanctioned posts available and therefore, the power available under Section 116 was inevitably resorted to. On the whole, the counter affidavit strongly refuted the petitioner's contention in regard to violation of the rule and also the plea of malafides, in regard to the accommodation of the 4th respondent.

20. Mr.P.S.Sivashanmuga Sundaram, learned Special Government Pleader, appearing for respondents 1 and 2 has strenuously reiterated the above facts and the contentions as contained in the counter affidavit.

21. The learned Special Government Pleader submitted that the petitioner was facing disciplinary action earlier and that was one of the reasons that formed the basis for her transfer

from the Corporation. Moreover as stated in the counter affidavit, her services were required in Kancheepuram Municipality. Since some posts in the category of Town Planning Officer were remaining vacant in the Municipality, the order of transfer was passed for administrative reasons and no malafides could be attributed to any authority. When the power is available under Section 116 of the Coimbatore City Municipal Corporation Act, it is well within the authority of the Government to exercise such power for transferring a Government servant from one Corporation to another Municipality depending on the exigencies of service.

22. According to the learned Special Government Pleader no specific malafides is also attributed to any official and in the absence of which the challenge by the petitioner has no substance at all.

23. In regard to the plea taken by the petitioner that deputation, which is governed by FR 110, which provides, 'no Government servant may be transferred to foreign service against his will', the learned Special Government Pleader would rely on the contention that the rule is applicable only in case of transfer to foreign service, which means transfer should be outside the department, whereas, in this case, the transfer is within the department itself, viz., the Department of Municipal Administration. Therefore, the reliance place on behalf of the petitioner on the said rule may not be correct, even otherwise, he would submit that the said rule is also not absolute, as it can always be resorted to, to tide over exigencies of service, as provided under the proviso to the said rule.

24. Mr.P.Srinivas, learned standing counsel appearing for the Avadi Municipality/3rd respondent would submit that the petitioner was facing some charges in discharge of her duties in Avadi City Municipal Corporation, due to which the Corporation recommended her transfer to a different place. He would emphasize that the action taken to transfer her from the Corporation service was in public interest and therefore, the impugned action may not be interfered with.

25. Mr.Ilamvazhudi, learned counsel appearing for the 4th respondent, who has been accommodated in the place of the petitioner at Avadi City Municipal Corporation would submit that the 4th respondent had been permitted to join the Avadi City Municipal Corporation immediately, after the impugned transfer order was issued. According to the learned counsel, transfer being an incident of Government service, not necessarily the consent to be taken when the transfer is effected for administrative requirement.

26. According to the learned counsel, it is entirely within the purview of the Government to relocate the officers in places according to the administrative requirement and in

that view of the matter, the impugned transfer which was passed on administrative consideration, cannot said to be a malafide transfer, for accommodating the 4th respondent. The learned counsel would submit that as contended by the learned Special Government Pleader, no specific plea of malafides has been taken in the writ petition against any officials of the Corporation or against the 1st respondent and therefore, it is not open to the petitioner to plead that the accommodation of the 4th respondent was actuated by malafides. According to the learned counsel, it is a routine transfer and therefore, the same need not be interfered with.

27. The learned counsel would also refer to a document filed by him that Government passed G.O.(D) No.21 MAWS Department dated 26.06.2020, transferring six Revenue Assistants from Avadi City Municipal Corporation, taking into account the disciplinary proceedings initiated against them, to various municipalities, by invoking the power under Section 116 of the Coimbatore City Corporation Act, 1981. Therefore, according to the learned counsel, the power exercised by the Government in transferring the petitioner, cannot be held to be bad in law.

28. On behalf of the petitioner, a reply affidavit has also been filed. In the reply, it is averred that if the vacancies were available in Kancheepuram Municipality, as claimed by official respondents in the counter affidavit, the 4th respondent, who was posted in the place of petitioner, could have been accommodated in that Municipality. Therefore, the intention of the Corporation was only to accommodate the 4th respondent in the place of the petitioner and only in consideration of that intention, the petitioner has been transferred out.

29. In the reply affidavit, it is also stated that a reference to action against one Town Planning Inspector by DAVC and his arrest, suspension and all that was motivated as that has got no bearing at all on the present case. As regards the punishments meted out to her, it is stated in the reply affidavit, that it was all earlier when she was working in a different Municipality, but, one of the punishments of increment cut for five years, is under challenge before this Court.

30. The learned counsel for the petitioner, Mr.N.Balamuralikrishnan reiterated the averments in the reply affidavit and said that the bald averments made in the counter affidavit by and on behalf of the respondents 1 and 2 cannot be the basis for transferring the petitioner by invoking the special power. If the disciplinary action against the petitioner was the basis of the transfer, then it becomes punitive and the claim that transfer was on administrative ground, is untrue and false. Therefore, he would submit that the transfer order is not for bonafide consideration for

advancing any administrative requirement and hence, liable to be set aside.

31. Considered the submissions of Mr.N.Balamuralikrishnan, learned counsel for the petitioner, Mr.P.S.Sivashanmugasundaram, learned Special Government Pleader appearing for respondents 1 and 2, Mr.P.Srinivas, learned Standing Counsel appearing for the 3rd respondent/Avadi City Municipal Corporation and Mr.Ilamvazhudi, learned counsel appearing for the 4th respondent. This Court also perused the materials placed on record.

32. At the outset, this Court, in order to examine the contention of the Government and the Corporation in relation to the administrative requirement for passing the impugned order, the relevant files were called for and the same was also produced for perusal of this Court.

33. As regards the first contention of the counsel appearing for the petitioner, that the transfer from the Avadi City Municipal Corporation to Kancheepuram Municipality was against the provisions of the Ordinance under Section 9(6) which is extracted supra, the contention needs to be examined with reference to other provision heavily relied on by the respondents viz., Section 116 of the Coimbatore City Municipal Corporation Act, 1981.

34. From the reading of the above provisions, it is indisputably clear that the Government have the power to transfer its officers from the service of the Corporation to the service of any of the Municipality and vice versa. It cannot also be disputed that for the purpose of appointment, transfer, promotion, etc., the Corporation is considered to be a Unit by itself. Therefore, any transfer which is to take place outside the Corporation concerned, it has to be necessarily treated as transfer to a different service. In that event, as rightly termed, the present transfer is not a normal transfer, but, it is a transfer on a deputation basis, if the expression deputation cannot be used at all in this type of transfer, in the opinion of this Court is questionable.

35. However, once the posting of the petitioner to the service of the Municipality is treated as a different service, whether it is deputation or otherwise, it becomes all the more reason for this Court to see whether there was any emergent requirement at all, for achieving better administration, for posting the petitioner to Kancheepuram Municipality on a deputation basis, as expressed in the impugned order. The availability of special power of transfer from Corporation service to the service of the Municipality, is beyond any pale of doubt, however, what is to be examined is whether the out of the ordinary power has been exercised properly or fairly for administrative reasons, in the case on hand, is what to be adjudicated.

36. With reference to the contention of the administrative requirement of the petitioner's service at Kancheepuram Municipality, this Court finds the submissions strange and unconvincing. In this context, this Court is unable to appreciate as to what is the necessity for posting the 4th respondent on deputation basis in the place of the petitioner, when the 4th respondent was already working in the Kancheepuram Municipality. If the vacancies were available and needed to be filled up urgently to advance effective administration, why displace Town Planning Officer, the 4th respondent herein from Kancheepuram Municipality and post in Avadi City Municipal Corporation. It could have been open to the Government to relocate the 4th respondent in Kancheepuram, as he was serving in the same Municipality. Therefore, it is quite perplexing that the 4th respondent was brought from Kancheepuram and posted in Avadi City Municipal Corporation in the place of the petitioner. Therefore, this Court is of the view that there appears to be some substance in the contention made on behalf of the petitioner. More than the posting of the petitioner to Kancheepuram Municipality, accommodating the 4th respondent in her place lends more credibility to the contention that the impugned transfer suffer from malice in law.

37. Moreover, when a special power is vested, viz., the power under Section 116 of the Coimbatore City Municipal Corporation Act, 1981 such power cannot be exercised routinely in the normal circumstances. When admittedly the Corporation is a Unit by itself, any transfer outside the Corporation has to be under compelling circumstances. What is the compelling circumstance in this case, though has not been explained properly, but, it is contended that there were allegations against the petitioner functioning at Avadi City Municipal Corporation and some disciplinary action is also pending against her. It was also contended that the petitioner was also imposed with the punishment, earlier on the basis of her misconduct.

38. In regard to the pending allegation against the petitioner, no doubt, it is always within the administrative discretion of the employer to relocate the officers for securing larger public interest. At the same time, in the guise of protecting public interest, a Government servant cannot be sent out to a different service, on mere allegations unsupported by any material. Moreover on the basis of the past record of service, an officer could be transferred, particularly the petitioner has suffered punishments for the acts of misconduct. In any event the past misconduct stated against the petitioner relate to several years ago and that can't certainly be a valid consideration for the Government or the Corporation, to hold the past misconduct against her for the purpose of transferring her to a different service now in 2020. Past punishments cannot certainly be the reason for

effecting transfer. For this purpose, this Court has perused the relevant files, produced on behalf of the 1st and 2nd respondents. There is reference regarding pending disciplinary actions against this petitioner, but, unfortunately, the files do not reveal anything more in specific terms. Further the files also do not reveal any administrative requirement for the petitioner to be posted to Municipality services. When administrative requirement is the prerequisite for the inter service transfer and as the same was also slated to be the basis of the transfer, as found in the transfer order itself, this Court is unable to find any iota of material in the files, suggesting any administrative requirement or exigencies as contended on behalf of respondents 1 and 2.

39. When the Municipality had been upgraded into a City Municipal Corporation and the power of routine transfer in the services of the municipality is replaced by the provisions of the Ordinance, particularly Section 9(6), extracted supra, the effect of the above section, in the view of this Court, places constriction of the General Power exercised by the 1st respondent.

40. In these circumstances, viewing the present transfer from that perspective, there has to be a compelling administrative reason for exercise of the special power. As a corollary, unless the 1st respondent forms an opinion that the petitioner cannot be retained in the Corporation service in public interest or her services were required indispensably in the Municipality concerned, the power cannot be resorted to as a matter of routine exercise. Moreover, as rightly contended by the learned counsel for the petitioner, the counter affidavit filed on behalf of respondents 1 and 2 has referred to DAVC action against one Town Planning Inspector and his arrest, detention and suspension, has no relevance at all to this case. Probably, this Court feels that such reference was made to distract the focus of this Court, from testing the validity of the present transfer order in terms of the rule position. Moreover the allegations against the petitioner herself are concerned, this Court did find a reference to disciplinary actions pending against her, but, what were the nature of charges, were not specifically found in the file nor this Court find any specific observation in that regard, what actuated the order of transfer. Respondents 1 and 2 probably, being confronted with the present challenge have come up with such plausible answers in the form of allegations against the petitioner for sustaining their impugned action.

41. As regards the the transfer of six Revenue Assistants on the basis of pending disciplinary action by order dated 26.06.2020, referred to by the counsel for the 4th respondent, this Court is not informed as to the circumstances under which such transfer order was passed. In any event, this is brought

to the knowledge of this Court only by the private respondent and neither the learned Special Government Pleader nor the learned counsel for the Avadi City Municipal Corporation, has spoken and submitted as to the basis of which the said transfer was passed against the Revenue Assistants.

42. In the absence of any administrative requirement and also in the absence of any specific material as to the continuance of the petitioner in the Corporation would be detrimental to public interest, the order of transfer to a different service, becomes questionable and liable to be examined on the touchstone of validity in terms of Section 9 (6) of the Ordinance issued by the Government dated 17.6.2019, and also on the principle of fair play in administrative action.

43. In the normal circumstances, when transfer is within the same service, any allegation can also be a subject matter of consideration for relocating the officers in public interest, but, when special power vested is invoked by the authority, such power has to be exercised with utmost circumspect and in compelling circumstances and cannot be exercised for achieving a routine purpose and also as a measure of punitive action.

44. In regard to the rival contentions as to the applicability of FR 110, this Court is not inclined to go into the said controversy for the simple reasons that prima facie, this Court is of the view that FR110 may be applicable only to a posting in a foreign service that means outside the department. As far as the present transfer is concerned, it can only be termed as a transfer to a different service in the same department of Municipal Administration. Therefore, this Court, prima facie is in agreement with the contention raised in the counter affidavit filed on behalf of the respondents 1 and 2, on this aspect.

45. In the conspectus of the above discussion, this Court is of the considered view that the transfer is neither necessitated for administrative reasons nor was impelled by any paramount public interest. On the other hand, this Court is of the view that the transfer to a different service, even on deputation basis, is intended to achieve an extraneous result, lacking in bonafides and hence, liable to be interfered with.

46. Accordingly, the order of the 1st respondent in G.O. (D) No.158 (ME-3) Municipal Administration and Water Supply Department dated 08.05.2020 and the consequential proceedings of the 2nd respondent in Na.Ka.No.5703/2020/F4 dated 08.5.2020 and the 3rd respondent in Na.Ka.No.2907/2070/CI dated

08.05.2020, are set aside. The writ petition is allowed. No costs. Consequently, the connected Writ Miscellaneous Petitions are closed.

Sd/-
Assistant Registrar(CS)

//True Copy//

Sub Assistant Registrar

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To

1. The Secretary to Government,
State of Tamilnadu
Municipal Administration and Water Supply
Department,
Secretariat, Chennai - 600 009.

2. The Commissioner of Municipal Administration,
No.75, Santhome High Road,
Raja Annamalaipuram,
Chennai - 600 028.

3. The Commissioner,
Avadi City Municipal Corporation,
Avadi, Chennai - 600 054.

+1cc to Mr.P.Srinivas , Advocate SR.No. 29753

+1cc to Mr.N.Balamuralikrishnan , Advocate SR.No. 29878

+1 cc to Government Pleader Sr.No. 29709

WP No.7692 of 2020

A.SK(19/10/2020)

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