

**In the High Court at Calcutta
Constitutional Writ Jurisdiction
Appellate Side**

**The Hon'ble Justice Sabyasachi Bhattacharyya
And
The Hon'ble Justice Jay Sengupta**

W.P.S.T. 55 of 2021

**Dr. Ashok Kumar Maity
Vs.
The State of West Bengal and others**

For the petitioner : Mr. Ashok Kumar Banerjee
Mr. Sumit Ray,
Mr. Sailen Naskar,
Mr. Allauddin Mondal

For the State : Mr. Tapan Kumar Mukherjee,
Mr. Biswabrata Basu Mallik,
Mr. Sayan Ganguly

Hearing concluded on : 24.09.2021

Judgment on : 01.10.2021

Sabyasachi Bhattacharyya, J.:-

1. In the present writ petition, the petitioner has challenged a Transfer Order bearing no. HF/O/Dental/133/HFW-38099/58/29 dated February 25, 2021, whereby the petitioner was transferred from the Calcutta National Medical College and Hospital to the Diamond Harbour Government Medical College and Hospital.
2. Learned senior counsel appearing for the petitioner contends that the petitioner did his Masters' Degree of Dental Surgery in Periodontia.

Reliance is placed on a photocopy of a certificate issued by the University of Calcutta, annexed at page 83 (annexure P-5) to the writ petition. Learned senior counsel for the petitioner contends that, pursuant to a Division Bench judgment of this Court dated February 8, 2010, the Director of Medical Education and Ex-Officio Secretary, Government of West Bengal, by an order dated May 11, 2010, had recommended that a previous transfer order of the petitioner be cancelled and it was directed that the petitioner may remain posted as Professor, Department of Dentistry, Calcutta National Medical College and Hospital “for the present”. However, it was made clear in the said order that the petitioner may be transferred afresh in future, maintaining the rules and regulations.

3. Subsequently, by the impugned notification dated February 25, 2021, it was communicated to the petitioner that the Governor of West Bengal had been pleased to transfer the petitioner to the Department of Dentistry, Diamond Harbour Government Medical College and Hospital, with effect from his date of joining and to continue in the respective place of posting until further order, in the interest of public service.
4. Pursuant thereto, the release order was passed on February 25, 2021 itself, whereby the petitioner was released from the Calcutta National Medical College and Hospital, with instruction to join his duty as Professor, Department of Dentistry at Diamond Harbour Government Medical College and Hospital at Diamond Harbour.

5. The petitioner moved the West Bengal Administrative Tribunal against such transfer order by filing OA No. 184 of 2021. In the said application, apart from seeking the cancellation of the transfer order and the consequent release order, the petitioner had also sought for stay of the transfer order. However, prayers (d) and (e), pertaining to release of dues/unpaid salary of the petitioner and regularisation/normalisation of his attendance from September, 2019 were not pressed.
6. It was submitted before the Tribunal that only 11 months were left for the petitioner's superannuation. Such superannuation of the petitioner is due in normal course on January 31, 2022.
7. Vide Order No. 01 dated March 8, 2021, the Tribunal categorically recorded that the petitioner had sought for postponement of the transfer, since his son's examination was due to be held from June 1 to June 10, 2021. On such humanitarian aspect of the matter, the transfer was deferred till June 15, 2021, with the rider that the applicant will join the post, to which he had been transferred, on June 16, 2021. The Tribunal held that such postponement was directed on the humanitarian ground of the then impending Madhyamik Examinations of the petitioner's son, however, the applicant was to join the transferred post on June 16, 2021.
8. Although the prayers in the present writ petition do not reveal any challenge to such order of the Tribunal, but directly pray for a cancellation of the transfer order as well as the consequent release order, since the said challenge had already been decided by the

Tribunal, the writ petition cannot be entertained on the reliefs as prayed therein, if read literally. However, for the ends of justice, the reliefs are moulded and the writ petition is deemed to be a challenge to the order dated March 8, 2021 of the Tribunal passed in OA No. 184 of 2021.

9. Learned senior counsel for the petitioner contends that the petitioner has been working as a Professor in the Department of Periodontia in the Calcutta National Medical College and Hospital, which is a specific field of specialization in treatment of gums and teeth. However, the Diamond Harbour Government Medical College and Hospital, which is the transferee hospital, does not have the scope of teaching in the said subject of specialization of the petitioner. It is further submitted that there is no such Department of Periodontia in the transferee institution at all.
10. Moreover, at the fag end of his career, the transfer is not only unjust but reeks of *mala fides* on the part of the authorities.
11. Learned counsel places reliance on a Memorandum dated November 18, 1996, bearing no. H/MA/MES/1891/1M-77/96/Calcutta, to argue that the said memorandum sets out the guiding principles regarding posting and transfer of medical officers and teachers of the erstwhile West Bengal Health Services.
12. It is submitted that several guidelines, as stipulated therein by the Department of Health and Family Welfare, Government of West Bengal itself, have been squarely violated by the impugned transfer.

- 13.** By placing particular reliance on Guideline 4, learned senior counsel indicated that WBMES teachers, which cadre has been created within the erstwhile West Bengal Health Services, shall be required to work for a period of 8 to 10 years in any institution(s) outside Zone-I. A teacher posted in Zone-I can be transferred to other institutions of that Zone as per necessity.
- 14.** It is submitted that there is nothing on record to show that the Diamond Harbour Medical College and Hospital is located within Zone-I.
- 15.** Guideline 8 stipulates that any choice of posting indicated by a teacher of WBMES from one Zone to another Zone during the last 3 years before superannuation shall normally be given due consideration.
- 16.** In the present case, although a few months are left for the petitioner's superannuation, such guideline was flouted by the respondent.
- 17.** Guideline 13 provides that, notwithstanding anything contained in the guidelines, the Government may post at/transfer any teacher from one Medical Institute to another in the interest of public service.
- 18.** It is submitted that no public service would be subserved if the petitioner is plucked out from his field of specialization and is compelled to teach at some other department in the transferee medical college and hospital.
- 19.** It is contended by the petitioner that there is patent discrimination in case of the petitioner since, despite the vacancy of posts which require equivalent qualification elsewhere within Zone-I, the petitioner has been

transferred to Diamond Harbour, which is far off from his residence. As regards public interest, in the affidavit-in-opposition filed by the respondent to the present writ petition, the parties have cited the emergency during the current pandemic situation as one of the reasons for such transfer. However, it is argued that the specific field of specialization of the petitioner, that is, dentistry, does not come within the fold of the pandemic, that is, Covid-19. As such, no 'public interest' would be subserved by such transfer.

20. Apart from violation of Guidelines 4 and 8 as indicated above, the extreme haste in which the petitioner was transferred and a release order was passed on the same date, that is, February 25, 2021, clearly shows the *mala fides* on the part of the respondent against the petitioner.
21. It is submitted that Guideline 13 permits that transfer of any teacher of the WBMES cadre from any medical institution to another in West Bengal in the interest of "public service", which test is not satisfied in the present case.
22. It is submitted by the learned Additional Government Pleader (AGP) that not only in view of the pandemic, but also due to exigency arising out of vacancy of competent teacher in the transferee medical college and hospital, the impugned transfer was in the interest of public service.
23. It is further contended by the learned AGP, by citing *Pravin Kumar Vs. Union of India and others*, reported at (2020) 9 SCC 471, that

Constitutional courts, while exercising their powers of judicial review, would not assume the role of an appellate authority. Their jurisdiction is circumscribed by limits of correcting errors of law, procedural errors leading to manifest injustice or violation of principles of Natural Justice. Put differently, judicial review is not analogous to venturing into the merits of case like a appellate authority. In the present case, no pleading of *mala fides*, let alone particulars thereof, finds place in the writ petition. There is no material or specific allegation to indicate mala fides against the petitioner on the part of the authorities.

- 24.** In the affidavit-in-opposition, it is contended, not only the pandemic, but public interest was also cited as a reason for the transfer.
- 25.** As regards alleged discrimination against the petitioner, in view of other vacancies being available near Kolkata, it is submitted that the said point is being urged for the first time before this Court. Moreover, it was within the discretion of the administration to choose where to transfer the petitioner for the ends of public service.
- 26.** The petitioner is being transferred to a similar post of teacher, as he is holding at present, in the Diamond Harbour Government Medical College and Hospital, which also contains a Dentistry Department.
- 27.** That apart, the Disaster Management Act also overrides other statutes and bye-laws and permits the administration to post medical practitioners to any hospital in view of the vacancies arising.

28. It is controverted by the learned AGP that there was any arbitrariness in the impugned transfer.
29. The learned AGP also cites *S.C. Saxena Vs. Union of India and others*, reported in (2006) 9 SCC 583, in support of the proposition that a government servant cannot disobey a transfer order by not reporting at the place of posting and then go to a court to ventilate his grievances. It is his duty to first report for work where he is transferred and to make a representation as to what may be his personal problems. Such tendency of not reporting at the place of posting and indulging in litigation needs to be curbed, the Supreme Court held in the said report.
30. Learned Senior Advocate appearing for the petitioner places reliance on the judgment reported at AIR 2008 SC 690 [*State of Rajasthan Vs. Ganeshi Lal*] for the proposition that reliance on a decision without looking into the factual background of the case before it, is clearly impermissible and a decision is a precedent on its own facts. Each case presents its own features. It is not everything said by a Judge while giving a judgment that constitutes a precedent. It was further held that the only thing in a Judge's decision binding a party is the principle upon which the case is decided and for this reason it is important to analyse a decision and isolate from it the *ratio decidendi*.
31. Learned senior counsel submits that, in view of such proposition, the judgements relied on by the State respondents cannot be taken as precedents in the present case.

32. Upon hearing learned counsel for the parties and a scrutiny of the records, I arrive at the following decision.
33. A perusal of the Guidelines in the Memorandum dated November 18, 1996 clearly indicates that those are not mandatory in nature but, as the name suggests, are merely Guidelines regarding posting and transfer.
34. As far as Guideline 1 is concerned, the specific stipulation is that transfer shall be normally effected after considering the actual need arising out of such phenomena, as stipulated, among other considerations. The transfer, it is provided, shall not be a routine procedure but shall be effected to run the academic, medical related needs of the medical teaching institutions in an efficient manner.
35. Guideline 4 merely stipulates that all WBMES teachers, during the entire period of his/her services in WBMES, shall be required to work for a period of 8 to 10 years in institutions outside Zone I. Although it has been provided that teachers posted in Zone I can be transferred in other institutions of that Zone as per necessity, there is no mandate cast by the guidelines to do so in all cases.
36. In any event, Guideline 13 overrides the other clauses and clearly indicates that, notwithstanding anything contained in the foregoing paragraphs of the guidelines, the Government may post and/or transfer any teacher within the WBMES cadre from any Medical Institution to another in West Bengal 'in the public interest'.

- 37.** Guideline 8, which stipulates that any choice of posting indicated by a teacher from one Zone to another during the last 3 years before superannuation shall be given due consideration, contains the adjective “normally”, which itself indicates that the said Guideline is not mandatory in nature.
- 38.** It is further seen that, in the present case, the respondents have specifically made out a case in their affidavit-in-opposition that there is a dearth of specialists in dentistry in the transferee Medical College and Hospital, for which the necessity arose to transfer the petitioner in the interest of public service.
- 39.** That apart, the fact that the specialized field of Periodontia also pertains to gums, which might be affected due to several epidemics, would also add to the necessity of transfer. In any event, merely because the petitioner did his Masters’ degree in the specific subject of Periodontia, it is not mandatory that he should be posted only to Medical Colleges having specialized departments of Periodontia. The petitioner is fully qualified as a Professor in the field of dentistry and, as such, cannot cite the absence of a Periodontia department in the transferee Medical College and Hospital, despite there being vacancy in the Dentistry department of the said College.
- 40.** That apart, no arbitrariness and/or *mala fides* on the part of the authorities against the petitioner has been specifically pleaded and/or proved in the present case.

41. In fact, by flouting the decision in *S.C. Saxena* (supra), the petitioner has been stalling the compliance of the transfer order for an inordinate period.
42. At first, the petitioner resorted to the pretext of his son's examination, which was considered on humanitarian ground, subject to the petitioner joining the transferee hospital on June 16, 2021. However, the petitioner, despite taking advantage of such breathing period, did not comply with the order of the Tribunal in a nonchalant manner.
43. As correctly pointed out by the learned AGP, the Supreme Court clearly laid down the contours of judicial review in *Pravin Kumar* (supra), which precludes this Court, sitting in judicial review under Article 226 of the Constitution of India, from scrutinizing and re-appreciating the materials-on-record. In the present case, the petitioner has failed to make out any positive case of *mala fides* on the part of the authority and/or any manifest injustice or violation of the principles of natural justice. In such view of the fact, it was well within the administrative discretion of the respondents to direct the transfer of the petitioner to the Diamond Harbour Medical College and Hospital, which has a Dentistry Department as well.
44. Accordingly, there is no merit in the present writ petition. WPST 55 of 2021 is, thus, dismissed on contest without any order as to costs.
45. The petitioner shall join the transferee Medical College and Hospital at Diamond harbour within a week from date and will be subject to all

deductions due to his non-reporting to the transferee Hospital in the interregnum, in accordance with law.

- 46.** Urgent certified server copies shall be supplied to the applying parties, subject to due compliance with the necessary formalities.

(Sabyasachi Bhattacharyya, J.)

I agree.

(Jay Sengupta, J.)