

IN THE HIGH COURT AT CALCUTTA
Constitutional Writ Jurisdiction
Appellate Side

Present :- Hon'ble Justice Amrita Sinha

WPA No. 7857 of 2020

Dr. Tarakeswar Prasad

Vs.

Union of India & Ors.

For the writ petitioner	:-	Mr. Kishore Datta, Ld. AG. Mr. Subhabrata Datta, Adv. Mr. Aranya Saha, Adv.
For UOI	:-	Mr. Debapriya Gupta, Adv.
For the respondent no. 6	:-	Ms. Sucharita Biswas, Adv.
Hearing concluded on	:-	06-01-2021
Judgment on	:-	14-01-2021

Amrita Sinha, J.:-

The instant writ petition is a sequel of the order passed by an Hon'ble Division Bench of this Court on 25th August, 2020 in MAT 486 of 2020 with CAN 4324 of 2020 and CAN 4325 of 2020.

In an earlier writ petition filed by the petitioner being WP 5692 (W) of 2020 challenging his order of transfer, the learned Single Judge by an order dated 2nd July, 2020, as an interim measure, restrained the respondents from giving any effect to the impugned order of transfer dated 22nd June, 2020 for a period of eight weeks. In an appeal preferred by the Union of India against the aforesaid order, the Hon'ble Division Bench by the order dated 25th August, 2020 was pleased to set

aside the order of transfer with a further direction upon the Ministry to reschedule the transfer roster accordingly.

In compliance of the order passed by the Hon'ble Division Bench, the Ministry by an order dated 23rd September, 2020 posted the petitioner at the Composite Hospital, BSF Kolkata.

The petitioner's grievance, primarily, is that though the respondent authority has retained him at Kolkata but with a mala fide intention did not reschedule the transfer roster. In view of not rescheduling the transfer roster, the person who was originally transferred to Kolkata i.e; Dr. Subrata Chakraborty, the private respondent herein, has been retained at Kolkata and the petitioner has been posted at Kolkata. The same implies that presently two persons are serving as the Medical Superintendent of the Composite Hospital, Kolkata.

The petitioner refers to the BSF manual, Medical Directorate wherefrom it appears that in respect of a 50 bedded hospital there is only one sanctioned post of Medical Superintendent. It has been submitted that the respondent authorities are acting contrary to their own guidelines and have engaged two medical superintendents in the Composite Hospital which is a 50 bedded one.

The petitioner has filed a supplementary affidavit annexing the office order dated 28th September, 2020 wherein the duties of the two medical superintendents of the Composite Hospital, Kolkata have been mentioned. According to the petitioner the duties have been allotted to

him in such a manner that the same completely nullifies the purport of the order of the Hon'ble Division Bench.

It has been contended that the duties which were performed by the petitioner previously have been assigned to the private respondent and the nature of the duties allotted to the petitioner is such, that it appears that the petitioner is a subordinate officer of the private respondent.

It has been argued that though there has not been any change in the scale of pay but from the nature of the duties assigned to the petitioner it appears that he has been placed under the command of the private respondent.

The petitioner prays for partial withdrawal of the impugned order of transfer.

The petitioner relies upon a judgment delivered by the Hon'ble Supreme Court in the matter of **Vice-Chancellor, L.N.Mithila University –vs- Dayanand Jha** reported in **(1986) 3 SCC 7** paragraphs 7 and 8 in support of his contention that equivalence of the pay scale is not the only factor in judging whether the posts are equivalent or not. The true criteria for equivalence are the status and the nature and responsibilities of the duties attached to the two posts.

The learned advocate representing the private respondent vehemently opposes the prayer of the petitioner. It has been vociferously contended that the writ petition is not maintainable. The petitioner does not have the locus standi to file the writ petition as he is not an

aggrieved person. It has been argued that as the order of the Hon'ble Division Bench has been duly complied with by the respondent authority the petitioner ought not to have any further grievance.

The private respondent relies upon the decision delivered by the Hon'ble Supreme Court in the matter of **Dr. Umakant Saran -vs- State of Bihar & Ors.** reported in **AIR 1973 SC 964** paragraph 10 on the issue that mandamus may be issued to compel the authorities to do something only when the statute imposes a legal duty and the aggrieved party has a legal right under the statute to enforce its performance.

Reliance has also been placed on the judgment delivered by the Hon'ble Supreme Court in the matter of **Mani Subrat Jain -vs- State of Haryana & Ors.** reported in **AIR 1997 SC 276** paragraph 9 to highlight the point that one cannot ask for a mandamus without a legal right. There must be a judicially enforceable right as well as a legally protected right, before one suffering a legal grievance can ask for a mandamus.

The private respondent further relies on the judgment of the Hon'ble Supreme Court in the matter of **D. Nagaraj -vs- State of Karnataka & Ors.** reported in **AIR 1977 SC 876** paragraph 7 to drive the point that a person who is not aggrieved by the discrimination complained of, cannot maintain a writ petition.

The learned advocate appearing on behalf of the private respondent has relied upon the laboratory investigation reports given by the hospital, in favour of the wife of the petitioner on 7th August, 2020 and 10th August, 2020. It has been submitted that the petitioner has deliberately misled the Court and obtained order from the Hon'ble

Division Bench on 25th August, 2020. It has been pointed out that on the day the order was passed by the Court, the wife of the petitioner had reported negative for Covid and accordingly Covid ought not to have been a reason praying for recalling the order of transfer.

It has also been argued that as the tenure of the petitioner at Kolkata was long over, he is liable to be transferred to some other place and the Court ought not to interfere with the posting order of the private respondent in Kolkata.

The learned advocate representing the Union of India submits that the office order dated 28th September, 2020 clearly mentions that in view of the Covid pandemic scenario and the load of patients in the Composite Hospital, BSF Kolkata, owing to huge deployment of paramilitary force in North-East region and to cater to the best and speedy treatment of the needy jawans and their families and with an aim of an earlier implementation of “PMJY Aushman Bharat Yojna”, senior doctor, Dr. Subrata Chakaraborty has been posted at the Composite Hospital, BSF Kolkata.

It has been further submitted that the duty of the two medical officers have been clearly mentioned in the said office order and no case has been made out by the petitioner as regards conflict of duties. It has been argued that in view of the pandemic, as per the provision of Section 35 of the Disaster Management Act, 2005, the Central Government is entitled to take all such measures that it thinks expedient for the purpose of disaster management. It is open for the respondent authorities to deploy requisite number of medical officers in

the hospitals as per exigencies. In the pandemic situation the guidelines as indicated in the BSF manual will not stand in the way of implementation of the provisions of the Disaster Management Act.

The respondent authority contends that the petitioner does not have any legally enforceable right to file the instant writ petition. Reference has been made to the averment made by the petitioner in paragraph 15 page 10 of the writ petition, wherein the petitioner has admitted that the Union of India has complied with the order dated 25th August, 2020 and has given effect to the same by allowing the petitioner to stay at his present place of posting, that is Composite Hospital, BSF Kolkata until further orders.

The respondent authority denies the allegation of the petitioner that he has been allotted duties in such a manner as if he was subordinate to the private respondent. It has been contended that the duties of both the officers have been distinctly mentioned in the office order and there is hardly any reason on the part of the petitioner to be aggrieved with the same.

The respondent authority relies on the decision delivered by the Hon'ble Supreme Court in the matter of Mani Subrat Jain (supra) and submits that the writ petition at the instance of the petitioner is not maintainable. Both the respondents deny the applicability of the ratio decidendi of the decision delivered by the Hon'ble Supreme Court in the matter of Dayanand Jha (supra). Both pray for dismissal of the writ petition.

I have heard the submissions made on behalf of both the parties.

Though the office order dated 28th September, 2020 mentions that senior doctor, Dr. Subrata Chakraborty has been transferred from Chandigarh to Kolkata to cater to the best and speedy treatment of the needy jawans and their families and with the aim of an earlier implementation of the “PMJY Aushman Bharat Yojna”, but it appears from records that both the parties are highly interested and keen to remain posted at the Composite Hospital, Kolkata for varied reasons.

The petitioner has averred in the writ petition that his wife, aged about 61 years, is suffering from chronic kidney and critical disease for which she has to undergo haemodialysis thrice a week at Medica Super Speciality Hospital, Kolkata. He joined the Composite Hospital, Kolkata on 2nd January, 2017 and he is due to retire from service on 31st December, 2021.

The petitioner by an order dated 2nd August, 2019 was transferred from Kolkata to Chandigarh. Being aggrieved by the said order of transfer he filed a writ petition before this Court being WP 15717 (W) of 2019. During the pendency of the writ petition the transfer order of the petitioner stood modified and the respondent authority permitted the petitioner to continue to remain posted at Kolkata till completion of his normal tenure.

An order of transfer was thereafter issued on 22nd June, 2020 whereby the petitioner was transferred from Kolkata to Chennai and the private respondent was transferred from Chandigarh to Kolkata. The petitioner being aggrieved by the same filed the writ petition being WP 5692 (W) of 2020. The said writ petition stood disposed of by the order of

the Hon'ble Division Bench on 25th August, 2020 whereby the transfer order of the petitioner was set aside and the Ministry was directed to reschedule the transfer roster accordingly.

The Ministry in compliance of the order of the Hon'ble Appeal Court permitted the petitioner to retain his post at the Composite Hospital, BSF Kolkata but at the same time, also permitted the private respondent to remain posted at Kolkata.

The BSF manual, Medical Directorate lays down the guidelines pertaining to the organisational role and task. The manual has been published with the aim to support a standard and uniform pattern all over the force pertaining to the medical directorate. It gives the basic information covering all aspects of the functioning of the directorate.

In the manual it has been mentioned that there is only one sanctioned post of Medical Superintendent in a 50 bedded Composite Hospital. Admittedly, the Composite Hospital at Kolkata is a 50 bedded one. To wriggle out of their act in posting two superintendents in a 50 bedded hospital, the respondent authority has relied upon Section 35 of the Disaster Management Act, 2005. An impression has been created that in view of the huge load in the hospital at Kolkata, services of two medical superintendents were required to cater to the best and speedy treatment of the patients. Had medical exigency been the real reason for retaining two medical superintendents in the Composite Hospital at Kolkata, then the office order ought not to have mentioned, that Dr. Subrata Chakraborty has been posted at the Composite Hospital, Kolkata on 'compassionate ground'.

Even if the office order dated 28th September, 2020 is to be given credence, then as per the said office order the respondent authority ought to assign the duty of earlier implementation of “PMJY Ayushman Bharat Yojna” to Dr. Chakraborty and not to the petitioner.

From the charter of duties it appears that the petitioner has been made in-charge of the “PMJM Ayushman Bharat Yojna” run by the Composite Hospital, whereas the very reason for transferring Dr. Subrata Chakraborty from Chandigarh to Kolkata was for the speedy implementation of the said project. The reason portrayed for bringing on transfer and retaining Dr. Subrata Chakraborty at Kolkata is absolutely contrary to the duties allotted to him.

Undoubtedly, the respondent authorities have complied with the order of the Hon’ble Division Bench, but at the same time adopted a ploy to bypass the same by rescheduling the transfer roster in such a manner, that both the doctors have been retained at Kolkata and both have been left fighting between themselves. Due to the infighting in between the two doctors the ultimate sufferer will be the patients who visit the hospital for treatment. Both the doctors are trying to steal a march over the other. Both complain that the other has been retained at Kolkata for long periods. If such a situation is permitted to continue, then within no time, will there be a total impasse in the said hospital.

As the earlier transfer order of the petitioner was set aside by the Court and direction was passed for rescheduling the transfer roster, the Ministry ought to have acted in a prudent manner prior to passing the subsequent order of transfer on 23rd September, 2020.

The petitioner has averred that the hospital at Kolkata is the solitary instance, throughout the country, where two medical superintendents have been posted against one sanctioned post in a 50 bedded hospital. The entire country is passing through the pandemic and there may be genuine requirement of a medical superintendent in a hospital. It is not the case of the Ministry that the number of beds in the Kolkata hospital has increased. Then the only reason for the extra load would be a rise in the number of outdoor patients. Assuming it is so, even then, it has to be assessed as to whether an additional medical superintendent was required for handling the extra load. Had that been so, the office order would not have mentioned, that Dr. Subrata Chakraborty has been posted at Kolkata on 'compassionate ground'.

As the respondent authority complied with the order of the Hon'ble Division Bench it implies that they have accepted the said order. The order has attained finality. In such a case, the order ought to have been implemented in its proper perspective. When there is a specific direction for rescheduling the transfer roster, the posting of the doctors at Kolkata ought to have been rescheduled. Instead of rescheduling the Kolkata roster the Ministry has retained two senior doctors at Kolkata on the plea of implementation of the provision of Section 35 of the Disaster Management Act.

The respondents have strongly pressed the issue of non-maintainability of the writ petition on the ground that no cause of action survives to file the same. Decisions of the Supreme Court have been relied upon on the point that in the absence of a legally enforceable right a writ of mandamus cannot be prayed for. I am not inclined to accept

the aforesaid submission of the respondents that the petitioner does not have a cause of action. The petitioner is primarily aggrieved by the alleged arbitrary assignment of duties by the respondent authority and by acting contrary to the guidelines of their manual. A writ of mandamus can always be issued commanding the respondents to act in accordance with law.

The Ministry is the appropriate body to take a decision as to which officer is to be posted where. The employee, as a matter of right, cannot claim to be posted at a particular place and to perform a particular duty. It is the sole and absolute prerogative of the employer to allocate duties to the employees in the exigencies of service and in the best interest of the administration. The employer ought to assign duties in a proper manner and to take care that there is no resentment amongst the employees. Instead of maintaining a congenial atmosphere at the workplace the action of the respondent authority has brought two senior medical superintendents of the Composite Hospital at gun points. Both are levelling accusations against the other, and the Ministry is adding fuel to fire.

It is neither open for the court to enter into such trivial disputes, nor does the Court have the expertise to direct what duties to be allotted to the warring doctors, but keeping in mind the interest of the patients, in the midst of the pandemic, the Court is compelled to exercise jurisdiction in the matter.

The Ministry is directed to revisit the order regarding posting/transfer of both the medical superintendents in the light of the

order passed by the Hon'ble Division Bench on 25th August, 2020 within ten days. In the event the Ministry is of the considered opinion that service of both the medical officers are genuinely required in the 50 bedded Composite Hospital at Kolkata, then the medical officers shall be allotted duties in such a manner that both have equal opportunities to serve the people. Duties shall be allotted to extract the best possible service of the senior doctors. One officer should not be bogged down with heavy duty practically leaving no work for the other. The post, status and pay of the two doctors being the same, both should be treated in like manner and one should not be made to feel or act as subordinate to the other. If the Ministry is of the considered opinion that the duties of the two doctors are evenly distributed, then the Ministry may swap the duties allotted to the doctors. The duties presently allotted to the petitioner may be allotted to Dr. Chakraborty and the duties of Dr. Chakraborty may be allotted to the petitioner. All necessary steps shall be taken to ensure that service to the patients of the hospital is not hampered or jeopardised in any manner whatsoever due to the infighting between the two superintendents.

WPA No 7857 of 2020 is disposed of.

No costs.

Urgent certified photocopy of this judgment, if applied for, be supplied to the parties or their advocates on record expeditiously on compliance of usual legal formalities.

(Amrita Sinha, J.)