

IN THE HIGH COURT AT CALCUTTA

Civil Appellate Jurisdiction

Appellate Side

Present:

The Hon'ble Justice Debangsu Basak

And

The Hon'ble Justice Md. Shabbar Rashidi

F.M.A 458 of 2023

With

CAN 1 of 2023

CAN 2 of 2023

Sri Subrata Chakravorty

Vs.

The State of West Bengal & Ors.

For the Appellant : Mr. Subir Sanyal, Adv.
Mr. Arjun Roy Mukherjee, Adv.
Mr. Sougata Mitra, Adv.
Ms. Soma Chakraborty, Adv.
Ms. Subhasri Chatterjee, Adv.
Mr. Subhadeep Maitra, Adv.

For the WBBSE : Mr. Kishore Dutta, Ld. A.G.
Ms. Koyeli Bhattacharyya, Adv.

Hearing Concluded on : June 13, 2024

Judgement on : June 26, 2024

DEBANGSU BASAK, J.:-

1. Appellant has assailed the judgement and order dated December 21, 2022 passed in WPA 19024 of 2022 dismissing the writ petition of the appellant.

2. Learned advocate appearing for the appellant has submitted that, the appellant is working as Office Superintendent under the West Bengal Board of Secondary

Education. As employee of the Board, appellant is governed by the Office Order dated March 23, 2007 which is the transfer policy for the officers and employees of the Board.

3. Learned advocate appearing for the appellant has contended that, although, the transfer policy cannot be said to have statutory flavour, nonetheless, such transfer policy is required to be taken into consideration by the Administration while issuing an order of transfer in respect of officers and employees of the Board.

4. Referring to the facts of the present case, learned advocate appearing for the appellant has contended that, appellant has crossed the age of 52 years. Since appellant has crossed the age of 52 years, appellant should not have been transferred from his post at Kolkata. Moreover, appellant has to look after his ailing mother and that, the medical condition of the ailing mother of the appellant is such that, she cannot be moved out from Kolkata.

5. Learned advocate appearing for the appellant has referred to the last paragraph of the transfer policy and contended that, powers under Section 28 (3) (c) of the West Bengal Board of Secondary Education Act, 1963 is required to be exercised subject to the transfer policy. He has referred to

the order of transfer dated August 17, 2022 and contended that, the same was not issued by the President of the Board. He has also pointed out that, such transfer order does not refer to the transfer policy nor does it appear that, the transfer policy has been considered by the Administration while issuing such order of transfer. He has contended that, since the transfer policy was framed by the Board, the same cannot be flouted by the Board. Previous exercise of powers under Section 28 of the Act of 1963 or previous orders of transfer dehors the transfer policy and no challenge being thrown with regard thereto are of no consequence.

6. In support of his contentions that, since there exist a transfer policy, the same has to be taken into consideration by the authorities, although such transfer policy may not have statutory flavour, learned advocate for the appellant has relied upon **2022 Volume 14 Supreme Court Cases 187 (Ms. X vs. Registrar General, High Court of Madhya Pradesh and Another)** and **2008 Volume 14 Supreme Court Cases 370 (Punjab National Bank by Chairman and Another vs. Astamija Dash).**

7. Referring to order dated May 21, 2024, learned advocate appearing for the appellant has submitted that,

original file was required to be produced by the respondent authorities. He has referred to a writing dated August 17, 2022 containing the signature of the President relating to placement of service. He has contended that, such a writing cannot be construed to be grant of approval by the President in terms of the transfer policy or under Section 28 of the Act of 1963.

8. Learned Advocate General appearing for the Court has referred to the transfer policy and contended that, the same cannot be said to be imbued with any statutory flavour. No mala fide has been alleged as against the Board and therefore, the question of proving the same by the appellant does not arise. In absence of the transfer order being in violation of a statute or being issued mala fide, Writ Court should not interfere with the transfer order. In support of such contention, he has relied upon ***AIR 1991 Supreme Court 532 (Mrs. Shilpi Bose and Others vs. State of Bihar and Others)*** and ***1993 Volume 4 Supreme Court Cases 357 (Union of India and Others vs. S. L. Abbas)***.

9. Learned Advocate General appearing for the Board has referred the conduct of the appellant. He has submitted that, the appellant obtained an interim protection in the appeal.

Against such order, a special leave petition was filed. Supreme Court by the order dated May 17, 2023 had required the appellant to join to the post to which he was transferred by the impugned order of transfer. Appellant had joined the transferred post on June 1, 2023 and then took leave on and from June 2, 2023. He has not joined the post thereafter. Appellant has been without pay since January 20, 2024.

10. Learned Advocate General has contended that, approval of the President for transferring the appellant was obtained on August 17, 2022. Referring to the file produced in terms of the order dated May 21, 2024, he has contended that, six employees were considered for transfer from their present posting to the proposed place of posting. Such proposal had been placed before the President of the Board who approved of the same on August 17, 2022 by signing on the document under the heading of placement of service. Therefore, he has contended that, the transfer policy was considered and the appellant was directed to be placed at the new posting with the approval of the President of the Board.

11. Appellant as a writ petitioner has challenged a transfer order dated August 17, 2022 by which he has been

transferred, as an office superintendent, from his posting at Kolkata to North Bengal Regional Office of the Board.

12. By the impugned judgement and order dated December 21, 2022 the learned single judge has declined to grant relief to the appellant with regard to the order of transfer challenged in the writ petition.

13. ***Mrs. Shilpi Bose (supra)*** has observed that, Court should not interfere with the transfer order which are made in public interest and for administrative reasons unless the transfer orders are made in violation of any mandatory statutory rule or mala fide. It has also observed that, a government servant holding a transferable post has no vested right to remain posted at one place or the other and that he is liable to be transferred from one place to the other. Transfer orders issued by the competent authority does not violate any of his legal rights. Even if a transfer order is passed in violation of executive instructions, the Court ordinarily should not interfere with the order, instead the affected party should approach the higher authorities in the Department.

14. ***S. L. Abbas (supra)*** has observed that an order of transfer is an incident of government service. It has also held that, unless the order of transfer is vitiated by mala fides or is

made in violation of any statutory provision, Court cannot interfere with it.

15. Appellant is an employee of the Board. Board has been established under the West Bengal Board of Secondary Education Act, 1963 and is an Article 12 authority. His service with such authority is transferable. Board at the level of the President and Executive Committee issued an office order dated March 23, 2007 stating that it contained a transfer policy. None of the parties before us have claimed that the office order dated March 23, 2007 has a statutory flavour.

16. Appellant has contended that, the administration should have considered the transfer policy enshrined in the office order dated March 23, 2007 prior to issuing the impugned transfer order and that, the impugned transfer order was not in accordance with the transfer policy so enshrined.

17. Relevant portion of the office order dated March 23, 2007 are as follows: –

“Persuant to the order passed by the President W.B.B.S.E and subsequent approval by the Executive committee of the West Bengal Board of Secondary Education in its meeting held on 29/12/2006 the following transfer policy for the officers and Employees of the board is being circulated:

1. Usually a female employee after her attaining of the age of 45 years shall not be ordinarily transferred out of the officer where she is posted. Similarly a male employee shall not be transferred after his attainment of 52 years of age. This general aspect shall not be applicable in cases of transfer on promotion to the scale and/ or in post of Assistant Secretary and Deputy Secretary. Provided that if any employee is transferred to an office considered to be distant from his/her home then the span of such transfer shall abide by the following schedule

<i>Burdwan Regional Office</i>	<i>Four Years</i>
<i>Midnapore Regional Office</i>	<i>Four Years</i>
<i>North Bengal Regional Office</i>	<i>Three Years</i>

This consideration is made in order not to disturb the familial responsibility of any employee. In case transfer is made on mutual basis or on the basis of ones own volition then the above consideration may not be applicable.”

“7. Not with standing anything contained in this office order the President, W.B.B.S.E will be at liberty to exercise his over all power as entailed u/s 28(3) (a) of W.B.B.S.E Act 1963 in the interest of the smooth administration of W.B.B.S.E.”

18. Clause 1 of the office order dated March 23, 2007 opens with the word “usually” of which “normally” is a synonym. If the word “usually” by itself is understood to be “normally” or “ordinarily” then, in either of the situations, Clause 1 does not prohibit transfers of employees and officers of the Board in absolute terms. Moreover, notwithstanding anything in the office order dated March 23, 2007, the last

clause thereof reserves the right of the President of the Board to exercise his overall power under Section 28 (3) (a) of the Act of 1963.

19. In the facts and circumstances of the present case, appellant has also canvassed the medical condition of his mother as another ground which should have been taken into consideration by the Administration prior to issuing the order of transfer.

20. By an order dated May 21, 2024 passed in this appeal, the coordinate bench had directed the Board to produce the original file containing the approval of the President of the Board. Such file had been produced before us which we perused and returned. It has appeared from such file that, a proposal for transfer of 6 employees of the Board had been placed by the Assistant Secretary of the Board before the President of the Board on August 17, 2022 and that, the same was approved by the President of the Board by signing on the same on the same date.

21. It has been contended on behalf of the appellant that, mere signature of the President of the Board on the proposal for transfer is neither an approval of the proposal nor due consideration of the transfer policy contained in the office

order dated March 23, 2007 as the proposal does not refer to such office order dated March 23, 2007.

22. With respect, we are unable to accept such contentions of the appellant as, the President of the Board has signed the proposal dated August 17, 2022 placed by the Assistant Secretary of the Board before him without noting any dissent or disapproval to the same. Moreover, the proposal was placed before the President of the Board for consideration as to whether the services of the 6 employees may be placed at the noted transferred posting for smooth functioning of the Section/Regional Office of the Board. Signature of the President on such proposal for transfer has to be construed as an approval in absence of any noting of dissent or any noting to the contrary of the proposal. Neither the proposal for transfer nor the approval thereof has been established to be in violation of the office order dated March 23, 2007 and therefore the question of non-consideration of such office order at the time of consideration of the proposal and approval of the transfer of the appellant, does not arise.

23. In *Astamija Dash (supra)* the Supreme Court had granted relief to a lady who could not avail of the chances of passing the test during normal probation period and extended

probation period due to suffering from miscarriages. Her request for grant of extra chance had been held to be wrongly rejected by the employer. In the facts and circumstances of the present case, the employee concerned has not suffered any debilitating instance so as to not join at the transferred posting.

24. *Ms. X (supra)* has been rendered in the context of transfer policy adopted by the Madhya Pradesh High Court in respect of judicial officers subordinate to it. It has held that, although, the preamble of the transfer policy stated that such policy was not enforceable, every judicial officer governed by such transfer policy will have a legitimate expectation that such a policy is given due weightage when the case of judicial officer for transfer is being considered. It has explained legal malice or malice in law to be something done without lawful excuse. It has held that, an act done wrongfully and wilfully without a reasonable or probable cause and not necessarily an act done from ill feeling and spite can nonetheless be classified as legal malice or malice in law. In the facts of that case, it has been found that the transfer order governing the judicial officer was covered by malice in law in as much as it had been passed without taking into consideration the

guidelines provided in the transfer policy but on the basis of unverified allegations made in the complaint as against the judicial officer. It has also been observed that, there is a presumption of validity of the State action and the initial burden to prove arbitrariness of State action is on the person who alleges it. However, where the impugned action is not based on any plausible reason or principle and appears to be arbitrary, the onus shifts to the State to justify its action as fair and reasonable.

25. In the facts and circumstances of the present case, authorities had contemplated transferring 6 employees from their present place of posting to the proposed place of posting by a writing relating to the same generated by the Assistant Secretary of the Board on August 17, 2022 making a proposal to such effect. Such writing containing the proposal for transfer had been placed before the President of the Board on August 17, 2022 for his consideration whereupon, the President of the Board had signed the same on such date. Such fact has appeared from the original file produced in Court by the Board. Subsequent to the approval of the President of the Board the impugned order of transfer had been issued. Nothing has been placed before us to suggest

that, Board issued the impugned order of transfer arbitrarily or in violation of the existing transfer policy or that the same was not taken into consideration. As has been noted in **Ms. X** (*supra*) there is a presumption of validity of State action and the initial burden of proof is on the petitioner alleging it. The impugned order of transfer has not been established to be arbitrary or not based on any plausible reason or principle.

26. The appellant had been working at the Kolkata office of the Board since inception. He was about 53 years of age when the impugned order of transfer had been issued. He cannot and should not be allowed to claim that, he has an indefensible right to be posted at the Kolkata office for all times to come during his service tenure. The transfer policy on which the appellant has relied upon does not create any embargo on the administration in transferring a male employee after the age of 52 if the interest of the better administration of the affairs of the Board required such a transfer.

27. Section 28 of the Act of 1963 has noted the powers and duties of the President of the Board. Subsection (3) clause (c) has permitted the President of the Board to take such action which was not inconsistent with any decision of the

Board or the executive committee, as it considers necessary for the proper functioning of the Board or the executive committee under the Act of 1963. The impugned order of transfer cannot be said to be an action taken by the President of the Board inconsistent with the transfer policy dated March 23, 2007.

28. In view of the discussions above, we find no merit in the present appeal.

29. FMA 458 of 2023 along with all connected applications are dismissed without any orders to cost.

[DEBANGSU BASAK, J.]

30. I agree.

[MD. SHABBAR RASHIDI, J.]