

(2008) 12 CAL CK 0019

Calcutta High Court

Case No: W.P.C.T. No. 89 of 2008

Union of India and Others

APPELLANT

Vs

Dr. Somnath Kundu and Another

RESPONDENT

Date of Decision: Dec. 24, 2008

Acts Referred:

- Constitution of India, 1950 - Article 14, 226

Hon'ble Judges: Prasenjit Mandal, J; Kalyan Jyoti Sengupta, J

Bench: Division Bench

Advocate: D.K. Basu, Mr. Jayanta Banerjee and Ms. Soma Roychoudhuri, for the Appellant; Madhumita Roy and Mr. Surojit Samanta, for the Respondent

Final Decision: Dismissed

Judgement

1. The applicant Union of India through General Manager South Eastern Railway and other officials of the Railways have filed above application against the judgment and order of the learned Central Administrative Tribunal (hereinafter in short learned Tribunal) dated 3rd March 2008. The learned Tribunal by its aforesaid judgment has quashed order of transfer of the first Respondent who is a Doctor in Railway hospitals having found the said order of transfer being vitiated with mala fide. The short fact which has been categorically recorded by the learned Tribunal leading to filing of this application is as follows:

At the end of December, 2007 while serving in the post of Deputy CMD in the South Eastern Railway in Calcutta, Respondent No.1 had been served with an order issued under the signature of Mr. A.K. Nandy, Deputy CPO (GAZ) for the Chief Personnel Officer by which he has been sought to be placed in the post of Senior DMO (Casualty), thereby he was shifted from the office of the CMO, South Eastern Railway. Immediately, thereafter, the applicant met the Medical Director Dr. Bikramaditya Swain and requested him to withdraw the said order by reason of the fact that applicant was a very reputed Doctor in the South Eastern Railway at Garden

Reach holding prestigious position and the order of transfer to the post of Senior DMO (Casualty) which is less important than the earlier one and this order is also was causing humiliation to him as a medical professional. However, the MD on such request reacted with hostility and he threatened the applicant with dire consequences. The applicant had no other option but to obey the said order of posting and the applicant was directed to leave Calcutta for Annual Training Camp at Territorial Army Camp at Adra for 3 weeks. After completion of the said training he resumed at Garden Reach in the said post of Senior DMO (Casualty) but on the very next day the applicant was informed that an order of transfer was issued transferring him to Bhaga, Adra Division. By another order being Memo No. G/8/39C/530 dated 25.01.2008 issued under the signature of the Medical Director/GRC the applicant has been spared in the afternoon of 26th January 2008 to report at Adra. Another incumbent, Dr. D. Pal, Senior DMO Bhaga, Adra Division has been directed to move only on being relieved by the applicant after joining Bhaga, South Eastern Railway. Being aggrieved by the said order of transfer he approached the Tribunal contending that the said order of transfer is mala fide and further not for administrative necessity and this was issued only to harass him to accommodate a particular doctor. The allegations of mala fide has been particularised in the application before the Tribunal. The said application was contested by the applicants before us. It appears that allegation of mala fide and arbitrariness are directed against a number of persons so they were made parties in the application. Directions for filing affidavits were given by the learned Tribunal. In spite of direction other officials against whom allegation of mala fide were made, did not come forward to file any affidavit. A statement of reply was filed before the Tribunal on behalf of South Eastern Railways representing Union of India. The said reply countering allegations of the applicant is not in affidavit form but is merely a bare statement, however, verified simply by one A.K. Nandy Deputy Chief Personnel Officer (GAZ) South Eastern Railway on behalf of other respondents. In the said reply allegation contained in the petition has been denied and disputed. We find that another reply appearing to be exhaustive one was filed by the respondent Railway but it is not clear from the records why the same was filed. The learned Tribunal appears to have taken note of the statement and averment made in the first reply. The sum and substance of the allegations made in the application before us, by Railway that the learned Tribunal has unduly interfered with the order of Transfer, being an administrative one. It is said that the learned Tribunal failed to take note of the explanation given for issuing order of transfer. There has been no mala fide and in fact the allegation of mala fide is devoid of particulars moreover the same has not been proved. The learned Tribunal ought not to have accepted the allegations mechanically. On factual score it has been explained as to why transfer of the first respondent was necessary. One of the senior doctors viz. Dr. Pal who was at Bhaga Railway Hospital for long 20 years and making several representations for his shifting from Bhaga to Calcutta. In order to shift him the first respondent has to be chosen, as Doctors who are staying at Garden Reach are in specialised department,

and they cannot be asked to go because there will be serious problem thereat. The department in which first respondent was working at Garden Reach is absolutely general in nature and he has to accommodate a senior person who has been for long 20 years at a particular place. The allegations of mala fide levelled against a number of officials has no nexus and no relation with the order of transfer.

2. Mr. Dipak Kumar Basu, Senior Advocate, Mr. Jayanta Banerjee, Ms. Soma Roychoudhuri, learned advocates highlighting facts mentioned in the application submits that allegations of mala fide have not been proved and the learned Tribunal has proceeded on the basis of inference merely. They submit that allegations of mala fide must be pleaded with particulars and be established with proof. It cannot be a matter of inference, but the learned Tribunal has quashed order of transfer merely on inference. The finding of the learned Tribunal is based on no evidence. If this judgment and order of the learned Tribunal is not set aside by this Court there will be serious administrative chaos as there is no Doctor at Bhaga because Dr. Paul who has been at Bhaga for long 20 years has been shifted. It is further submitted by them that the learned Tribunal has ignored the principle laid down by the Supreme Court which guides the exercise of power of the Tribunal and Court on the order of transfer on the ground of mala fide. They rely on the following decisions of the Supreme Court to support their submission viz. [Mohd. Masood Ahmad Vs. State of U.P. and Others](#), [State of U.P. and Others Vs. Gobardhan Lal, Pearlite Liners Pvt. Ltd. Vs. Manorama Sirsi](#), and 1993 SCC (1) 54. He submits further that the applicant without exhausting departmental remedy rushed the learned Tribunal.

3. Mr. Surojit Samanta learned advocate for the first respondent contends that the learned Tribunal on fact found that it is clear case of mala fide behind the order of transfer. This Court in exercise of power of judicial review should not interfere with fact findings. The persons against whom the allegations of mala fide were made did not come forward to file any affidavit to refute the allegations. The reply before the Tribunal was verified by Deputy Personnel Officer and his denial of allegations made against other official personally is of no value. Therefore the allegation of mala fide against the other person in view of non filing of the reply stands admitted on the principle of non-traversal.

4. He submits further that it is strange that order of transfer has been passed against his client in order to accommodate a particular Doctor bringing him at his choice of place. It is admitted position that there are large number of Doctors who have been at Garden Reach for a longer time. His client, barely two years ago has been brought to Calcutta on transfer. Nothing has been disclosed about any norms or procedure transferring Doctors from one hospital to another. Therefore, taking the matter in totality it is clear that the said order of Transfer was not for administrative necessity.

5. We have gone through the pleadings and the documents annexed therewith and heard the contentions of the learned counsels. Preliminary point raised in this

matter by the applicant, railway authority, is that the first respondent despite having alternative remedy in the department approached the learned Tribunal. We think this point perhaps should have been appropriate at the admission stage of the matter. In our considered view if the Tribunal admits the matter despite existence of alternative remedy it shall be presumed that such an alternative remedy is not efficacious at all. No challenge has been made against the order of admission instead the railway authorities have contested the matter on merit and had taken this point now. We, therefore, think that this point cannot be allowed to be agitated here. Now, the question is whether there exists any mala fide of such a nature which calls for interference by the Court of law or the learned Tribunal. The learned Tribunal has duly taken note of statement of law laid down by the Hon"ble Supreme Court in its various decisions.

6. In the case of [Mohd. Masood Ahmad Vs. State of U.P. and Others](#), the Hon"ble Supreme Court while considering earlier decision of the same Court has reiterated legal principle to guide the law Courts and the Tribunals in the matter of interference of the order of transfer. It is ruled that interference of the Courts with transfer orders should only be in very rare cases. In paragraph 6 while following earlier decision of the Supreme Court in Abani Kanta Ray v. State of Orissa reported in 1996 SCC (L&S) 175 the Apex Court has propounded that transfer which is an incident of service is not to be interfered with by the Courts unless it is shown to be clearly arbitrary or vitiated by mala fides or infraction of any professed norm or principle governing the transfer. While summing up all the cases decided earlier it has been held in paragraph 7 that the order of transfer is a part of the service conditions of an employee which should not be interfered with ordinarily by a Court of law in exercise of its discretionary jurisdiction under Article 226 unless the Court finds that either the order is mala fide or that the service Rules prohibit such transfer, or that the authorities who issued the orders, were not competent to pass the orders.

7. In case of [State of U.P. and Others Vs. Gobardhan Lal](#),) it has been held in paragraph 8 that 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, it is shown to be an outcome of a mala fide exercise of power or is made in violation of any statutory provision. The decision of the Supreme Court in the case of [Pearlite Liners Pvt. Ltd. Vs. Manorama Sirsi](#), is not helpful in this case as the same relates to a civil suit filed by an employee for declaration and permanent injunction against disciplinary action and order of transfer. In the case of [M. Sankaranarayanan, IAS Vs. State of Karnataka and others](#), Apex Court having considered a large number of decisions of the same Court has laid down as proposition of law, when law Court and Tribunal will be receptive to the allegation of mala fide against order of mala fide. A portion of paragraph 12 of the said judgment is of considerable guidance to this Court. The statement of law expressed therein is summarised as under:

It may not always be possible to demonstrate malice in fact with full and elaborate particulars and it may be permissible in appropriate case to draw reasonable inference of mala fide from the facts pleaded and established. But such inference must be based on factual matrix and such factual matrix cannot remain in the realm of insinuation, surmise or conjecture".

8. Thus, on summation of proposition of law laid down by the Apex Court it emerges that ordinarily an employee cannot have any justiciable right to challenge order of transfer. It can only be done in case of a reasonable degree of proof of mala fide and in gross violation of norms and guideline without having any administrative necessity. Order of transfer can also be questioned before law Court or Tribunal in case the same is irrational and an outcome of capriciousness, as in Article 14 of Constitution of India there is no place of irrationality and capriciousness.

9. In this case, the allegations of mala fide have been specifically stated with particulars in sub paragraph (h) of paragraph 3 of the application before the Tribunal. In this sub paragraph it is stated that one Dr. Y. C. Bhusanam, Chief Medical Director, was served with an order of transfer and the same was challenged by him before Central Administrative Tribunal on several grounds including mala fide. As the first respondent is liked and appreciated by Dr. Bhushanam and his order of transfer was stalled by the interference of the Tribunal he has been made a scapegoat and victimised as a measure of reprisal against Dr. Bhusanam. It is also stated specifically that the applicant has been threatened by one Mr. Saibal Bose, Secretary to General Manager that unless and until the applicant withdraws his allegiance to Dr. Bhusanam he would be facing either order of transfer or disciplinary proceedings. The said Mr. Saibal Bose has been made party respondent. He has not come forward to refute the said allegations. The applicant at Garden Reach has been posted less than two years ago. At first he was posted as Deputy CMD, CMO and then in December, 2007 he asked to undergo Annual Training Camp at Adra for three weeks. Immediately after his return impugned order of transfer was passed. It is also admitted position that the order of transfer was passed on 25th January, 2008 with a specific direction that he is deemed to have been spared immediately. By another order of the same date the first respondent is deemed to have been spared in the afternoon of 26th January, 2008 with advice to report to DRM(P), S.E. Railway, Adra for his further posting at Adra. It is not understood as to what was the exigency and administrative necessity to remove him on the same day and to report on the subsequent day at Adra. It is significant that original order of transfer stipulates "Bhaga" being the place of posting, whereas by another order he was to report to DRM(P) for his posting at Adra not Bhaga. It is not explained why such apparently inconsistent orders of postings with extraordinary haste and speed were passed. Taking of those facts and circumstances together the learned Tribunal has found that there exist mala fide. We also think so, as there can not be direct proof of malice in fact in executive action. It would certainly appear from action viz passing of inconsistent order is one of the instances of malicious action. It also

appears Respondent No.1 within Garden Reach he was shifted from one place to another in December, 2007. It is an admitted position also that in order to accommodate one doctor the applicant has been chosen and picked up to give him relief whereas other doctors are not touched although they were remaining at Garden Reach for several years. Some explanations have been given that those doctors are specialised in particular field, hence they could not be asked to move. No published norms or guidelines have been disclosed for transfer policy. In absence of norms and guidelines in the cloak of administrative necessity executive gets unguided and free hand to take action of their own whims and caprice. Learned Tribunal, therefore, while following the Supreme Court decision rendered in case of [E.P. Royappa Vs. State of Tamil Nadu and Another](#), has correctly held that this transfer order is arbitrary action also.

10. We think a set of allegation what has been held to be mala fide by the learned Tribunal can not legitimately be appreciated by us differently as the said set of allegation can not reasonably be absurd. We, therefore, have no reason to interfere with the order of the learned Tribunal, hence the application is dismissed. We clarify that judgment and order of the learned Tribunal will be operative as against order of transfer of the first respondent. No order as to costs.

Prasenjit Mandal, J.

11. I agree.