

HIGH COURT OF MADHYA PRADESH
PRINCIPAL SEAT AT JABALPUR

Writ Petition No.21175/2019
(Sanjay Upadhyay Vs. State of M.P. & Others)

Jabalpur, Dated : 03.12.2019

Shri K.C. Ghildiyal, learned counsel for the petitioner.

Shri Deepak Kumar Singh, Dy. Govt. Advocate for the respondents/State.

Since, the pleadings are complete and the learned counsel for the parties are ready to argue the matter finally as the matter relates to transfer, therefore, it is heard finally.

2. This petition has been filed under Article 226 of the Constitution of India challenging the legality, validity and propriety of the order dated 26.09.2019 (Annexure-P/17) whereby the petitioner has been directed to be transferred from District Raisen to District Sidhi. The order is assailed mainly on the ground that the same is illegal, arbitrary, *mala fide* and issued contrary to the provisions of the transfer policy. It is contended by the learned counsel for the petitioner that the order impugned is also in violation of the law laid down by the Apex Court in the case of (2013) 15 SCC 732 (*T.S.R. Subramanian and Others Vs. Union of India and Others*) and also in AIR 2019 SC 189 (*Dr. Nagorao Shivaji Chavan Vs. Dr. Sunil Purushottam Bhamre and Others*).

3. The basic contention put-forth by the learned counsel for the petitioner is that within a short span of 1½ years, the petitioner is being transferred from District Raisen to District Sidhi. He submits that in the

last three years, the petitioner has suffered almost eight transfer orders and as such, the present impugned order of transfer (Annexure-P/17) passed by the respondent No.1 comes within the definition of frequent transfer which itself is arbitrary on the part of the respondents and, therefore, the said order deserves to be quashed.

4. As per the facts of the case, the petitioner is a member of the State Administrative Services (for brevity, 'SAS') and by order dated 22.12.2017, he was directed to be transferred from District Harda to District Raisen. In pursuance to the said order, the petitioner was relieved on 19.01.2018 from District Harda to join at District Raisen. The petitioner joined at District Raisen on 01.02.2018. Initially, he was assigned the duty of Deputy Collector, District Office Raisen but later on he was posted as Sub-Divisional Officer Gauharganj and order in this regard was issued on 24.02.2018. Thereafter, again within the period of three months, another order was issued on 26.05.2018 and the petitioner was again posted as Deputy Collector in District Office Raisen. He challenged the said order by filing a writ petition before this High Court being W.P. No.12286/2018 wherein the order dated 26.05.2018 was stayed. The interim order granted by this Court on 21.06.2018 was assailed by the State by filing Writ Appeal No.845/2018. The Division Bench, by its order dated 05.07.2018, stayed the operation of the order dated 21.06.2018 passed by the Writ Court and both the writ petition and the writ appeal are pending before this Court till now.

5. The learned counsel for the petitioner has contended that in the year 2016 when the petitioner was directed to be posted at District Harda, his Headquarter was changed thrice within the period of eight

months till 19.12.2017. Then, vide order dated 22.12.2017, the petitioner was transferred from District Harda to District Raisen. He joined at District Raisen on 01.02.2018 as a Deputy Collector and then on 08.02.2018, the petitioner was given the additional charge of Link Officer of Additional Collector and thereafter, only after 22 days, vide order dated 24.02.2018, he was again directed to be transferred as Sub-Divisional Officer to Gauharganj and the order dated 30.01.2018 was modified vide Annexure-P/6. The petitioner, vide order dated 23.02.2019 (Annexure-P/12), was again transferred from District Raisen to Directorate Office as Deputy Director, Panchayat Raj, Bhopal. He challenged the said order by filing a petition before the High Court vide W.P. No.4532/2019 but the said order dated 23.02.2019 was later on cancelled vide order dated 04.03.2019 and therefore, the writ petition filed by the petitioner was withdrawn. Thereafter, on 05.03.2019 (Annexure-P/14), the petitioner was transferred as SDM, District Bareilly which was at a distance of 100 Kms from District Raisen. Then again, only after a short period of five months, the petitioner was transferred vide Annexure-P/15 dated 16.08.2019 and was sent to Silwani. The petitioner submitted his joining at Silwani and was also assigned the additional charge of the post of Sub-Divisional Officer, Begumganj on 20.09.2019. The additional charge of Begumganj was given to the petitioner whereas his original posting was at a distance of 50 Kms. and finally vide order dated 26.09.2019 which is impugned in this petition, the petitioner has been directed to be transferred from District Raisen to District Sidhi.

The learned counsel for the petitioner further submits that as per

the policy of the State Government, the normal tenure of an employee is three years at one place whereas as per the background shown herein above, the petitioner was not allowed to continue at one place for a period of three years and was being frequently transferred. To support his contention, he has relied upon the decisions reported in ***T.S.R. Subramanian*** (*supra*) and ***Dr. Nagorao Shivaji Chavan*** (*supra*).

6. A reply has been filed by the State taking a stand therein that transfer within the District amounts to local shifting and as such, the case of the petitioner does not come within the definition of frequent transfer as his Headquarter has not been changed but within the same Headquarter he was shifted from one office to another and as per the guidelines issued on 19.05.2017, it amounts to local shifting. The respondents have relied upon the decision reported in **(2004) 11 SC 402** (***State of U.P. Vs. Goverdhanlal***) in which the Supreme Court has observed that transfer is an incident of service and an employee cannot claim to be continued in a particular place or position as long as he desires. It is also observed by the Supreme Court that in the said case, the scope of interference in transfer matters by the High Court under Article 226 of the Constitution of India is very limited as the Court or the Tribunal cannot substitute their own decision in the matter of transfer.

7. The petitioner has also filed a rejoinder taking the stand therein that even otherwise, in District Raisen there are only nine officers posted whereas the District has a strength of ten SAS officers and the petitioner can be adjusted in District Raisen itself. It is also submitted by the petitioner in his reply that the respondent No.3 who is being

brought in place of the petitioner belongs to District Raisen as per his service record and Clause-11.14 of the transfer policy very categorically provides that an officer should not be posted at his home District therefore, posting of respondent No.3 in District Raisen is illegal.

8. From the contention made by the learned counsel for the parties and after perusal of the record, it is clear that in the present case, the petitioner has been directed to be shifted from one place to another frequently and his Headquarter has also been changed. Though, there are certain transfers which have been made within the District but that does not mean that every shifting within the District is considered as a local shifting. Since, the Headquarter of the petitioner has been changed within the District therefore, shifting can be considered to be a transfer.

9. It is noteworthy to mention here that transfer has been defined in the rules known as the M.P. Civil Services (Joining Time) Rules, 1982 under Rule 2(b) as :-

“2. Definitions.- In these rules, unless the context otherwise requires :-

(a) xxx xxx xxx

(b) “Transfer” means the movement of a Government servant from one post to another either within the same station or to another station to take up duties of a new post or in consequence of change of his headquarters.”

And as per the definition of transfer provided under the Fundamental Rules 9(17), transfer has been defined as :-

“F.R. 9(17).- Transfer means the movement of a Government servant from one headquarter station in which he is employed to another such station either (a) to take up the duties of a new post, or (b) in consequence of a change of his headquarters.”

Thus, in view of the definition of transfer, it is clear that the stand taken by the respondents in their reply is not correct and is also clear that shifting of a government employee even within the District can be considered to be a transfer.

10. Undisputedly, transfer is an incident of service and interference in transfer matters in a writ petition in normal course is not permissible but it does not mean that if an employee is frequently transferred by the authority and not allowing him to continue or complete his normal tenure at one place, the High Court cannot examine the validity of the order. The scope of interference in transfer matters is very limited for the reason that transfer is considered to be an administrative exercise and is an incident of service therefore, if administrative exigency arises, the employer has every right to transfer the employee but on several occasions, the Supreme Court as well as the High Court has considered this aspect that if an employee is arbitrarily transferred frequently then that conduct of the authorities is considered to be a *mala fide* action on their part and in such a circumstance, the High Court has every right to interfere in the matter.

11. The Supreme Court in the case of ***T.S.R. Subramanian***(*supra*) has observed the importance of allowing an employee to complete his normal tenure of service at one place and has stated as under :-

“**35.** We notice, at present the civil servants are not having stability of tenure, particularly in the State Governments where transfers and postings are made frequently, at the whims and fancies of the executive heard for political and other considerations and not in public interest. The necessity of minimum tenure has been endorsed and implemented by the

Union Government. In fact, we notice, almost 13 States have accepted the necessity of a minimum tenure for civil servants. Fixed minimum tenure would not only enable the civil servants to achieve their professional targets, but also help them to function as effective instruments of public policy. Repeated shuffling/transfer of the officers is deleterious to good governance. Minimum assured service tenure ensures efficient service delivery and also increased efficiency. They can also prioritise various social and economic measures intended to implement for the poor and marginalised sections of the Society.”

12. Further, in the case of ***Dr. Nagorao Shivaji Chavan*** (*supra*), the Supreme Court has observed as under :-

“5.It is an accepted principle that in public service transfer is an incident of service. It is also an implied condition of service and appointing authority has a wide discretion in the matter. The Government is the best judge to decide how to distribute and utilise the services of its employees. However, this power must be exercised honestly, bona fide and reasonably. It should be exercised in public interest. If the exercise of power is based on extraneous considerations or for achieving an alien purpose or an oblique motive it would amount to mala fide and colourable exercise of power. Frequent transfers, without sufficient reasons to justify such; transfers, cannot, but be held as mala fide. A transfer is mala fide when it is made not for professed purpose, such as in normal course or in public or administrative interest or in the exigencies of service but for other purpose, than is to accommodate another person for undisclosed reasons. It is the basic principle of rule of law and good administration, that even administrative actions should be just and fair.

The observation that transfer is also an implied condition of service is just an observation in passing. It certainly cannot be relied upon in support of the contention that an order of transfer ipso facto varies to the disadvantage of a Government service, any of

his conditions of service making the impugned order appealable under Rule 19(1)(a) of the Rules.

6. One cannot but deprecate that frequent, unscheduled and unreasonable transfers can uproot a family, cause irreparable harm to a Government servant and drive him to desperation. It disrupts the education of his children and leads to numerous other complications and problems and results in hardship and demoralisation. It therefore follows that the policy of transfer should be reasonable and fair and should apply to everybody equally. But, at the same time, it cannot be forgotten that so far as superior or more responsible posts are concerned, continued posting at one station or in one department of the Government is not conducive to good administration. It creates vested interest and therefore we find that even from the British times the general policy has been to restrict the period of posting for a definite period. We wish to add that the position of Class III and Class IV employees stand on a different footing. We trust that the Government will keep these considerations in view while making an order of transfer.”

13. The basic object for confining the limited jurisdiction of High Court for not interfering in the matter of transfer is that the employer is the best judge to know as to how and where the services of its employee can be utilized and under the administrative exigency the employee can be transferred by the employer. However, when action of the employer is questioned in the Court alleging arbitrariness and *mala fide*, the Court can atleast examine the fact whether any administrative exigency actually exists and transfer of the employee is being done frequently due to such administrative exigency. The High Court in one of the cases has considered this aspect and observed that the word ‘Administrative Exigency’ cannot be used by the employer for its convenience but it is shown to be existed. The Court has also considered that if an employee

is transferred within a normal tenure and further he has been frequently transferred then the State has to explain the administrative exigency otherwise it can be presumed that the transfer is being made without any rhyme or reason. The observation made by the High Court is as follows :-

“14. That, it is apparent from the impugned order dated 05.07.2019 that the petitioner has been transferred within less than 2 years of his posting at Indore against the guidelines of the transfer policy which amounts to frequent transfer as it is without any rhyme or reason and inspite of direction by this Hon’ble Court to seek instructions, the State Govt. has not been able to establish the alleged administrative exigency. The practice of abrupt and frequent transfer by abuse of power by State Govt. has been depreciated by the Hon’ble Supreme Court in the matter of **B. Varadha Rao V. State of Karnataka** reported in **(1986) 4 SCC 131** wherein the Hon’ble Court has held that an employer can transfer the employees to meet bonafide exigency of administration but if the transfers are done frequently without any cogent reason of administrative exigency then such transfers are liable to be struck down.

15. Again in the matter of **Somesh Tiwari V. Union of India** reported in **(2009) 2 SCC 592** the Hon’ble Supreme Court has held that though transfer is an incident of service and cannot be interfered with often but if the order of transfer is based on irrelevant ground or without any rhyme and reason it becomes malafde and constitutes ‘*malice in law*’. Relevant extract of the aforesaid judgment is reproduced herein for ready reference.

16. Indisputably an order of transfer is an administrative order. There cannot be any doubt whatsoever that transfer, which is ordinarily an incident of service should not be interfered with, save in cases where inter alia mala fide on the part of the authority is proved. Mala fide is of two kinds—one malice in fact and the second malice in law. The order in question would attract the principle of malice in law as it was not based on any factor germane for passing an order of transfer and based on an

irrelevant ground i.e. on the allegations made against the appellant in the anonymous complaint. It is one thing to say that the employer is entitled to pass an order of transfer in administrative exigencies but it is another thing to say that the order of transfer is passed by way of or in lieu of punishment. When an order of transfer is passed in lieu of punishment, the same is liable to be set aside being wholly illegal.

16. Following the aforesaid judgment of Somesh Tiwari (Supra) this Hon'ble court in the matter of **Swati Singh V.M.P.K.V.V. Co. Ltd.** reported in **2014 (1) M.P.L.J. 308** has held that malice in law means something which is done without lawful excuse. In the present case also the impugned transfer order is made on the ground of alleged administrative exigency, but the respondent State has miserably failed to establish alleged administrative exigency which constitutes malice in law and makes the impugned order **Annexure P/4** bad in law. Relevant extract of the judgment of **Swati Singh (Supra)** is reproduced herein for ready reference:-

22. In the opinion of this court, there is a difference between malice in fact and malice in law. Malice in fact means express or actual malice, ill-will towards a particular person; an actual intention to injure. It implies desire or intent to injure while malice in law or implied malice means wrongful act done intentionally without just cause or excuse (See: Black's Law Dictionary-Sixth Deluxe Edn.). Malice in fact or actual malice relates to the actual state or condition of mind of the person who did the act. Malice in fact is where the malice is not established by legal presumption or proof of certain facts, but is to be found from the evidence in the case [See (2003) 8 SCC 567 (*Chairman and MD, BPL Ltd. v. S.P. Gururaja*)]. Malice in its legal sense means malice such as may be assumed for a wrongful act done intentionally, but without just cause or excuse or one of reasonable or probable cause. The term "malice in fact" would come within the purview of the said definition. [see AIR 2006 SC 2912 (*R.S. Garg v. State of U.P.*) and AIR 1991 SC 1260 (*State of Bihar v. P.P. Sharma*).

23. This is settled in law that exercise of power for an extraneous or ulterior purpose

amount to “malice in law”. These are cases where, though the authority has no corrupt motive or personal malice against the party affected, yet the law will impute a fraud on the statute, if he has exercised the power for a purpose other than that for which the enabling provision conferred the power or discretion. Legal malice or malice in law means something done without lawful excuse. In other words, it is an act done wrongfully and willfully without reasonable or probable cause, and not necessarily an act done from ill-feeling and spite. It is a deliberate act in disregard of the rights of the other (See: *State of A.P. v. Goverdhanlal Pitti* (2003) 4 SCC 739). Where government action is unreasonable or lacking in quality of public interest, though different from that of *mala fides*, it may in a given case furnish evidence of *mala fides* (See: *Kasturi Lal v. State of J & K* (1980) 4 SCC 211). Even if an order is found to be not vitiated by malice in fact, but still can be held to be invalid, if the same is passed for unauthorized purpose as it would amount to malafide in law [see: (2005) 6 SCC 776 (*Punjab State Electricity Board v. Zora Singh*)]. Interference of *mala fides* can be drawn by reading in between the lines and taking into consideration the attendant circumstances [see (1994) 6 SCC 98 (*N.K. Singh v. Union of India*)]. In (2009) 2 SCC 592 (*Somesh Tiwari v. Union of India*) it is opined that transfer order will be bad in law, if it is issued not based on any factors germane to the passing of an order of transfer and based on irrelevant grounds.

24. At the cost of repetition, in my opinion the transfer order can be passed only in administrative exigency and in public interest. On the basis of aforesaid judgments, it is clear that transfer order can be passed only on the said relevant consideration and purpose. The appreciation letter Annexure P/17 leaves no room for any doubt that the petitioner's continuance at Gwalior was neither against administrative exigency nor public interest. The word “administrative Exigency” and “public interest” are not magic words nor these are ‘mantras’ which can serve the purpose in any circumstances. These words have definite meaning and in a given case the employer must show the

reason for transferring the employee. Reasons must be deservable. Putting it differently, the said words are not like a carpet under which anything can be swept. On the basis of pleadings, material and antecedents facts of this case, in the opinion of this Court, transfer order is passed for extraneous and irrelevant considerations other than the reasons for which valid transfer order can be passed. Such exercise of power amounts to colourable exercise of powers. In (1991) 1 SCC 212 (*Kumari Shrilekha Vidyarthi v. State of U.P.*) the Apex Court opined that it is in consonance with the Court's commitment to openness which implies scrutiny of every State action to provide an effective check against the arbitrariness and abuse of power. The Court would much rather be wrong in saying so rather than be wrong in not saying so. Non-arbitrariness, being a necessary concomitant of the rule of law, it is imperative that all actions of every public functionary, in whatever sphere, must be guided by reason for not humour, whim, caprice or personal predilections of the persons entrusted with the task on behalf of the State and exercise of all power must be for public good instead of being an abuse of the power.

17. That, another submission made by the respondents is that though the transfer policy contemplates that ordinarily transfer of employees should not be done before expiry of 3 years but since the transfer policy not having statutory flavor it is not binding. This contention of the Respondents lacks weightage as it is settled position of law that a field which is not occupied by statutory rules can be governed by executive instructions. Meaning thereby the State Government can fill up gaps and cover areas which otherwise have not been covered by statutory provisions. The aforesaid principle has been laid down in the matter of **Union of India V. Central Electrical and Mechanical Engineering Services (CE & MES) Group A (Direct Recruits) Assn. and Others** reported in (2008) 1 SCC 354 in Para 10 as under:-

10. It is now a well-settled principle of law that an executive order must be passed in conformity with the rules. Power of the State Government to issue

executive instructions is confined to filling up of the gaps or covering the area which otherwise has not been covered by the existing rules. See *Sant Ram Sharma v. State of Rajasthan* [AIR 1967 SC 1910] and *DDA v. Joginder S. Monga* [(2004) 2 SCC 297]. Such office orders must be subservient to the statutory rules.

18. Similar question came up for consideration before the Hon'ble Apex Court in the matter of **State of M.P. V. S.K. Dubey** reported in **(2012) 4 SCC 578**, wherein the Hon'ble Supreme Court has specifically held that executive powers of state extends to matters with respect to which the legislature of the State has power to make laws. Article 162 of the Constitution gives State Executive coextensive powers with that of the State Legislature and therefore, the transfer policy framed by the State Govt. cannot simply be washed away treating it to be not binding on the State Govt. Relevant extract of the aforesaid judgment is reproduced herein for ready reference:-

30. The moot question that falls for determination in this appeal is: whether in the absence of any express rule in the State Rules, was it open to the State Government of Madhya Pradesh to have provided by way of an executive Order dated 5-4-2002 that the service rendered by the respondent as President of the State Commission would be counted as pensionable service? The incidental question is: whether such order is inconsistent with Section 16(2) or the State Rules?

31. Subject to the provisions of the Constitution, the executive power of a State extends to the matters with respect to which the legislature of the State has power to make laws. This is what is provided in Article 162 of the Constitution. In other words, the executive power of the State executive is coextensive with that of the State Legislature.

32. In *Sant Ram Sharma* [AIR 1967 SC 1910] this Court negated the arguments advanced on behalf of the appellant therein that in the absence of any statutory rules governing promotions to selection grade posts the Government cannot issue administrative instructions and such administrative instructions cannot impose any restrictions not

found in the rules already framed. The Court stated: (AIR p. 1914, para 7)

“7. ... It is true that the Government cannot amend or supersede statutory rules by administrative instructions, but if the rules are silent on any particular point the Government can fill up the gaps and supplement the rules and issue instructions not inconsistent with the rules already framed.”

The above legal position has been followed and reiterated by this Court time and again.

33. The Constitution Bench of this Court in *Lalit Mohan Deb* [(1973) 3 SCC 862 : 1973 SCC (L&S) 272] said: (SCC p. 867, para 9)

“9. It is true that there are no statutory rules regulating the selection of assistants to the selection grade. But the absence of such rules is no bar to the administration giving instructions regarding promotion to the higher grade as long as such instructions are not inconsistent with any rule on the subject.”

In *Union of India v. Central Electrical & Mechanical Engg. Service (CE&MES) Group ‘A’ (Direct Recruits) Assn., CPWD* [(2008) 1 SCC 354 : (2008) 1 SCC (L&S) 173], this Court held that the executive instructions could fill in gaps not covered by the rules but such instructions cannot be in derogation of the statutory rules.

19. The aforesaid proposition of law again came up for consideration before the Hon’ble Supreme Court recently and in the matter of **State of Karnataka V. Krishna Kumar and Others** reported in AIR 2019 SC 3133 the Hon’ble Supreme Court has held that in the absence of statutory provisions the executive functions would have force of law. Relevant extract of the aforesaid judgement is reproduced herein for ready reference:-

9. Even assuming that the provisions of the Act of 2007 and rules thereunder are applicable, since there is no provision to the contrary therein, the provision in question providing for mutual transfer could have been carved out by issuing executive instructions contained in Memo dated 7.4.2010. No such provision in the Act and rules has been pointed out with respect to mutual transfers. Particularly when the provisions of ‘mutual transfer’ which is made in Office Memorandum of 2010, depends on the volition of an employee, there is no compulsion, it cannot be

said to be arbitrary. It is ordered only when two incumbents opt for mutual transfer. Thus, Office Memorandum dated 07.04.2010 could not be said to be in violation of the provisions of the Act of 2007 and rules. The Tribunal and the High Court both have misdirected themselves in this regard.

10. In our considered opinion, the provisions of mutual transfer does not militate against the provisions of the Act and rules framed thereunder and particularly, when it was with respect to SSA Scheme, it was open to making certain provisions by way of Office Memorandum dated 07.04.2010. Mere reference to the Act and the rules framed in the same does not mean that the provisions have been adopted for all the purposes. In the same Memo the provisions have been carved out for mutual transfer. In the absence of statutory provision, the executive instructions would have force of law, more so when the SSA is an independent scheme. The SSA Scheme is funded by the Central Government and considering its exigency, independent provisions could have been carved out which is not to be found in the Act of 2007 and the rules framed thereunder.”

14. In view of the above, it is clear from the facts of the case in hand that the petitioner has been frequently transferred without assigning any reason as to what administrative exigency existed. The respondents, in their reply, have also not explained that frequent transfer of the petitioner and not allowing him to be continued at one station for a normal tenure is because of administrative exigency. In absence of any such explanation, that too, when the orders have been assailed by the petitioner alleging arbitrariness and *mala fide* on the part of the respondent authorities, the duty lies upon the employer to explain the administrative exigency under which the petitioner is being frequently transferred. As such, in absence of such an explanation, the Court should have no hesitation to form an opinion that the petitioner is being arbitrarily transferred frequently and such an action of the employer has to be deprecated.

15. Accordingly, I am of the opinion that the order impugned is a clear sign of arbitrariness and it comes within the meaning of frequent transfer and as such, the same is not sustainable and deserves to be set aside. The respondents have also not clarified that when there are ten vacancies of SAS officers in the District Raisen then in such a situation, the petitioner can also be accommodated along with the respondent No.3.

16. Accordingly, the order impugned dated 26.09.2019 (Annexure-P/17) is hereby set aside and the petition is accordingly **allowed** in the above terms.

(SANJAY DWIVEDI)
JUDGE