

Bombay High Court

Soudamini S. Chaudhari vs The State Of Maharashtra And 3 Ors on 16 December, 2020

Bench: G. S. Kulkarni

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WP-2585.2019

IN THE HIGH COURT OF JUDICATURE AT BOMBAY
ORDINARY ORIGINAL CIVIL JURISDICTION
WRIT PETITION NO.2585 OF 2019

Dr. Soudamini S. Chaudhari .. Petitioner
Versus
The State of Maharashtra & Ors. .. Respondents
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Mr. Anil Anturkar, Senior Advocate i/b Mr.Amol A. Gatne, Advocate for the Petitioner.

Ms. Jyoti Chavan, AGP for the Respondent Nos.1 to 3.

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CORAM : DIPANKAR DATTA, CJ &
G.S. KULKARNI, J
RESERVED ON : DECEMBER 9, 2020
PRONOUNCED ON : DECEMBER 16, 2020

JUDGMENT: (PER DIPANKAR DATTA, CJ)

1. The Maharashtra Administrative Tribunal, Mumbai (hereafter "the Tribunal", for short) by its judgment and order dated January 4, 2019 spurned the petitioner's challenge to an order of transfer. Aggrieved thereby, she has mounted a challenge to the same by presenting this writ petition.

2. The petitioner, at the relevant time, was holding the office of Professor and Head of the Department, Obstetrics and sng WP-2585.2019 Gynaecology at R.A. Podar Ayurved Medical College, Mumbai (hereafter "Podar Medical College", for short). By the impugned order of transfer dated June 21, 2018, she was transferred and posted as Professor, Government Ayurved College, Nanded (hereafter "the Govt. College", for short) to relieve Dr. Surekha J. Devaikaar, who was sought to be posted at Podar Medical College on transfer from the Govt. College.

3. The order was assailed on two-fold grounds. First, it was issued not in administrative interest but to accommodate Dr. Surekha J. Devaikaar at Podar Medical College, and secondly, it was as a measure of penalty. In support of the second ground, the petitioner alleged that a complaint was received by the Dean of Podar Medical College against her and without conducting any enquiry into the veracity of the allegations levelled therein, she was transferred to the Govt. College. According to her, the impugned transfer order was contrary to the provisions of the Maharashtra Government Servants Regulation of Transfers and Prevention of Delay in Discharge of Official Duties Act, 2005 (hereafter "the Transfer Act", for short) and, therefore, liable to be set aside.

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4. Both the grounds of challenge did not impress the Tribunal, which proceeded to reject the original application by a detailed judgment and order.

5. Appearing in support of the writ petition, Mr. Anturkar, learned senior counsel did not press the first ground of challenge to the impugned order of transfer raised before the Tribunal, i.e., it was issued to accommodate Dr. Surekha J. Devaikaar. However, he urged that power under the Transfer Act has been exercised illegally. There are previous reports of the Dean of Podar Medical College appreciating the work of the petitioner, yet, on the pretext that a complaint had been received evincing that the petitioner's relation with the nursing staff and other employees was far from cordial, a move was initiated to transfer the petitioner prior to expiry of her normal tenure at Podar Medical College culminating in her unceremonious exit from the office which she had been holding in Mumbai. Referring to the impugned judgment and order, he contended that the Tribunal failed to apply its mind and erroneously applied the law laid down in the decision of the Supreme Court in *Union of India and others vs. Janardhan Debanath and another*, reported in sng WP-2585.2019 (2004) 4 SCC 245, to negate the petitioner's claim. According to him, the Supreme Court in paragraph 14 of the said decision had highlighted the need of a prima facie satisfaction being recorded on the contemporary reports about the occurrence complained of necessitating the transfer which, regrettably, was missing in the present case and which, the Tribunal failed to notice; therefore, the Tribunal itself fell in error in not ascertaining whether there has been compliance with the law laid down by the Supreme Court and reliance on the said decision being inapt, its judgment and order is liable to interdiction by this Court in exercise of its judicial review powers.

6. Per contra, Ms. Chavan, learned AGP for the respondents 1 to 3 contended that there has been bona fide exercise of power under the Transfer Act and the petitioner not having challenged the order of transfer either on the ground that it has been issued in derogation of any statutory provision or that it is actuated by mala fide, the same does not merit interference; hence, the writ petition ought to be dismissed.

7. We have heard the parties, perused the materials on record in the light of the decision in *Janardhan Debanath* (supra) sng WP-2585.2019 and read the impugned judgment and order. Let us find out whether there is reason for us to interdict.

8. The Tribunal noted in paragraph 20 of its judgment the sequence of events starting from the report of the Dean dated May 24, 2018. Looking at the report, which was addressed to the Director, Directorate of Ayush, it appears to us that the Dean had expressed serious concern with regard to the petitioner's way of functioning as the Professor and Head of the Department and the bitter relations that the nursing staff and other employees had with her, which was ultimately adversely affecting the patients lodged for treatment. It was, accordingly, requested that considering the contents of such report the petitioner be transferred immediately. A copy of such report was forwarded to the Hon'ble Minister, Medical Education and Drugs Department, Mantralaya, Mumbai. Upon receipt of the aforesaid report, the Director, Ayush submitted a proposal before the Civil Service Board (hereafter "the Board", for short). The Board in its meeting held on May 28, 2018 recommended, inter alia, the transfer of the petitioner to the Govt. College. Such recommendation was approved by the Hon'ble Minister of the relevant department and sng WP-2585.2019 finally by the Hon'ble Chief Minister, being the higher competent authority, in terms of the provisions of sub-sections (4) and (5) of section 4 of the Transfer Act. This resulted in issuance of the transfer order dated June 21, 2018 whereby the petitioner was transferred. In the remarks column we find a recording that the Dean had recommended the petitioner's transfer on receipt of complaint against her; hence, transfer was proposed for administrative reasons. By the self-same order, Dr. Surekha J. Devaikaar was transferred to Podar Medical College. Insofar as she is concerned, it was recorded in the remarks column that her transfer was on her request.

9. The plea raised in the original application by the petitioner that accommodation sought to be given to Dr. Surekha J. Devaikaar at Podar Medical College was one of the reasons for her unscheduled and premature transfer not having been pressed before us, the point available to be reagitated before us that the petitioner was made the victim of mala fide acts does not surface for decision. What remains is the other point of the transfer being ordered as and by way of a measure of penalty.

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10. Before proceeding further, we may note the relevant decisions of the Supreme Court on challenges to transfer orders on the common ground that they are punitive in nature. We would first take note of the decisions that the Tribunal considered and then those that were not considered but having a bearing on the question which we are tasked to decide.

11. In Janardhan Debanath (supra), the respondents' challenge to the transfer order rested on four grounds, one of which was that the same was passed as a measure of penalty. The appellants contended that the transfer was ordered in public interest and on account of exigencies of administration. They referred to an incident of misbehaviour involving the respondents with a superior officer, who happened to be a lady, and it was argued that the respondents' conduct being certainly unbecoming of a Government employee, they were transferred to enforce discipline and to avoid recurrence of such unfortunate incident. Although the respondents succeeded before the High Court, the Supreme Court upset the judgment and order under challenge and upheld the order of transfer. One of the provisions of the Fundamental Rules formed the foundation of the claim of sng WP-2585.2019 the respondents, i.e., FR 15. The Supreme Court after taking note of what FR 15

provides, held that the High Court completely misconstrued FR 15 as if there cannot be any transfer in terms thereof on account of inefficiency or misbehaviour and the view expressed was clearly contrary to the pronounced intention of FR

15. Next, the Supreme Court considered whether the use of the expression "undesirable" in the transfer order warranted an enquiry before the transfer. The point was dealt with in paragraph 12 of the decision and we prefer to reproduce the same hereunder:

"12. That brings us to the other question as to whether the use of the expression 'undesirable' warranted an enquiry before the transfer. Strong reliance was placed by learned counsel for the respondents on a decision of this Court in Jagdish Mitter v. Union of India (AIR 1964 SC 449 at p. 456, para 21) to contend that whenever there is a use of the word 'undesirable' it casts a stigma and it cannot be done without holding a regular enquiry. The submission is clearly without substance. The said case relates to use of the expression 'undesirable' in an order affecting the continuance in service by way of discharge. The decision has therefore no application to the facts of the present case. The manner, nature and extent of exercise to be undertaken by courts/tribunals in a case to adjudge whether it casts a stigma or constitutes one by way of punishment would also very much depend upon the consequences flowing from the order and as to whether it adversely affected any service conditions -- status, service sng WP-2585.2019 prospects financially -- and the same yardstick, norms or standards cannot be applied to all categories of cases. Transfers unless they involve any such adverse impact or visit the persons concerned with any penal consequences, are not required to be subjected to same type of scrutiny, approach and assessment as in the case of dismissal, discharge, reversion or termination and utmost latitude should be left with the department concerned to enforce discipline, decency and decorum in public service which are indisputably essential to maintain quality of public service and meet untoward administrative exigencies to ensure smooth functioning of the administration."

After such observations, the Court also proceeded to hold as follows:

"14. The allegations made against the respondents are of serious nature, and the conduct attributed is certainly unbecoming. Whether there was any misbehaviour is a question which can be gone into in a departmental proceeding. For the purposes of effecting a transfer, the question of holding an enquiry to find out whether there was misbehaviour or conduct unbecoming of an employee is unnecessary and what is needed is the prima facie satisfaction of the authority concerned on the contemporary reports about the occurrence complained of and if the requirement, as submitted by learned counsel for the respondents, of holding an elaborate enquiry is to be insisted upon the very purpose of transferring an employee in public interest or exigencies of administration to enforce decorum and ensure probity would get frustrated. The question whether the respondents could be transferred to a different division is a matter for the employer to consider depending upon the administrative necessities

and the extent of solution for the problems faced by the administration. It is not for this Court to direct one way or the other.

sng WP-2585.2019 The judgment of the High Court is clearly indefensible and is set aside. The writ petitions filed before the High Court deserve to be dismissed which we direct. The appeals are allowed with no order as to costs."

12. Next in line is the decision in *Somesh Tiwari vs. Union of India*, reported in (2009) 2 SCC 592. The appellant, an officer of the Indian Revenue Service, at the relevant time was posted at Bhopal. Based on an anonymous complaint, he was transferred to Shillong. An enquiry conducted by the respondents revealed that the allegations levelled in the anonymous complaint were not true. The appellant did not join at Shillong. His representation for being retained in Bhopal for one more year on compassionate and humanitarian grounds was not favourably considered resulting in institution of proceedings before the Central Administrative Tribunal, Jabalpur bench (hereafter "the CAT", for short). The CAT disposed of the original application with a direction to the respondents to consider the representation. The same came to be rejected. Once again, the appellant approached the CAT. During pendency of the challenge to such order of rejection before the CAT, the appellant was promoted, and transferred from Shillong to Ahmedabad. The original application was disposed of by the CAT without sng WP-2585.2019 interfering with the order under challenge noting that the appellant had not reported at Ahmedabad and observing the transfer order to have been passed in administrative interest. A writ petition that followed resulted in an interim order restraining the respondents from initiating disciplinary action against the appellants. The writ petition was finally disposed of by the High Court by quashing the order of transfer to Shillong on the ground that an anonymous complaint could not have been acted upon. However, having noted that the appellant had not joined at Ahmedabad, the Court directed that the appellant would not be entitled to salary for the period commencing fifteen days after the modified order of transfer to Ahmedabad till the date he again joins duties at Bhopal. The correctness of this direction fell for consideration before the Supreme Court. The appeal was disposed of with direction to treat the period of absence of the appellant as leave in terms of the relevant rules. While the facts in the civil appeal are entirely different from the facts obtaining before us, certain observations in paragraph 16 call for being noticed:

"16. Indisputably an order of transfer is an administrative order. There cannot be any doubt whatsoever that transfer, which is ordinarily an sng WP-2585.2019 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."

13. There are two other decisions which were not placed before the Tribunal and hence it did not have the occasion to consider. They are State of Uttar Pradesh vs. Siya Ram, reported in (2004) 7 SCC 405, and the High Court of Judicature at Madras vs. R. Perachi, reported in (2011) 12 SCC 137.

14. In Siya Ram (supra), the High Court upheld the contention that the impugned transfer order, though purported to be on administrative grounds, was in fact in the nature of a punitive transfer which was issued without waiting for disciplinary proceedings that had been initiated against the employee. The Supreme Court set aside the order under challenge and held:

sng WP-2585.2019 "5. The High Court while exercising jurisdiction under Articles 226 and 227 of the Constitution of India had gone into the question as to whether the transfer was in the interest of public service. That would essentially require factual adjudication and invariably depend upon peculiar facts and circumstances of the case concerned. No government servant or employee of a public undertaking has any legal right to be posted forever at any one particular place or place of his choice since transfer of a particular employee appointed to the class or category of transferable posts from one place to other is not only an incident, but a condition of service, necessary too in public interest and efficiency in the public administration. Unless an order of transfer is shown to be an outcome of mala fide exercise or stated to be in violation of statutory provisions prohibiting any such transfer, the courts or the tribunals normally cannot interfere with such orders as a matter of routine, as though they were appellate authorities substituting their own decision for that of the employer/management, as against such orders passed in the interest of administrative exigencies of the service concerned. This position was highlighted by this Court in National Hydroelectric Power Corpn. Ltd. v. Shri Bhagwan [(2001) 8 SCC 174]."

15. In R. Perachi (supra), an order of transfer was challenged on the ground that it would affect the promotional prospects of the employee. While reversing the judgment and order of the High Court, the Supreme Court held in the facts of that case that the pay, position and seniority of the first respondent was not affected by the impugned transfer, and therefore, the same could not be said to be punitive merely sng WP-2585.2019 because his promotional chances got affected due to the transfer. Hence, there was no question of providing him any opportunity of hearing at that stage before effecting the transfer, and the order of transfer could not be faulted on that count as well.

16. Our understanding of the principles of law laid down in the aforesaid decisions is this. A Government servant, holding a transferable service, can be transferred from one post to another having regard to administrative policy or practice or because of administrative reasons. However, an order of transfer could be labelled as mala fide if it is used as a cloak for punishment. Unless a case of mala fide is pleaded and proved, it may not be appropriate for the Court to review the expediency and propriety of an administrative order to transfer a Government servant from one post to the other. Whenever a transfer order is proved to have been passed mala fide or when such an order has penal consequences, the Court ought not hesitate to strike down the transfer order. But when reasons for transfer are administrative in nature and the appropriate authority acts bona fide, the Court has to stay at a distance and not interfere with such administrative order for transfer.

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17. While we shall bear in mind the aforesaid dicta, the transfer of Government servants in Maharashtra being guided by statutory provisions, a proper decision on the controversy raised before us has to be given looking at the same.

18. In terms of section 2(i) of the Transfer Act, 'transfer' means posting of a Government servant from one post, office or department to another post, office or department. A look at section 4 thereof, which has "Tenure of transfer" as the marginal note, is necessary because such provision appears to be the very heart of the enactment. Sub-section (1) ordains that no Government servant shall ordinarily be transferred before completion of his tenure of posting as provided in section 3, i.e., 3 (three) years. The procedure for preparation of 'transfer list' is envisaged in sub-sections (2) to (4). Sub-section (4) sets out that ordinarily, transfers be made only once in a year in the month of April or May. Clause (ii) of the proviso to sub-section (4) lays down that a transfer may be made any time in the year where the competent authority is satisfied that the transfer is essential due to exceptional circumstances or special reasons which ought to be recorded, and must have the prior approval of the next higher sng WP-2585.2019 authority. Sub-section (5), which is a non-obstante clause, empowers the competent authority, in special cases, to record reasons in writing and with the prior approval of the immediately superior Transferring Authority mentioned in the table of section 6, to transfer a Government servant before completion of his tenure of post as provided in section 3.

19. Transfer being an incidence of service and the petitioner being the holder of a transferable post could complain against the transfer order, if the same were ordered in violation of any of the provisions of the Transfer Act. Her claim that she has been punished on the basis of unsubstantiated allegations contained in a complaint has to be judged in the light of the provisions referred to above.

20. That the complaint received by the Dean from the staff of Podar Medical College and forwarded to the Director, Ayush formed the plinth of the petitioner's transfer, is the admitted position. There is nothing oblique on that count as such to cast a doubt. Question is, whether by reason of the order of transfer the petitioner has been punished, or in other words, whether the weapon of transfer has been used against her as a punitive sng WP-2585.2019 measure, or whether it is in public interest that it was considered necessary to transfer and post her at the Govt. College. Having regard to the law laid down in Janardhan Debanath (supra), to amount to a punishment it is incumbent for the petitioner to show that the order of transfer has entailed penal consequences for her. There is no allegation from the side of the petitioner that by reason of the impugned transfer order, she has been asked to discharge duty on a post lower than that she held at Podar Medical College, or that there has been downgrading of her pay, or that her promotional prospects are jeopardised or that the order is stigmatic in the sense that she would have to carry an indelible stain for the rest of her service career without there being any finding of guilt recorded against her. On the contrary, the complaint together with the report of the Dean acted as a catalyst to meet two ends, i.e., avoid further conflict between the petitioner and the staff and to secure the interests of the patients, which was taking a beating because of such conflict. The petitioner's presence at Podar Medical College was not found desirable, on facts and in the circumstances, which resulted in the respondents deciding to post her at the Govt. College but keeping her entitlements intact.

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21. The submission of Mr. Anturkar with reference to a single sentence in paragraph 14 of the decision in Janardhan Debanath (*supra*) that no *prima facie* conclusion has been recorded, has not impressed us for the simple reason that the entire matter was considered by the Dean and then by the Board, followed by the Hon'ble Minister and the Hon'ble Chief Minister in that order, and an order has been passed to sub-serve public interest. As noticed before, the impugned transfer order was preceded by consideration of the report of the Dean. The *prima facie* satisfaction has to be inferred from such report as well as the remarks in the impugned order of transfer. Moreover, the petitioner had completed two years when the impugned transfer order was issued. The terms of the Transfer Act are such that no Government servant can claim that he has a right not to be dislodged before 3 (three) years. In the exigency of administration, an order could indeed be passed transferring a Government servant even prior to completion of the tenure of 3 (three) years, which is the normal tenure. We see no reason to fault the respondents 1 to 3 in not being inclined to have an enquiry conducted or to act on any adverse findings arrived at behind the petitioner's back but to order her transfer in sng WP-2585.2019 administrative interest for ensuring unhindered and smooth working conditions at Podar Medical College noting the situation prevailing at Podar Medical College. For the machinery of the Government to work, there cannot be any doubt that some free play in the joints has to be conceded to the administrative body in the administrative sphere.

22. Of course, we are not unmindful that a case could arise where a person in public employment often creates situations (without violating his service terms and conditions) which are not too comfortable or palatable for the employer and perceiving the employee's further presence undesirable at the particular place and to deter him from creating similar such situations in future, the employer under the veil of a seemingly innocuous order of transfer, which does not affect duty, responsibility, pay and promotional prospects and issued purportedly in administrative interest transfers the employee to get rid of him as a punitive measure. Indeed, a purpose of the nature referred to above could be achieved by the employer without passing a stigmatic order. However, despite not having suffered any penal consequences, the employee could feel sng WP-2585.2019 aggrieved even by such order of transfer claiming that he has been punished for no fault on his part and may argue that the impugned order should be interdicted bearing in mind the law laid down in Somesh Tiwari (*supra*). Such cases, as and when they are brought before the Court, have to be dealt with in a manner known to law. Although the Courts are loath to interfere in matters relating to transfer issued in administrative exigencies, nothing prevents a Court, if it is *prima facie* satisfied with the case of the aggrieved employee, to lift the veil and ascertain whether any *mala fide* motive has triggered the transfer and/or the employee has been dealt with in any manner violative of his rights in the matter of public employment.

23. Such argument, however, may not be available in a case of the present nature where there are statutory provisions regulating transfer and the employer is authorised to order a 'transfer', as defined in section 2(i), in the manner prescribed. We have not found any infirmity in the decision-making process leading to the impugned transfer, so as to warrant interference.

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24. For the reasons aforesaid, we find no merit in this writ petition. The same stands dismissed. However, the parties shall bear their own costs.

25. This order will be digitally signed by the Private Secretary/Personal Assistant of this Court. All concerned will act on production by fax or e-mail of a digitally signed copy of this order.

Jayant V.

Salunke Digitally signed by Jayant V. Salunke Date: 2020.12.16 10:37:43 +0530 (G. S. Kulkarni, J.)
(Dipankar Datta, CJ.)