

Calcutta High Court
Calcutta High Court
Mr. Tapas Sil vs Union Of India & Ors on 1 August, 2011
Author: Soumitra Pal
GA 1327 of 2009

WP No. 1238 of 2008

IN THE HIGH COURT AT CALCUTTA

Constitutional Writ Jurisdiction

ORIGINAL SIDE

MR. TAPAS SIL Plaintiff/Petitioner/Applicant Versus

UNION OF INDIA & ORS. Defendant/Respondent For Petitioner : Mr.S.Majumder,Advocate with Ms.A.Banerjee,Advocate. For Defendant/Respondent Nos.2 & 6: Mr.A.K.Bhattacharay,Advocate with Mr. S. Gangopadhyay, Advocate

BEFORE:

The Hon'ble JUSTICE SOUMITRA PAL

Date : 1st/3rd August, 2011.

The Court : In the writ petition, the petitioner, the Deputy General Manager (Turnkey Project) of the M/s. Hindusthan Cables Ltd, the respondent no.2, a company and a Government of India undertaking and at present registered with the BIFR, has challenged the order of transfer dated 16/18th July, 2008 transferring him from Kolkata to Hyderabad Unit primarily on the ground that it was mala fide. Prayer has been made in the application, having G.A.No.1327 of 2009, for a direction upon the 2

respondent no.2 to allow him to avail himself of the Voluntary Retirement Scheme which was in vogue from 1st November, 2009 to 30th November, 2009, since on 23rd November, 2009 he had filed an application seeking voluntary retirement.

The facts which require to be considered and which have been highlighted during argument are that on 18th July, 2007 the petitioner received a letter from the Personnel Department of the respondent no.2 requesting him to submit his graduation certificate on the ground that the said certificate was missing from his service file. The petitioner by letter dated 20th July, 2007 requested the Personnel Department to let him know the reasons behind the request for submission of the said certificate even after his employment for the past sixteen years. On the same day, the petitioner was informed by the Personnel Department that it was pursuant to the letter dated 6th July, 2007 and the subsequent reminder dated 13th July, 2007 at the instance of the Vigilance Department. According to the petitioner, as he was being victimised and/or defamed amongst the officers and his colleagues, he addressed a letter dated 31st July, 2007 requesting the Vigilance Department to let him know the reasons as to why he was being asked to submit his graduation certificate. However, as the letter dated 31st July, 2007 failed to elicit any answer, a reminder was sent on 7th August, 2007 to the Deputy General Manager (Vigilance), the 3

respondent no.4. However, it too went unanswered. Incidentally, in the meantime, by letter dated 23rd July, 2007, the petitioner had submitted a copy of the graduation certificate. Now feeling frustrated, the petitioner filed an application dated 21st August, 2007 under the Right to Information Act, 2005 (for short 'the Act')

with the Public Information Officer of the respondent no.2 reiterating the said request. Since no information was obtained, on 15th October, 2007 the petitioner applied before the First Appellate authority of the respondent no.2, but without any success. Aggrieved, on 1st February, 2008 the petitioner filed a second appeal before the Chief Information Commissioner, the Central Information Commission, New Delhi under section 19(3) of the Act. Pursuant thereto, the Central Information Commissioner by his order dated 4th June, 2008 held that the denial of information was unacceptable and the Public Information Officer of the respondent no.2 was directed to furnish the information. Consequent to the said order, the office of the Public Information Officer of the respondent no.2, by its letter dated 16th June, 2008 informed that a complaint was received against the petitioner on 27th June, 2007 alleging multiple irregularities/allegations and in connection with one such allegation an investigation had been undertaken by the Vigilance Department and the Personnel Department had requested the petitioner to furnish a copy of the graduation certificate. According to the 4

petitioner, under the guidelines of the Central Vigilance Commission any anonymous complaint must be filed and investigation has to be conducted within three months and a report has to be submitted. Thereafter, by letter dated 8th July, 2008 information was sought for on behalf of the petitioner from the Chief Vigilance Officer, the respondent no.3, regarding the name of the complainant, with regard to the steps taken pursuant to the complaint and whether the rules and regulations have been followed or not. According to the petitioner he came to know from a reliable source that there had been a group of officers in the office of the respondent no.2 who had taken animosity against him because of his honesty and sincerity in discharging his official duties. The respondent no.3 was also involved in the said unholy nexus of officers plotting against him and in order harass him a consorted effort was made by all such vindictive officers to remove the copy of his graduation certificate from the petitioner's service record through surreptitious means to create a false case against him so that his employment with the respondent no.2 could be put into jeopardy. Thereafter on or about 21st July, 2008 the petitioner was handed over the impugned order of transfer dated 16th/18th July, 2008. Mr. Soumya Majumder, learned advocate for the petitioner, reiterating the statements in the writ petition has submitted that it has not been rebutted in the affidavit-in-opposition of the respondents that the 5

Hyderabad unit of the respondent no.2 where the petitioner had been transferred, is not functioning. Submission is that the respondents in their affidavits have not annexed documents in support of administrative exigencies resulting in passing the order of transfer. That apart, on 8th July, 2008 a letter was written on behalf of the petitioner to the respondent no.3 regarding the complaints and soon thereafter, the transfer order dated 16th/18th July, 2008 transferring the petitioner from Kolkata to Hyderabad was issued. According to the petitioner since the impugned order does not record that it was issued on the ground of exigency and the letter dated 8th July, 2008 was closely followed by the impugned order of transfer dated 16/18th July, 2008, the impugned order of transfer is mala fide. Mr. Bhattacharya and Mr. Gangopadhaya, learned advocates appearing for the respondents have submitted that there is no averment in the petition about the persons who are conspiring against the petitioners. The petitioner has merely speculated that he has been made a victim. Moreover, the intention of transfer was to provide the petitioner a place where he would be allotted duties and thus it was not a punitive transfer. That the order of transfer was not punitive is evident since the designation of the petitioner was not changed and existing scale of pay was maintained. Submission has been made that mere absence of a few words that it was in public interest does not make the order of transfer invalid. 6

On a query, as to why the respondents failed to furnish before the second appellate authority the Office Memorandum dated 14th September, 2005 issued by the Central Vigilance Commissioner whereby it was directed that the identity of the complainant was to be kept secret, it has been fairly submitted that it should have been brought to the notice of the said authority.

Learned advocates for the parties have relied on several judgments which shall be dealt with appropriately in this judgment. It is seen from facts that on 18th July, 2007, the petitioner was directed to furnish a copy of the graduation certificate. On 20th July, 2007 the petitioner requested the respondent no.2 to let him know the reasons of such request. On the same day he was informed that it was at the instance of the Vigilance

Department. On 31st July, 2007 and on 7th August, 2007 the petitioner requested the authorities to let him know the reasons for such submission which met with no success. Aggrieved on 21st August, 2007 he filed an application under the Right to Information Act, 2005 which met with no result. Thereafter, an application was made before the Appellate authority. It met with the same fate. A second appeal was preferred. The second appellate authority by its order dated 4th June, 2008 directed the Chief Information Officer of the respondent no.2 to 7

furnish the information. Consequently, the respondent no.2 by its letter dated 16th June, 2008 intimated that it was pursuant to a complaint dated 27th June, 2007, as already noted. Thereafter, by letter dated 8th July, 2008 issued on behalf of the petitioner, the Chief Vigilance Officer, the respondent no.3, was requested to let him know the steps taken pursuant to the receipt of the complaint and whether rules have been followed or not. Soon thereafter, the petitioner received the order dated 16th/18th July, 2008 transferring him from Kolkata to Hyderabad unit. The question is whether the impugned order transferring the petitioner from Kolkata to Hyderabad is fraught with malice. In this regard the order dated 4th June, 2008 passed by the second appellate authority, some of the paragraphs in the petition and in the affidavit-in-opposition should be closely examined. It is pertinent to note the second appellate authority in its order dated 4th June, 2008 had made significant observations while dealing with the facts which are as follows:

"4. The CPIO has refused to provide the information u/s 8(1) (h) of the Act on the ground that the disclosure of information would impede the process of investigation. He has however not indicated the specific grounds for initiation of such investigation."

(Emphasis supplied)

8

Thereafter its "Decision" is as under:

"5. The CPIO has not indicated as to how the disclosure of such information as the purpose or the reason for obtaining a certificate would interfere with ongoing investigation, if any. The denial of information u/s 8(1) (h) of the Act is therefore un-acceptable. The CPIO is, therefore, directed to furnish the information asked for within 15 days from the date of issue of this decision."

(Emphasis supplied)

Therefore, it is evident that the appellate authority had held it was not indicated by the CPIO how the disclosure of information would interfere with the ongoing investigation and thus denial of information was not accepted and hence information was directed to be furnished. Now, since it has been alleged on behalf of the petitioner that after information was given on 16th June, 2008, the letter dated 8th July, 2008 furnished on his behalf had led to the issuance of the impugned order dated 16th July/18th July, 2008, it is appropriate to refer to paragraph 14 of the writ petition, which is as under:-

9

"14. Subsequent to the aforesaid Order dated 4.6.08 passed by the Central Information Commission, the office of the Public Information Officer of the Respondent No.2 Company vide its letter dated 16.6.08 informed your petitioner that a complaint was received on 27.6.07 as against your petitioner and in pursuance of the said complaint dated 27.6.07 alleging multiple irregularities/allegations, an investigation has been undertaken by the Vigilance Department and that in connection with one of such allegations leveled against your petitioner that the Personnel Department of the Respondent No.2 Company had requested your petitioner to furnish a copy of his graduation certificate for the purpose of verification. A copy of the aforesaid time bound communication dated 16.6.08 is annexed hereto and marked with the letter "P10".

It is evident from paragraph 14 of the writ petition that the petitioner was informed that the graduation certificate was sought for pursuant to a complaint.

Paragraph-14 of the writ petition has been dealt with in paragraph 12 of the affidavit-in-opposition affirmed on behalf of the respondent nos. 2 and 6. It is as under:-

10

"12. With regard to the contents of paragraphs 10,11,12,13 and 14 of the said petition, I say that to avoid the order of transfer the Petitioner is trying to make a story out of some facts which has no relevance to each other. I further say that it is the Petitioner who has made the issue relating to submission of the said certificate a complicated one by putting allegations of malafide followed by making applications and appeals under the Right to Information Act, 2005. In this regard, I categorically and specifically say that being a Senior Executive of the Respondent No.2 the acts and conduct of the Petitioner is uncalled for since he has tried to stall the administrative wheels of the Respondent No.2 in any manner whatsoever. I again say that the acts and conducts of the Petitioner cannot be supported since being a Government employee, he has tried to make an issue out of nothing by projecting himself indispensable to the Respondent No.2 which is absolutely an undemocratic and unhealthy attitude in the eye of law."

It appears from the tenor of the language used in paragraph-12 of the affidavit-in-opposition that the respondents had grudgingly accepted the order passed by the second Appellate Authority, as the respondents have tried to justify their stand by stating that the act and conduct of the petitioner was "uncalled for" and he had "tried to stall the administrative wheels of the respondent no.2" and "he has tried to make an issue out of nothing by projecting himself indispensable to the respondent no.2....". The oral submission of the learned advocate for the respondents that the 11

contents of the complaints could not be divulged due to the Office Memorandum dated 14th September, 2005 issued by the Vigilance Department is of no help to the stand taken by the respondents since, in my view, it is not clear what had prevented the respondents from furnishing the same before the second appellate authority. The reason for dealing in some detail with the paragraphs in the petition and in the affidavit-in-opposition in the light of the order dated 4th June, 2008 passed by the appellate authority is though the respondent nos. 2 and 6 in their affidavit have stated that "transfer is an incident of service" (paragraph 4(j) of the affidavit-in-opposition) and "the order of transfer of the petitioner to Hyderabad unit is normal phenomenon since transfer is part and parcel of the employment under the respondent no.2 which the petitioner has knowingly accepted", (paragraph 16 of the affidavit-in-opposition) however the respondents have not disclosed the reasons for such transfer. Examining the affidavit-in-opposition particularly paragraph-12 thereof, I find that the statements in the writ petition have been dealt with in a most casual and perfunctory manner. Since the impugned order of transfer was bereft of reasons and since the petitioner has alleged that the order of transfer was mala fide, it was incumbent on the part of the respondents to spell out the administrative exigency which necessitated in issuing the impugned order of transfer. As 12

the respondents even in their affidavit have not disclosed the reasons for issuing the order of transfer and as the letter on behalf of the petitioner dated 8th July, 2008 requesting the respondent no.3 to appraise the petitioner about the steps taken pursuant to the complaint against him was immediately followed by the impugned transfer order dated 16th/18th July, 2008 one cannot but conclude that the respondent no. 2 and 6 had acted with malice. That the respondent nos. 2 and 6 had acted in bad faith is evident from the proximity of events, that is, the issuance of the letter dated 8th July, 2008 on behalf of the petitioner, followed by the impugned order of transfer dated 16th/18th July, 2008.

It is an established proposition of law that transfer is an incident of service and it should not be stalled by an order of injunction on a mere asking. However, when the petitioner alleges that the order of transfer is fraught with malice, a duty is cast upon the respondents to spell out reasons in their affidavit which in the instant case

is woefully absent. In this regard it is appropriate to refer to the law laid down in the judgement in Mukul Mitra vs. Union of India : 1982(II)CHN 157, relied on by the petitioner, wherein it has been held as under :

"..... The appellant has challenged the order of transfer as mala fide. We do not think that it is necessary for us to deal with the question 13

whether the order of transfer is mala fide or not. But at the same time, in our opinion, a person cannot be transferred from one place to another without any reason whatsoever. There must be some ground, be it in the interest of public service or for administrative reasons or any other reason. But if an order of transfer does not disclose any reason, either in the order itself or in the affidavit-in-opposition, such order cannot be sustained. So far as the instant case is concerned, the position of the respondents is worse, for the ground that has been alleged in the affidavit-in-opposition in support of the order of transfer has been found to be not true." (paragraph 13)

Therefore, law is that the order of transfer should spell out the reasons; if it does not, it should be disclosed in the affidavit. Now with regard to the judgments relied on behalf of the respondents in Mohd.Masood Ahmed v. State of U.P & Ors: 2007(8) SCC 150, it is evident that the Supreme Court had relied on the law laid down in Abani Kanta Ray v. State of Orissa: 1995 Supp (4) SCC 169 wherein it was held that ordinarily Courts have no jurisdiction to interfere with the order of transfer unless the Court finds that either the order is clearly arbitrary or vitiated by mala fides or there is an infraction of the any professed norm or principle governing the transfer. It was held in paragraph 8 in Mohd. 14

Masood Ahmed (supra) that an order of transfer depends on the facts and circumstances of an individual case. The law laid down in Mohd. Masood Ahmed (supra) is not applicable to the facts of the instant case in hand as the petitioner was directed to be transferred by the order dated 16/18th July, 2008 which was close to the heels of the letter dated 8th July, 2008. The principles of law laid down in S.C.Saxena v. Union of India and Ors : (2006) 9 SCC 583 is not applicable on facts as therein the appellant instead of joining the transferred post at Tezpur or at Amritsar, where he was subsequently transferred, went on submitting leave applications supported by medical certificates from doctors who were not authorized under the applicable disciplinary rules and thereafter, charge-sheet alleging unauthorized absence of duty was issued. So far as the judgement in State of U.P. & Ors vs. Gobardhan Lal : AIR 2004 SC 2165 is concerned, it is evident from the law laid down in paragraphs 9 and 10 thereof that the facts should be of primary consideration and even when allegations of mala fide are made, those must be "such as to inspire confidence in the Court" and are based on concrete materials. In the case in hand, as neither the order of transfer nor affidavit-in-opposition spells out the reasons for transfer, in my view, the order of transfer was in bad faith. So far as the judgement in Union of India vs. Janardhan Debnath and Ors. : (2004) 4 SCC 245 is concerned, the Supreme Court allowing the appeal after considering 15

the facts had observed that allegations made against the respondents were of serious nature and the conduct of the employees was certainly unbecoming. The Apex Court therein held "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" (paragraph 14). However, in the case in hand the respondents have not spelt out what were the administrative exigencies which led to the order of transfer. Since the petitioner has alleged that the respondents acted in bad faith, the judgement in Union of India Ors. vs. S.L. Abbas : (1993) 4 SCC 357 is not at all applicable as in paragraph-6 thereof it has been found that "It is not the case of the respondent that the order of his transfer is vitiated by mala fides on the part of the authority making the order" In short, as already noted, the established principle of law is, unless an order of transfer is fraught with malice or is in bad faith, it cannot be interfered with. Hence, in a case where the order of transfer is under challenge on the ground of mala fide, it has to be examined whether it was in bad faith and for that facts have to be scrutinized. In the instant case, as the order of transfer does not spell out any reason and as the affidavit-in-opposition does not contain any reason in support of the order of transfer and as the impugned order of transfer dated 16/18th July, 2008 was close to the heels of the letter dated 8th July, 16

2008 issued on behalf of the petitioner requesting the respondent no.3 to look into the complaints, the order of transfer under challenge cannot be sustained and is, thus, set aside and quashed. Hence, the writ petition is allowed. Therefore, in the facts and circumstances of the case, the respondents are directed to pay all arrears of salary of the petitioner within a month from the date of furnishing a copy of the certified copy of this order. So far as the consideration of the application for voluntary retirement of the petitioner, which is the subject-matter in G.A. 1327 of 2009, since I find that the respondents had on 26th October, 2009 opened a scheme for voluntary retirement for a period of one month, that is, from 1st November, 2009 to 30th November, 2009 and as the petitioner on 23rd November 2009 had filed an application, the respondent nos.2 and 6 are directed to consider the same and shall pass a reasoned order within six weeks from the date of communication of this order. No order as to costs.

All parties concerned are to act on a signed photo copy of the operative part of this order on the usual undertakings. (SOUMITRA PAL, J.)

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