

ORISSA HIGH COURT: CUTTACK.

W. P. (C) No. 27638 OF 2011

In the matter of an application under Articles 226 and 227 of the
Constitution of India

Manasi Mishra

..... Petitioner

-versus-

Union of India and others

.... Opp. parties

For Petitioner : M/s. B.S.Tripathy, D.K.Mishra,
M.R. Kar & N.K.Das.

For opp. parties : Mr. J.K. Khandayatray.

Decided on 15.03.2013

PRESENT;

***THE HONOURABLE SHRI JUSTICE M.M.DAS
AND
THE HONOURABLE SHRI JUSTICE B.K.MISRA***

M. M. DAS, J.

The petitioner has assailed the order dated 30.9.2011 passed by the learned Central Administrative Tribunal, Cuttack Bench, Cuttack in dismissing her O.A. No. 497 of 2011, wherein she challenged her order of transfer from INHS Nivarini at Chilka to the Station Health Organization (V) at Family Welfare Centre, Visakhapatnam.

2. From the facts, as revealed, it appears that the husband of the petitioner died in harness on 30.9.1997 while working in INHS Nivarini as CPO No. 203934-N. The petitioner was given appointment under the Rehabilitation Assistance

Scheme as Family Welfare Extension Educator (for short, 'FWEE') in INHS Nivarini at INS Chilka in the district of Khurda on 16.2.1999. The service of the petitioner was permanent in nature and since the date of her joining, she was continuing there. It appears that the petitioner has made several representations to the opp. parties with regard to assigning duties to her over and above the duty of FWEE, but no action was taken thereon. The petitioner also alleged that the opp. parties 3 and 4 caused sexual harassment to her taking advantage of her helpless condition. She further alleged that the said opp. parties 3 and 4 pressurized the Oi/C, who took over the Family Welfare on 4.4.2011 to make allegations against her. The opp. parties 3 and 4 issued two show cause notices to the petitioner on 11.7.2011, one pertaining to a patient, namely, Mrs. Ritanjali Champati, who underwent sterilization on 6.7.2011 and the other on the issue of absence of the petitioner from duty on 9.7.2011. The petitioner furnished her show cause reply to both the said notices denying the allegations leveled against her as baseless, motivated and frivolous. Apprehending further action, the petitioner also endorsed the said show cause to the Flag Officer Commanding – in-Chief (for Command Medical Officer) Headquarters Southern Naval Command, Kochi and other higher authorities. It is asserted by the petitioner that she learnt from reliable sources that the opp. parties 3 and 4 while issuing the show cause notices have also simultaneously requested opp. party no. 2 in

writing to transfer the petitioner to Visakhapatnam making false allegations against her. On 29.7.2011 the petitioner suffered from ailment for which she submitted an application for grant of two days leave. As her health condition deteriorated, she was advised by the Attending Physician for better treatment, to go to Cuttack. She again submitted a leave application on 30.7.2011 seeking fifteen days leave on medical ground furnishing her leave address. While under treatment, she could come to know that the opp. party no. 2 has passed orders on 28.7.2011 permanently transferring her from INHS Nivarini to Station Health Organization (V) at Family Welfare Centre, Visakhapatnam purportedly on public interest. Aggrieved by the said order of transfer, the petitioner approached the Tribunal in O.A. No. 497 of 2011, inter alia, praying to quash the impugned order of transfer on the following grounds:-

(i) the order is a mala fide one;

(ii) the order is punitive in nature;

(iii) there was no public interest involved or administrative exigency warranting such transfer;

(iv) further, the said transfer was an out-come of extraneous reasons and was made at the behest and dictates of the opp. parties 3 and 4 against whom the petitioner earlier made serious allegations of sexual harassment.

3. During the pendency of the Original Application, on 3.8.2011, the learned Tribunal passed an order while issuing

notice, to maintain status quo in so far as the transfer of the petitioner is concerned, which was allowed to continue till final disposal of the Original Application. The opp. parties filed their response to the said O.A. and the petitioner also filed a rejoinder affidavit before the learned Tribunal denying the assertions made in the counter and justifying her allegations.

4. The learned Tribunal in the impugned order after noting the facts of the case and the allegations and counter allegations made and taking note of various case laws of the Hon'ble apex Court as well as this Court with regard to the limited scope of the courts in interfering with the orders of transfer, came to the conclusion that there is no substance in support of the allegations levelled by the petitioner, the same having not been supported by any unimpeachable material. As law is well settled that people are prone to make allegation of mala fide/usually raised by an interested party (as in the instant case), the Tribunal should be careful while quashing the order of transfer on such grounds. Thus concluding, the learned Tribunal declined to interfere with the order of transfer recording that it does so as the order of transfer is made in administrative exigencies.

5. Mr. Tripathy, learned counsel for the petitioner vehemently urged that from the counter filed by the opp. parties before the learned Tribunal, it is clear that the transfer order is punitive in nature and an out-come of mala fide. .

6. Learned counsel for the opp. parties, on the contrary, submitted that the learned Tribunal on detailed analysis of the law with regard to interfering with an order of transfer has rightly held that the order of transfer of the petitioner being in administrative exigency cannot be interfered with.

7. This Court on perusal of the impugned order of the learned Tribunal finds that though the learned Tribunal referred to the decision in the case of ***Somesh Tiwari v. Union of India and others***, (2009) 2 SCC 592 relied upon by the petitioner before it, but came to the conclusion that the post in which the petitioner was continuing was having a liability of All India transfer and the aforesaid decision in the case of *Somesh Tiwari* (supra) has no applicability to the facts of the case.

8. It appears that in the counter filed by the opp. parties before the learned Tribunal, it was categorically stated by the opp. parties that the applicant was assigned duties of FWEE as per orders of the competent authority, but she failed to perform the duties to the desired extent she was counselled. She has not utilized her skills and did not take enough interest for contribution to Family Welfare cause and community service commensurate to their qualification and pay. A complaint was also made by the officer in charge on 11.7.2011 to the Commanding Officer regarding non-performance of family welfare duties as she was not present prior to surgery of a lady

patient for permanent sterilization nor did she visit her thereafter. She did not even turn up for disbursing family welfare incentive payment to patients on the day of discharge in spite of being informed repeatedly by the Family Ward Staff. Despite opportunity and show cause, she was not punctual in her duty. Considering all aspects of the matter, the competent authority decided to transfer the petitioner which needs no interference by the Tribunal. An order of the Calcutta Bench of the Tribunal was relied upon by the opp. parties for the above purpose.

(emphasis supplied)

9. In the case of *Somesh Tiwari* (supra), the Hon'ble apex Court was considering a case, where an anonymous complaint was made against the appellant therein, which was investigated by the departmental authorities , but nothing adverse was found against the appellant, yet he was transferred from Bhopal to Shillong. He resisted his transfer and did not move out of Bhopal. Subsequently, another order dated 28.12.2005 was passed transferring the appellant to Ahmedabad. He contested that order also. The Administrative Tribunal dismissed his application but the High Court found that the transfer order was not a bona fide exercise of power and, therefore, declared it invalid. But the High Court taking note of the fact that the appellant had not obeyed the transfer order and continued to stay in Bhopal, denied him salary for the period commencing fifteen days after the date of order of transfer till he

rejoined in the duty at Bhopal station. The order of the High Court was challenged before the Hon'ble apex Court. The Hon'ble apex Court considered the validity of the appellant's transfer out of Bhopal as well as denial of salary to him. It also took note of internal notings in official files which showed that Government itself admitted that appellant's transfer to Shillong was a harsh posting and his second transfer to Ahmedabad was considered as "less harsh posting". The question was whether appellant's transfer in the facts and circumstances of the case, was a bona fide exercise of power. Second issue was whether appellant should have been denied salary for the period he did not obey second transfer order.

10. The Hon'ble apex Court allowing the appeal with costs assessed at Rs. 50,000/- and modifying the order of the High Court held that an order of transfer is an administrative order. Transfer, which is ordinarily an incident of service should not be interfered with, save in cases where inter alia mala fides on the part of the authority is proved. Mala fides are of two kinds, first, malice in fact and 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 to passing of an order of transfer and based on an irrelevant ground, i.e., on the allegations made against the appellant in an anonymous complaint. The Hon'ble apex Court further held that 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. It may be noted that no vigilance enquiry was initiated against the appellant and the transfer order was passed on material which was non-existent. Thus, the order suffers not only from non application of mind but also from malice in law. Thus holding, the Hon'ble apex Court modified the judgment of the High Court by concluding that the order of transfer was passed on material which was non-existent and, therefore, the said order not only suffers from total non-application of mind on the part of the authorities but also suffers from malice in law. *(emphasis supplied)*

11. Applying the ratio of the aforesaid decision to the facts of the present case, it is clear that in the instant case also even though show cause notices were issued to the petitioner, but no enquiry whatsoever was conducted therein by giving opportunity to the petitioner and in the other hand, basing on the same allegations, the order of transfer was passed.

This Court, therefore, finds that the order of transfer was punitive in nature, which is ipso facto illegal and unsustainable.

12. In the result, the order of the learned Central Administrative Tribunal, Cuttack Bench, Cuttack impugned in this writ petition stands quashed and as a consequence, the

order transferring the petitioner from INHS Nivarini at INS Chilka to Station Health Organization (V) at Family Welfare Centre, Visakhapatnam also stands quashed and the opp. parties are directed to allow the petitioner to continue in INHS Nivarini in her previous post of FWEE. If, in the meantime, the petitioner has been relieved, she shall be allowed to rejoin in her previous post with immediate effect.

13. The writ petition is accordingly allowed, but in the circumstances, without cost.

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M.M. Das, J.

B.K.MISRA, J. *I agree.*

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B.K. Misra, J.

Orissa High Court, Cuttack.
March 15th, 2013/Biswal.