

IN THE HIGH COURT OF HIMACHAL PRADESH, SHIMLA.

CWP No. 511 of 2020

Reserved on: 18.08.2020

Decided on: 26.08.2020

Sheela Suryavanshi

...Petitioner

Versus

State of H.P. & Ors.

...Respondents

Coram:

Hon'ble Mr. Justice Tarlok Singh Chauhan, Judge.

Hon'ble Ms. Justice Jyotsna Rewal Dua, Judge.

Whether approved for reporting? ¹ Yes.

For the Petitioner : Mr. Ram Murti Bisht, Advocate.

For the Respondents : Mr. Ashok Sharma, Advocate General
with Mr. Ranjan & Mr. Vinod Thakur, Addl.
A.Gs. and Ms. Svaneel Jaswal, Dy.A.G.,
for respondents No. 1 and 2-State.

Mr. Vinod Chauhan, Advocate, for
respondent No. 3.

Tarlok Singh Chauhan, Judge

The petitioner is a Lecturer (English), who joined Government Senior Secondary School, Sanjauli, on 16.08.2017 and was thereafter ordered to be transferred vice private respondent vide order dated 23.01.2020 and aggrieved thereby has filed the instant petition for the grant of following substantive relief:-

- (i) That the impugned transfer order dated 23.01.2020 (Annexure P-1) may kindly be quashed and set aside.

¹ Whether reporters of the local papers may be allowed to see the judgment? yes

2. It is argued by Shri Ram Murti Bisht, learned Advocate, for the petitioner, that the order of transfer is not sustainable, as it has been passed on extraneous consideration and with malafide intention to simply adjust private respondent No.3, who at her own request had been posted at GSSS, Theog in July, 2019 and after short stay of six month, on 01.01.2020, on the basis of D.O. note No. 199274, got herself transferred back to GSSS, Sanjauli, dislodging the petitioner.

3. The stand of the official respondents is that the petitioner was transferred vice private respondent No. 3, with the prior approval of the competent authority, on the medical ground of respondent No. 3, which fact though mentioned in the department file but could not erroneously be mentioned on the office order dated 23.01.2020.

4. To similar effect is the stand taken by respondent No. 3, wherein she has highlighted her medical ailment(s).

We have heard learned counsel for the parties and have gone through the records of the case.

5. In Black's Law Dictionary 'malafide' is said to be an intentional doing of a wrong act without just cause or excuse, it is done with an intention to inflict an injury or under such circumstances that the law will imply an evil motive to the act.

6. The Hon'ble Supreme Court has considered the question of malafide in case of transfer and the following principles are laid down in the case of **B. Varadha Rao vs. State of Karnataka & Others, AIR 1986 SC 1955:**

“The Government is the best judge to decide how to distribute and utilize the services of its employees. However, this power must be exercised honestly, bonafide and reasonably. It should be exercised in public, interest. If the exercise of power is based on extraneous consideration or for achieving an alien purpose or an oblique motive it would amount to malafide and colourable exercise of power. Frequent transfers, without sufficient reasons to justify such transfers, cannot but be held as in 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.”

7. Similarly in the case of **Mrs. Shilpi Bose and Others vs. State of Bihar & Others, AIR 1991 SC 532**, it is observed by the Supreme Court as under:-

“In our opinion, the courts should not interfere with a transfer order which are made in public interest and for administrative reasons unless the transfer orders are made in violation of any mandatory statutory rule or on the ground of mala fide. A Government servant holding a transferable post has no vested right to remain posted at one place or the other, he is liable to be transferred from one place to the other. Transfer orders issued by the competent authority do not violate any of his

legal rights. Even if a transfer order is passed in violation of executive instructions or orders, the Courts ordinarily should not interfere with the order instead affected party should approach the higher authorities in the department. If the courts continue to interfere with day-to-day transfer orders issued by the Government and its subordinate authorities, there will be complete chaos in the Administrations which would not be conducive to public interest. The administration which would not be conducive to public interest. The High Court overlooked these aspects in interfering with the transfer orders”.

8. Thereafter, in the Case of **Rajendra Roy vs. Union of India and another, AIR 1993 SC 1236**, the principle is laid down in the following manner:-

“It may not be always possible to establish malice in fact in a straight cut manner. In an appropriate case, it is possible to draw reasonable inference of malafide action from the pleadings and antecedent facts and circumstances. But for such inference there must be firm foundation of facts pleaded and established. Such inference cannot be drawn on the basis of insinuation and vague suggestions.”

9. Thus, on malafide, it can be said that the principal test of a due and proper exercise of the power is to ask the question: Was the transfer made for real administrative exigency? In finding the answer the Court might have to pierce the veil of the transfer order and see what was the operative reason for the transfer. If the findings reveal a nexus with administrative necessity, the exercise of the power will be upheld. If however, the operative reason has no

such nexus then the transfer will be vulnerable. In the latter case it will be a malafide use of power and will take within its sweep all situations where the nexus and administrative exigencies is absent. It needs to be emphasised that in the present context malafide is not limited to the personal malice of the authority making the transfer. Malafide has two components i.e. malice in law and malice in fact.

10. It may be stated here that if the transfers are made in order to adjust particular persons with no reasonable basis, such type of transfers can be termed as malafide one and would normally be liable to be quashed.

11. On the basis of the aforesaid exposition of law, it can conveniently be held that transfer in the instant case has not been made on administrative exigency but to adjust and accommodate respondent No. 3.

12. Record reveals that it was respondent No. 3, who vide letter dated 06.01.2020, addressed to the Education Minister, requested for her transfer on medical grounds as enumerated in letter, which is as under:-

To

The Hon'ble Education Minister,
Himachal Pradesh, Shimla-2.

Sub: Request for transfer on medical grounds

R/Sir,

With due respect and humble submission, I beg to lay down following few lines for your kind and sympathetic consideration please:

1. That presently I am working as PGT (English) in Govt. Girls Sr. Secondary School, Theog Distt. Shimla (HP) from July, 2019.

2. That I am suffering from Paralytic problems (brain strokes in Dec. 2018) (copy of prescription slip is enclosed) and since then under treatment in IGMC Shimla and it is very difficult for me to commute between Theog & Shimla daily due to my above problem.

So, it is humbly requested, I may please be transferred on medical grounds from Govt. Girls Sr. Secondary School Theog to Govt. Sr. Secondary School Sanjauli vice Smt. Sheela Suryavanshi, PGT (English). My short stay at GSSS Theog may kindly be condoned please.

13. The medical prescription slip annexed with this application, in fact, is an OPD slip in which it was only mentioned that this is a case of post circulation stroke and the B.P. of the petitioner has been recorded alongwith the details of the medicines. Even after that respondent No. 3 procured another D.O. note on the basis of which she got herself transferred to GSSS Sanjauli.

14. No doubt, respondent No. 3 was entitled to set-forth her grievance including the medical problems to her higher authorities and seek transfer and it was for the authorities, in turn, to accede or not to such request, but under no circumstances, respondent No. 3 could have exercised external influence to have transfer effected.

15. Now, the further question is whether request made by respondent No. 3 in the aforesaid letter was genuine and bonafide.

We really do not think so.

16. The record reveals that even though respondent No. 3 did suffer a paralytic (brain stroke) in 2018, but then it was on her request that she subsequently came to be transferred on mutual basis to GSSS Theog, where she remained posted from July, 2019 till the passing of the impugned transfer order. The request for transfer on mutual basis was probably made to take advantage under the policy of the transfer.

17. In **Rajendra Roy vs. Union of India and Anr. 1993 SC 1236**, the Apex Court held that "It is true that the order of transfer often causes a lot of difficulties and dislocation in the family set up of the concerned employees but on that score the order of transfer is not liable to be struck down.

18. Off late, this Court has seen a surge in litigation relating to transfer. The State of Himachal unlike other States is not evenly or uniformly developed in matters of basic infrastructure like education, health services etc. It is for this reason and rightly so that every employee tries to make an endeavour to seek posting in the district or tehsil headquarters where the infrastructure is relatively well developed. This we observe on the basis of the statistics relating to Shimla alone, where floating population is equal to permanent population. Most of these migration in urban areas is directly related with education of children and thereafter it could be for other purposes like better health facilities etc.

19. We further notice that because of cartel created by few of the employees serving in the urban and semi urban areas of Himachal Pradesh, the influential employees manage to secure their postings in and around urban areas, leaving practically no room for the other employees.

20. The instant case is one such classical example, which reflects the modus operandi being resorted to by these teachers on completion of their tenure by seeking mutual transfer or creating artificial vacancies and thereafter getting each one adjusted in such vacancies.

21. It cannot be ignored that not only the State or Country but the whole world is in the grip of pandemic COVID-19, because of which students cannot be taught physically in the class rooms and are being taught through online classes.

22. In such circumstances, the respondents are not only duty bound but are mandated by law to ensure that no monopoly in the matters of transfers is created in favour of selected fews but an endeavour has to be made to accommodate maximum number of teachers whose children are appearing for the board examination or examination for professional courses. These students can only study and attend classes on line if there is adequate and desired band-width. Even otherwise the facilities of tuition and coaching classes on online are mainly available in these places i.e. the

district and tehsil headquarters, therefore, also the State is required to adopt a fair and transparent policy of transfer by calling for the details of all the teachers whose children are to appear in the Board exam or examination for professional courses like MBBS, AIEEE etc. This would not only bring about an end to the monopoly created in favour of few teachers but would also ensure benefit to the student community as a whole.

23. The Central Government, State Governments and likewise all public sector undertakings are expected to function like a 'model employer'. A model employer is under an obligation to conduct itself with high probity and expected condour and the employer, who is duty bound to act as a model employer has obligation to treat its employees equally and in appropriate manner so that the employees are not condemned to feel totally subservient to the situation. A model employer should not exploit the employees and take advantage of their helpless and misery.

24. The action of the State must be reasonable, fair, just and transparent and not arbitrary, fanciful or unjust. The right of fair treatment is an essential ingredient of justice. Exercise of unbridled and uncanalised discretionary power impinges upon the right of the citizen; vesting of discretion is no wrong provided it is exercised purposively judiciously and without prejudice. Wider the discretion, the greater the chances of abuse. Absolute discretion is destructive

of freedom, than of man's other inventions. Absolute discretion marks the beginning of the end of the liberty.

25. It was observed by Wades Administrative Laws, 5th Edition at page 347 that *"The first requirement is the recognition that all powers have legal limits, the next requirement, no less vital, is that the Court should draw this limit in a way which strikes the most suitable balance between executive efficiency and legal protection of the citizen. Parliament consistently confers upon public authorities powers which on their face seem absolute and arbitrary. But arbitrary power and unfettered discretion are what the Courts refuse to countenance. They have woven a net-work of restrictive principles which require statutory powers to be reasonable and in good faith and in accordance with the spirit and letter of the empowering Act."* At page 359, it was also observed that *"Discretion of a statutory body is never unfettered. It is a discretion which is to be exercised according to law. That amounts at least to this that the statutory body must be guided by relevant consideration and not irrelevant. If its decision is influenced by extraneous consideration which ought not have taken into account, then the decision cannot stand. No matter that the statutory body may have acted in good faith, nevertheless, the decision will be set-aside."*

26. Here, it shall be apposite to make a reference to the judgment of the Hon'ble Supreme Court in ***New India Public***

School vs. Huda (1996) 5 SCC 510, wherein it was observed that when public authority discharges its public duty, it has to be consistent with the public purpose and clear and unequivocal guidelines or rules are necessary and the same cannot be acted at the whim and fancy of the public authorities or under their garb or cloak for any extraneous consideration.

27. The concept of reasonableness and non-arbitrariness pervades the entire constitutional spectrum and is a golden thread which runs through the whole fabric of the Constitution. Thus, Article 14 read with Article 16(1) of the Constitution accords right to an equality or an equal treatment consistent with principles of natural justice. Therefore, any law made or action taken by the employer, corporate statutory or instrumentality under Article 12 must act fairly and reasonably. Right to fair treatment is an essential inbuilt of natural justice.

28. As observed above, exercise of unbridled and uncanalised discretionary power impinges upon the right of the citizen; vesting of discretion is no wrong provided it is exercised purposively, judiciously and without prejudice.

29. The main concern of the Court in such matters is to ensure the Rule of law and to see that the executive acts fairly and gives a fair deal to its employees consistent with the requirements of Articles 14 and 16 of the Constitution. It also means that the State

should not exploit its employees nor should it seek to take advantage of their helplessness and misery. As is often said, the State must be a 'model employer'.

30. In the instant case, the incumbency of the petitioner and private respondent No. 3 is as under:-

Name: Smt. Sheela Suryavanshi (Petitioner)

Designation: Lecturer (English)

Sr. No.	Place of posting	Period
1	GSSS Halog Dhama (SML)	18.07.07 to 09.12.09 (As TGT)
2	GHS Annadale (SML)	10.12.09 to 31.03.13
3	GSSS Halog Dhama (SML)	01.04.13 to 01.04.16
4	GHS Annadale (SML)	02.04.16 to 09.06.16
5	GSSS Chikhar (SML)	10.06.16 to 27.06.17 on promotion as Lecturer
6	GSSS(G) Theog (SML)	28.06.17 to 16.08.17
7	GSSS Sanjauli (SML)	16.08.17 till date

Name: Smt. Rita Chauhan (Respondent No.3)

Designation: Lecturer English

Sr. No.	Place of posting	Period
1	GSSS Deori Khaneti (SML)	04.05.02 to 17.07.02 (As TGT)
2	GSSS Matiana (SML)	17.07.02 to 4.11.03
3	GSSS Chotta Shimla (SML)	04.11.03 to 27.09.06
4	GSSS (B) Theog (SML)	27.09.06 to 17.08.07
5	GSSS (G) Lakkar Bazar (SML)	17.08.07 to 02.07.08
6	GSSS Portmore (SML)	02.07.08 to 01.09.10
7	GSSS Bisha (SML)	01.09.10 to 03.04.12
8	GSSS Summer Hill (SML)	03.04.12 to 12.01.15
9	GSSS Baldeyn (SML)	13.01.15 to 31.05.16
10	GSSS Bhararia (SML)	01.06.16 to 27.03.17 (On promotion as Lecturer)
11	GSSS Sanjauli (SML)	27.03.17 to 24.07.19

12	GSSS (G) Theog (SML)	24.07.19 to 24.01.20
13	GSSS Sanjauli (SML)	24.01.2020 till date

31. It is not in dispute that the petitioner as also the third respondent hold a State Cadre Post, yet the petitioner has not been posted outside the district and has rather served in and around Shimla within a radius of 35 kms. in her entire service career.

32. The case of respondent No. 3 is also not different, as she except for a brief period from 01.09.2010 to 03.04.2012 when she was posted at GSSS, Bisha (Solan), has also remained posted in and around Shimla and have served within a radius of 47 kms. out of which 90% of the commutation is on the main National Highways.

33. Obviously, these postings, both in the case of the petitioner as also respondent No. 3, could not have been possible without the active support of the officials respondents.

34. As observed above, there has been a spike in cases relating to transfer and majority of these cases pertain to the respondents-department i.e. Education Department. It is for this precise reason that this Court in *CWP No. 1978 of 2019, titled as Sunita Devi vs. State of H.P. & Ors., decided on 18.03.2020* has recommended the State Government to implement online transfer in its Departments, Boards, Corporations etc. having over 500

employees by framing an online transfer policy on similar line as that of the adjoining State of Haryana.

35. In conclusion, even though we find the transfer of the petitioner to be malafide as it has been made in order to adjust the third respondent with no reasonable basis, but that does not mean that the petitioner would be entitled to be retained at GSSS Sanjauli.

36. It is a well known adage that "*Hard cases make bad law*".

37. **Robert CJ in Caperton vs. A. T. Massey** held that extreme cases often test the bounds of established legal principles. There is a cost to yield to the desire to correct the extreme case, rather than adhering to the legal principal. The cost has been demonstrated so often that it is captured in a legal aphorism "Hard cases make bad law."

38. A Writ of Certiorari neither in England nor in India issues as a matter of course. In **A. M. Allison vs. B. L. Sen (S) AIR 1957 SC 227**, it was observed as under:-

"Proceedings by way of certiorari are 'not of course'. (Vide Halsbury's 'Laws of England', Hailsham Edition, Vol. 9, paras 1480 and 1481 pp. 877-878). The High Court of Assam had the power to refuse the writs if it was satisfied that there was no failure of justice....."

39. Granting indulgence to any of the parties in this case would be causing manifest injustice to other teachers who are desirous of serving in Shimla and other district and tehsil headquarters but have failed mainly because of the cartel formed by the influential teachers like the parties in the instant case.

40. Even though the petitioner has made out a legal ground for quashing the impugned order, however, this Court is still not inclined to exercise discretion in her favour as "*justice*" is not on the side of the petitioner.

41. In the given facts and circumstances of the case as discussed above, neither the petitioner nor the third respondent deserve to be posted in their home district.

42. Accordingly, while disposing of the writ petition, we direct respondents no. 1 and 2 to transfer the petitioner as also respondent No. 3 outside their home district(s) within two weeks' from today. The respondents while effecting the transfers shall bear in mind that the same should not be amount to adjustment and should be a meaningful transfer.

43. Before parting, we hope and trust that the respondents would take all requisite steps to break the cartel and as far as possible ensure that maximum number of teachers, especially those whose children are to appear in the Board examination and examination for professional courses are afforded an opportunity to

serve in the district and tehsil headquarters or wherever requisite infrastructure like adequate band width, facility of tuition etc. are available.

44. The writ petition is disposed of in the aforesaid terms, so also pending applications, if any. Parties are left to bear their own costs.

Record is ordered to be returned.

List for compliance on **10.09.2020**.

(Tarlok Singh Chauhan)
Judge

(Jyotsna Rewal Dua)
Judge

26th August, 2020.
(sanjeev)