

# **BOMBAY HIGH COURT**

Seshrao Nagorao Umap

Vs.

State of Maharashtra

Writ Petition No. 3426 of 1983

(C.S. Dharmadhikari & S.P. Kurdukar, JJ.)

11.07.1984

## **JUDGMENT**

### **Dharmadhikari, J.**

1. The petitioner Dr. Sheshrao Nagorao Umap was a medical officer in the Municipal Dispensary, Bhusawal, District Jalgaon. He was posted in the said post vide order dated 19th June, 1981. Accordingly, he took charge of the post of medical officer at Bhusawal on 1st of July, 1981 and since then has been working in the said post. However, he came to be abruptly transferred as medical officer, Cottage, Hospital, Parola, District Jalgaon vide order dated 30th April, 1983. It appears that this order was issued to accommodate respondent No. 4 Dr. R. P. Patil who was transferred to Dhule and had never assumed charge of the said office at any time but proceeded on leave for last about one and half year. It then appears from record that the Administrator of the Municipal Council, Bhusawal made a representation to the Government that the petitioner should not be transferred to Parola since he has done exemplary work during his tenure. It was also pointed out that the respondent No. 4 Dr. Patil was a permanent resident of Bhusawal and had also opened a private Nursing Home in the name and style of 'Shiv Surgical Nursing Home' at Bhusawal itself. The Administrator had also pointed out that a vacancy of medical officer in the Urban Family Welfare Centre of the Municipal Council, Bhusawal was lying vacant and a suitable medical officer from the Government cadre may be deputed to the said post. The petitioner himself had also made a representation for cancellation of his transfer. In his representation the petitioner had also contended that his mid-term transfer is likely to adversely affect the academic career of his daughter. In view of these representations and the recommendation of the Deputy Director of Health Services, Nasik Circle, the earlier order of transfer came to be cancelled, vide order dated 28th June, 1983. It then appears that after this order of cancellation the respondent No. 4, who according to the petitioner is politically influential person engineered to get fresh order of transfer issued on 23rd September, 1983 by which the petitioner was again transferred as medical officer, Cottage Hospital, Parola and the

Respondent No. 4 was appointed as medical officer, Municipal Dispensary at Bhusawal, in place of the petitioner. It is this order of transfer which is challenged in this writ petition by the petitioner on various grounds. It is also contended by the petitioner that he is being transferred contrary to Government policy, with a view to accommodate the respondent No. 4 Dr. Patil because of the political influence he wields.

2. No return has been filed on behalf of any of the respondents denying the allegations made in the petition. Therefore in law they are deemed to be admitted.

3. Shri Atre, the learned counsel appearing for the petitioner contended before us that the order of transfer issued on 23rd of September, 1983 was not only mala fide but was issued in colorable exercise opinion there is must substance in this contention of Shri Atre.

4. It is not disputed that the normal practice of Government is to effect transfer of persons in transferable services after a period of 3 years unless exceptional circumstances make it obligatory to transfer the employee earlier than the said period. Normally such transfers are effected before starting of an academic year or rainy season. In the present case initial transfer order was issued on 30th April, 1983, that is even before the expiry of the normal period of three years. There were no complaints against the petitioner. On the other hand he had done exemplary work. Fortunately on the representations made by the petitioner as well as the Administrator of the Bhusawal Municipal Council this order of transfer was cancelled vide order dated 28th June, 1983. However, for the reasons best known to the respondents, the petitioner was again transferred vide order dated 23rd of September, 1983. According to the petitioner this was done with a view to accommodate the respondent No. 4 who is an influential person. The petitioner has also brought on record that the respondent No. 4 Dr. Patil has a private Nursing Home in Bhusawal where he is likely to carry on his private practice. This fact was brought to the notice of the respondents by the Administrator of the Municipal Council and this was the reason why the earlier order of transfer was cancelled. This is not the end of the matter. Dr. Patil who was transferred to Dhule as medical officer, never joined his duties and proceeded on leave. He was on leave for more than one and half year. He managed to continue in service in spite of his long absence. Specific allegations are made in the petition in this behalf, which are not denied by any of the respondents, including Dr. Patil. Therefore we have no hesitation in coming to the conclusion that the order of transfer dated 23rd September, 1983 was issued in colourable exercise of power merely to accommodate the respondent No. 4 Dr. Patil. It is no doubt true that the Government has power to transfer its employee employed in a transferable post but this power has to be exercised *bona fide* to meet the exigencies of the Administration. If the power is exercised mala fide, then obviously the order of transfer is liable to be struck down.

5. A provision for transfer is intended to check creation of vested interest, nepotism and corruption. It is true that nobody has a right to say that he cannot be transferred without his consent. However, like any other Executive or administrative power, the power of transfer must

be exercised in good faith and as per the guide lines laid down in that behalf. The Government is bound by its own policy decision and must enforce it faithfully. While implementing the policy it cannot pick and choose. It is equally true that such executive instructions of a policy decision cannot confer any enforceable legal right nor an order issued in breach of it, will become per se illegal. These instructions could be directory in nature. There could be exceptions to the general rule due to exigencies of service or due to some administrative reasons, but the exception cannot be permitted to become a rule. It is equally well settled that Courts should not interfere with the orders of transfers, which are issued in the exigencies of service and in discharge of administrative or executive power. However, if the order is issued in mala fide or in colourable exercise of power then the Court is bound to interfere, since the mala fide exercise of power is not considered to be legal exercise of power. Once a policy is laid down by the Government it must apply equally to every employee. In this context a reference could usefully be made to the observations of the Supreme Court in *Ep. Royappa v. State of Tamil Nadu and Others*<sup>1</sup>, which reads as under :

"Art. 16 embodies the fundamental guarantee that there shall be equality of opportunity for all citizens in matters relating to employment or appointment to any office under the State. Though enacted as a distinct and independent fundamental right because of its great importance as a principle ensuring equality of opportunity in public employment which is so vital to the building up of the new classless egalitarian society envisaged in the Constitution, Article 16 is only an instance of the application of the concept of equality enshrined in Article 14. In other words, Article 14 is the genus while Article 16 is a species. Article 16 gives effect to the doctrine of equality in all matters relating to public employment. The basic principle which therefore, informs both Articles 14 and 16 is equality and inhibition against discrimination. Now, what is the content and reach of this great equalizing principle ? It is a founding faith, to use the words of Bose, J., 'a way of life' and it must not be subjected to a narrow pedantic or lexicographic approach. We cannot countenance any attempt to truncate its all embracing scope and meaning, for to do so would be to violate its activist magnitude. Equality is a dynamic concept with many aspects and dimensions and it cannot be 'cribbed, cabined and confined' within traditional and doctrinaire limits. From a positivistic point of view, equality is antithetic to arbitrariness. In fact equality and arbitrariness are sworn enemies, one belongs to the rule of law in a republic while the other, to the whim and caprice of an absolute monarch. Where an act is arbitrary, it is implicit in it that it is unequal both according to political logic and constitutional law and is therefore violative of Article 14, and if it effects any matter relating to public employment, it is also violative of Article 16. Articles 14 and 16 strike at arbitrariness in State action and ensure fairness and equality of treatment. They require that State action must be based on valid relevant principles applicable alike to all similarly situate and it must not be guided by any extraneous or irrelevant considerations because that would be denial of equality. Where the operative reason for State action, as distinguished from motive inducing from the antechamber of the mind, is not legitimate

and relevant but is extraneous and outside the area of permissible consideration. It would amount to mala fide exercise of power and that is hit by Articles 14 and 16. Mala fide exercise of power and arbitrariness and different lethal radiations emanating from the same vice, in fact the latter comprehends the former. Both are inhibited by Articles 14 and 16."

These observations of the Supreme Court equally apply to the policy regarding the transfers of public servants. 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

<sup>1</sup> AIR 1974 SC 555

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 of 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. Frequent unscheduled and unreasonable transfer can uproot a family, cause irreparable harm to the employee and drive him to desperation. It disrupts the education of the children and leads to numerous other inconvenience and problems and results in hardship and demoralization. Therefore, the policy of transfer should be reasonable and fair and should apply to everybody equally. 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 interests. That is why we find that even from the time of British Rule the general policy has been to restrict the period of posting for a definite period. The position of Class III and Class IV employees is somewhat different. Therefore taking into consideration this salient feature of a good, efficient and smooth administration, the Government rightly decided to lay down general policy in relation to transfers. It has also specified the procedure for the same. Such a policy is helpful to streamline the administration. An accommodation on personal grounds for a short period of one year or so, can very well be appreciated but an employee who avoided normal transfers or manoeuvres to get it cancelled can safely be styled as an employee who is not willing to serve anywhere in the State, which is one of the essential conditions of service. Dr. Patil respondent No. 4 is a glaring example, of this. He wanted to stick to Bhusawal only. In case of such an employee, the Government will be well advised to take a note of this in his confidential service records, since this circumstance is relevant for deciding the question of his promotion etc. Such a rule will also help to check unwanted and unwarranted interference in the administration. We are constrained to make these observations since this Court is flooded with writ petitions wherein allegations of mala fides,

nepotism and political interference are made in the matters of transfers. It is no doubt true that the allegations of mala fides, are often more easily made than proved and it is easy to make such allegations but difficult to prove. But it cannot be forgotten that when Government departs from its avowed policy, and issues orders of transfer or its cancellation in an unusual manner, then people get an opportunity to make allegations of mala fides. We feel that this all can very well be avoided if an uniform policy is laid down and scrupulously followed. The case in hand is a telling example of flagrant abuse of power. In our opinion it is now high time, that the Chief of the Administrative machinery should personally took into the matter and stop this abuse of power.

6. It is contended by the petitioner that the normal practice, followed in the matters of transfer, is that an employee is normally transferred after a period of three years and that too before the beginning of rainy season or academic session. This position is not disputed by respondents. This period of 3 years is prescribed so as not to unsettle an employee and his family every now and then. Both these guidelines are therefore obviously in the interest of Administration. However, it is contended by the learned counsel for the petitioner, that in some cases an employee is retained at the same station for several years, obviously if he has a Godfather and in some cases employees are shunted out every now and then if they have no Godfathers. The learned counsel has gone to the extent of contending that there are several Government servants in Bombay who are never transferred in the whole of their service career. They carry out their duties of implementing various welfare schedules, in the remote villages, by sitting in ivory towers of Secretariat like their predecessors, the British bureaucrats. They are prone to pressures and political influences and are issuing such orders in mala fide and colorable exercise of power to gain favors or to save their skin. They are not conversant with the plight of a person who is transferred mid-term or frequently. There are many officers who are never transferred much less to mofussil places. Thus the policy of transfer is being used merely to harass those employees who have no Godfathers or pulls at the higher level. This criticism is far fetched and has no foundation in the record before us, therefore we are not impressed by it. However, so far as the case in hand is concerned, we are satisfied that the midterm transfer of the petitioner was effected only to accommodate Dr. Patil respondent No. 4 and was therefore wholly mala fide. Therefore we have no other alternative but to quash the impugned order of transfer dated 23rd of September, 1983. We do not think the we are hoping too much in asking the Government to adhere to its guidelines and not to exercise the power mala fide. In the result therefore, Rule is made absolute. However in the circumstances of the case there will be no order as to costs. A copy of this judgment be sent to the Chief Secretary, Government of Maharashtra for information.