

Somesh Tiwari vs Union Of India & Ors on 16 December, 2008

Equivalent citations: AIR 2009 SUPREME COURT 1399, 2009 (2) SCC 592, 2009 AIR SCW 854, 2009 LAB. I. C. 1005, 2009 (1) SCALE 63, (2009) 3 MAD LJ 727, (2009) 2 SCT 39, (2009) 3 SERVLR 506, (2009) 1 SCALE 63, (2009) 1 ESC 124

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Bench: S.B. Sinha, Cyriac Joseph

REPORTABLE

IN THE SUPREME COURT OF INDIA

CIVIL APPELLATE JURISDICTION

CIVIL APPEAL NO. 7308 OF 2008
(Arising out of SLP (Civil) No. 3516 of 2007)

Somesh Tiwari

.... Appellant

Versus

Union of India and others
Respondents

....

JUDGMENT

S.B. SINHA, J.

Leave granted.

1. A short but an interesting question that arises for consideration in this appeal is as to whether the High Court while quashing an order of transfer passed against the appellant was correct in directing that he would not be entitled to salary for the period commencing 15 days after the modified order of transfer to Ahmedabad was passed till the date he again joined his duties at the original place.

2. The basic fact of the matter is not in dispute. Appellant is an officer of Indian Revenue Service. He was posted as a Deputy Commissioner of Central Excise at Bhopal.

3. Inter alia, on the premise that the employees posted at the Bhopal office of the respondents apprehending disciplinary as also criminal proceedings at the hands of the appellant on the basis of the reassessment of the files undertaken by him, an anonymous complaint was made alleging caste-bias on his part, pursuant whereunto an order of transfer was passed against him on or about 22nd August, 2005.

4. Prior thereto he had filed a representation stating that, as he had been undergoing some treatment, he should be retained at Bhopal. Appellant, however, contended that in view of the fact that he had taken action against some erring officers, they were instrumental in sending the said anonymous letter on the basis whereof no action should have been taken in the light of the circular letters issued by the Central Vigilance Commission.

5. It is, however, accepted that an enquiry was conducted by an Assistant Commissioner, Directorate of Vigilance, into the said anonymous complaint wherein allegations made against the appellant were not found to be true but still recommendations were made that he be transferred from Bhopal. Only on that basis he was transferred to Shillong.

6. He indisputably made a representation praying that on compassionate and humanitarian grounds, he may be retained at Bhopal for at least one year. The said representation was not responded to.

7. In the aforementioned factual backdrop, he filed an O.A. before the Central Administrative Tribunal, Jabalpur Bench which was marked as O.A. No. 897 of 2005. By an order dated 27th September, 2005, having regard to the fact that the representation filed by the appellant had not been disposed of by the authorities of the respondents, it was directed :-

"4. Accordingly, we direct the Respondent No.2 to consider and decide the representation of the applicant dated 29th August, 2005 (Annexure A-5) and take a decision by passing a speaking, detailed and reasoned order within a period of 4 weeks from the date of receipt of a copy of this order. Till the decision is taken by the Respondent No.2 on the representation of the applicant, he will not be disturbed from the present place of posting. The learned counsel for the applicant is directed to send a copy of this order as well as the copy of the petition to the Respondent No.2 immediately."

8. By an order dated 19th October, 2005 the said representation was rejected.

9. Another representation was filed by the appellant on or about 25th October, 2005, stating :-

"I don't know whether any/some adverse report (reports) were sent by this Commissionerate or by Chief Commissioner office because if there were complaints against me, those were neither communicated to me nor I was given any opportunity to hear. It would not be surprising if any adverse report/reports were sent against me in such atmosphere of conspiracy against me.

Hence it is my humble pray that if any report/reports were sent by this office of Chief Commissioner office or Board or other forum, concerned file be shown to me along with supply of documents (i.e. copy of the complaints, proceedings of enquiry, enquiry report etc.). If no enquiry or complaint, that also be intimated to me through the letter so that I can prove my innocence before the Hon'ble Court (in case board turns down my representation inspite of direction given by CAT Jabalpur) or before 28.10.2005 which is earlier."

10. As the said representation was rejected by an order dated 27th October, 2005, appellant filed another O.A. before the Central Administrative Tribunal, Jabalpur, being O.A. No.1042 of 2005.

11. Indisputably during the pendency of the said O.A., respondents while considering the matter of promotion, posting and transfer in the grade of the Assistant Commissioner of Customs and Central Excise, passed order dated 28th December, 2005 inter alia transferring/posting on administrative consideration, transferred the appellant from Shillong to Ahmedabad. An application for amendment of the O.A. was thereafter filed, which was allowed.

12. The orders under challenge before the Tribunal were, thus, the orders dated 22nd August, 2005 ; 19th October, 2005 and 28th December, 2005.

13. Inter alia on the premise that the appellant had not reported at Ahmedabad and furthermore that the order of transfer was an administrative one, the Tribunal by its order dated 14th March, 2006 held :-

"19. On perusal of the records, I find that the order of transfer is on administrative exigencies. The applicant has All India transfer liability. An order of transfer should normally be eschewed and should not be countenanced by the Tribunal as though they are Appellate Authorities over such orders, which could assess the niceties of the administrative needs and requirements of the station concerned. This is for the reason that Tribunals cannot substitute their own decisions in the matter of transfer for the of (sic) competent authorities of the State and even allegations of malafide when made must be such as to inspire confidence in the court or as based on concrete materials and ought not to be entertained on the mere making of its or on consideration borne out of conjectures or surmises and except for strong and convincing reasons, no interference could ordinarily be made an order of transfer.

20. Since the applicant's request has been considered and he has been transferred from Shillong to Ahmedabad, even then the applicant has not reported for duty at Ahmedabad and he is still challenging the order of transfer (A-1). The applicant has been transferred under the modified order and the earlier orders merge with the present modified order. The applicant did not honor the impugned modified order of transfer. Now he is asking for recasting of the original order dated 22.8.2005 including the modified order. I find that there are no allegations against any impugned order of transfer is an administrative order. The authorities can extract

service of the applicant wherever they want. When the action of the Respondents is within their purview, I am not inclined to interfere with the impugned orders.

21. I considered the averments made in the pleadings and also the arguments of the learned counsel for the parties. I am of the considered view that there is no illegality or irregularity committed by the Respondents while passing the impugned orders. They have exercised their powers within their purview. The Tribunal need not interfere with the impugned orders. The applicant has not made out a case for grant of reliefs and accordingly the OA is dismissed. No costs."

14. Aggrieved by and dissatisfied therewith appellant filed a writ petition before the High Court of Madhya Pradesh at Jabalpur. As during the pendency of the said writ petition, a disciplinary proceeding was initiated against the appellant on the premise that he had not joined the post at Ahmedabad, the High Court passed an interim order on 17th April, 2006, directing :-

"since the transfer of the petitioner to Ahmedabad is sub-judice in this Court, for the time being disciplinary authority will not take any disciplinary action against the petitioner."

15. The High Court by reason of the impugned judgment and order dated 25th September, 2006 while opining that the order of transfer could not be passed on the basis of an anonymous complaint, which on enquiry having been found to be incorrect, held :-

"Though, when individually considered, the impact of the incorrect mention of the fact that the petitioner belongs to Madhya Pradesh and does not know English in the order rejecting the Petitioner's representation, except for indicating the extent of absence of application of mind by the respondents, is not fatal. However, the transfer of the petitioner on the ground that he apparently gave an impression that he worked on caste-biased ideology, in spite of the fact of recording a finding in the negative in the discreet inquiry conducted into the anonymous complaint would shock the conscience of any reasonable man to say the least."

It was furthermore opined that as the allegations of having a caste- bias were not found to be true, the order of transfer having been issued by way of punishment was unjustified, stating :-

"It is no doubt true that the petitioner or any other member of an All India Service can be transferred to any place (sic) country and is obliged and duty bound to comply with the same, but to transfer him on the ground that some unidentified colleague feels that he is a caste is (sic), in other words only because he belongs to a particular caste, is in violation of his fundamental rights under Article 14, 15(1) and 16(2) of the Constitution of India and is also stigmatic as it would label and identify him, without adjudication or justification, as a person who works on caste- bias for all times to come and would make him vulnerable to all and any such further anonymous complaints as whatever place he is posted and could be used as a convenient tool to

take any action against him or move him out as and when desired, by any person. Such an action also makes serious inroads into the personal rights of the petitioner as an individual as well as his fundamental rights of the petitioner as an individual as well as his fundamental rights, as the petitioner has apparently been transferred for having a working association with certain colleagues who happen to belong to his caste and which apparently has not found favour with the respondents, thereby giving a clear message to the petitioner to abstain from having any such relation with persons belonging to his own caste in future. The impugned order, if permitted to stand, would amount to opening a Pandora's box and would let loose the very evil that the Constitution seeks to contain and eradicate."

16. While striking down the order of transfer by invoking the principle of 'Wednesbury Unreasonableness', it was directed :-

"25. At this stage, it is to be noted that the petitioner in spite of being transferred from Bhopal to Ahmedabad has not gone and joined his place of posting till date and that there is an interim order of this Court preventing the respondents from taking any disciplinary action against the petitioner for not joining his place of posting at Ahmedabad. Under the circumstances while we quash the order of transfer of the petitioner from Bhopal to Ahmedabad we feel constrained to direct that the petitioner shall not be entitled to salary for the period commencing fifteen days after the modified order of transfer to Ahmedabad i.e. the order dated 28.12.2005 till the date he again joins duties at Bhopal."

17. Mr. B.S. Rajesh Agrajit, learned counsel appearing on behalf of the appellant, submitted that keeping in view the fact that the High Court despite arriving at a finding that the order of transfer was mala fide and an abuse of the process of the court, could not have directed that he be not paid his salary for the period commencing 15th days after the modified order dated 28th December, 2005 was passed till he joined the post, and thus the impugned judgment of the High Court is wholly unsustainable as no reason has been assigned in support thereof.

18. Mr. Wasim A. Qadri, learned counsel appearing on behalf of the Union of India, however, took us through the entire records and submitted that as despite the fact that no order of stay was granted by the Tribunal, the appellant did not join his post at Ahmedabad, the High Court was correct in its view for invoking the principle of 'no work no pay'. It was argued that an order of transfer, unless set aside, remains valid in law and in that view of the matter, it was obligatory on the part of the appellant to join his post at Ahmedabad so as to allow the respondents to take work from him.

19. Indisputably an order of transfer is an administrative order. There cannot be any doubt whatsoever that transfer, which is ordinarily an 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.

20. 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.

21. An enquiry was initiated against the appellant in terms of the allegations contained in an anonymous letter. Having regard to the directives of the Central Vigilance Commission, no enquiry could have been initiated against him but it is beyond any doubt or dispute that in the said enquiry, the allegations were found to be untrue.

Despite the same not only an order of transfer was passed but to a station, which, according to the respondents themselves, was 'harsh'.

The competent authority of appellant did not consider his initial representation. Admittedly an order of stay was passed by the Central Administrative Tribunal while disposing of O.A. No. 897 of 2005 dated 27th September, 2005.

By reason of the said order passed by the Central Administrative Tribunal, it was obligatory on the part of the respondents to dispose of his representation. When it was rejected, he filed a fresh Original Application.

22. Indisputably he did not join his post at Shillong. We, although, are of the opinion that the appellant, thus, should have joined at his transferred post, he did not do so as a result whereof he might have committed a misconduct. But while invoking the doctrine of 'no work no pay', as urged by Mr. Quadri, the superior courts must strike a balance. With a view to do justice to both the parties, the court was required to consider the conduct of both the parties.

Respondents knew that the matter was pending before the Tribunal. They did not approach the Tribunal to obtain leave for passing the second order of transfer. They passed an order of transfer while considering the cases of promotion and transfer of a large number of officers. The order of transfer suffered from a total non application of mind in so far as it proceeded on the premise that the appellant had already joined his post at Shillong. Even it was not stated that the said order of transfer was being passed in modification of the earlier order of transfer or upon reconsideration of the matter afresh on humanitarian ground or otherwise. We may place on record an extract from the note sheet of Member (P&V) dated 31st October, 2005 which reads as under :-

"AC(P) (i.e. petitioner) has tried to fix responsibility on some superintendents for loss/closure of some files about investigations against assessees, those superintendents, who happened to belong to SC/ST category on being thus pressured, has complained to the police and other agencies alleging harassment of backward classes by Sh. Somesh Tiwari, a Brahmin, these complaints were found to be baseless and the police had not pursued the matter. Having failed at the local level

it is possible that these officers had lodged the complaint at Delhi which resulted Sh. Tiwari's transfer. Sh. Tiwari is an honest and well intentioned officer..... It is proposed to give him less harsh posting."

(Emphasis supplied)

23. Removal of the appellant from Bhopal to a place which is 'less harsh' was thus recommended, which had evidently been acted upon. It is thus demonstrable that 'Shillong' was considered to be a harsh posting.

24. For appreciating the effect of such an order, we may also notice the order dated 19th October, 2005 which has been reproduced by the High Court in its impugned judgment, the relevant portion whereof reads thus :-

"2. As per Para 9.1 of the New Transfer Policy, Government may, if necessary in public interest, transfer or post any officer to any station or post. Para 9.2 of the policy stipulates that, an officer against whom the CVC has recommended initiation of vigilance proceedings, should not normally be posted or remain posted at the station where the cause of the vigilance proceedings originated. He shall also not be posted on a 'sensitive' charge. This restriction will remain in operation till such time the vigilance matter is not closed.

3. In the case of Shri Tiwari, he belongs to Madhya Pradesh and on enquiry into complaint of working on caste-biased ideology he was to be over-dependent upon a set of officers, apparently giving an impression that he (is) working on caste-

biased ideology. These circumstances have necessitated his transfer from Bhopal Central Excise Commissionerate to Shillong Commissionerate."

25. No vigilance enquiry was initiated against him. The order of transfer was passed on material which was not existent. The order, therefore, not only suffers from total non application of mind on the part of authorities of respondent No.1, but also suffers from malice in law.

26. The High Court while exercising its jurisdiction under Article 226 of the Constitution of India must consider the fact of each case. Mechanical application of the normal rule "no work no pay" may in a case of this nature, be found to be wholly unjust. No absolute proposition of law in this behalf can be laid down.

27. This Court in Commissioner, Karnataka Housing Board v. C. Muddaiah, [(2007) 7 SCC 689] laid down the law, thus :-

"32. The matter can be looked at from another angle also. It is true that while granting a relief in favour of a party, the Court must consider the relevant provisions of law and issue appropriate directions keeping in view such provisions. There may,

however, be cases where on the facts and in the circumstances, the Court may issue necessary directions in the larger interest of justice keeping in view the principles of justice, equity and good conscience. Take a case, where ex facie injustice has been meted out to an employee. In spite of the fact that he is entitled to certain benefits, they had not been given to him. His representations have been illegally and unjustifiably turned down. He finally approaches a Court of Law. The Court is convinced that gross injustice has been done to him and he was wrongfully, unfairly and with oblique motive deprived of those benefits. The Court, in the circumstances, directs the Authority to extend all benefits which he would have obtained had he not been illegally deprived of them. Is it open to the Authorities in such case to urge that as he has not worked (but held to be illegally deprived), he would not be granted the benefits? Upholding of such plea would amount to allowing a party to take undue advantage of his own wrong. It would perpetrate injustice rather than doing justice to the person wronged.

34. We are conscious and mindful that even in absence of statutory provision, normal rule is 'no work no pay'. In appropriate cases, however, a Court of Law may, nay must, take into account all the facts in their entirety and pass an appropriate order in consonance with law. The Court, in a given case, may hold that the person was willing to work but was illegally and unlawfully not allowed to do so. The Court may in the circumstances, direct the Authority to grant him all benefits considering 'as if he had worked'. It, therefore, cannot be contended as an absolute proposition of law that no direction of payment of consequential benefits can be granted by a Court of Law and if such directions are issued by a Court, the Authority can ignore them even if they had been finally confirmed by the Apex Court of the country (as has been done in the present case).

The bald contention of the appellant-Board, therefore, has no substance and must be rejected."

28. We, keeping in view the fact, that on the one hand the appellant did not join his posting at Ahmedabad, although no order of stay was passed and on the other wholly unwarranted and reprehensible conduct on the part of the authorities of the respondents, are of the opinion that interest of justice would be subserved if during the period from 28th December, 2005 till his joining his post at Bhopal, the appellant is treated to be on leave and the respondents are directed to pass an appropriate order invoking the leave rules applicable in this behalf. It is ordered accordingly.

29. The impugned judgment of the High Court is modified to the aforesaid extent. The appeal is allowed to the aforementioned extent. Respondents shall bear the cost of the appellant counsel's fee assessed at Rs.50,000/-.

.....J. (S.B. SINHA)J. (CYRIAC JOESPH) New Delhi December 16, 2008