

**IN THE GAUHATI HIGH COURT  
(HIGH COURT OF ASSAM, NAGALAND, MIZORAM & ARUNACHAL PRADESH)**

**ITANAGAR PERMANENT BENCH**

**WP(C)76(AP)2017**

Shri Takar Mara,  
Chief Engineer, (Power), Central Electrical  
Zone, Department of Power, Government of  
Arunachal Pradesh, Itanagar.

**.....Petitioner**

**By Advocates:**

Mr. Kento Jini  
Mr. T. T. Tara  
Mr. Tamar Gadi  
Mr. Binter Picha  
Mr. J. Jini

**-Versus-**

1. The State of Arunachal Pradesh represented by the Chief Secretary to the Government of Arunachal Pradesh, Itanagar.
2. The Commissioner of Power, Govt. of Arunachal Pradesh, Itanagar.
3. Shri Bar Takum, Superintendent Engineer (Electrical), Ziro, Department of Power, Lower Subansiri District, Government of Arunachal Pradesh, Itanagar.
4. Shri Tamiyo Taga, Hon'ble Minister Power, Govt. of Arunachal Pradesh, Itanagar.

**.....Respondents**

**By Advocates:**

Mr. Subu Tapin, Senior Government Advocate  
Mr. Gimi Tarak  
Mr. T. Garam  
Mr. S. Tada  
Ms. L. Asha

**:::BEFORE:::**

**HON'BLE MRS. JUSTICE RUMI KUMARI PHUKAN**

**Dates of hearing : 17.03.2017**

**Date of Judgment & Order : 19.04.2017**

### **JUDGMENT & ORDER(CAV)**

Heard Mr. Kento Jini, learned counsel for the petitioner. Also heard Mr. Subu Tapin, learned Senior Government Advocate, appearing for the State Respondents (Respondent Nos. 1 and 2), Mr. Gimi Tarak, learned counsel appearing for respondent No.3 and Mr. Ninnong Ratan, learned counsel appearing for respondent No.4.

**2].** The writ petitioner is a Chief Engineer (Power) Central Electrical Zone, Department of Power, Govt. of Arunachal Pradesh and he was promoted to the said post in the year 2012. The petitioner was visited with the impugned transfer and posting order vide Memo No.PWRS/E-2313/2012/307-19 dated 17.2.2017 issued by the Commissioner of Power, Govt. of Arunachal Pradesh, Itanagar whereby the petitioner has been transferred and posted attached officer to Hon'ble Minister Power as Technical Adviser. The grievances raised by the petitioner that by the impugned order he has been attached to a non-sanctioned post and non-existent post (as per information obtained through RTI) that too by bringing one Superintending Engineer/ Respondent No.3 in his place without any promotion to the post and he has been assigned the additional charges of the Chief Engineer which is presently holding by the petitioner. The post of Chief Engineer is a promotional post and replacing the respondent No.3 to the post of petitioner is stated to be most illegal because as per service jurisprudence an officer can be replaced by another officer of the same rank but definitely not by subordinate officer. Over and above, the instant transfer order has been assailed on different count that as per policy decision of the Govt. vide order dated 2.6.1998 no transfer should take place in the last three months of financial year and the respondent authority has very discouraging manner by violating the above circular issued the transfer order under some political interference. Two representations filed by the petitioner before the respondent authorities received no response, hence the present petition has been filed.

**3].** It has also been contended that as per OM No.Govt.-AP/2015 dated 10.2.2016 and O.M. No. CS (PR)(1)/2016 dated 11.2.2016 the functional posting of officers from lower post to higher post have been stopped but by violating the aforesaid directions the respondent no.3 is allowed to function as a Chief Engineer. Moreover, transfer cannot be made from one cadre to another cadre unless the permission is obtained from the incumbent. Accordingly it is the case of the petitioner the respondent

authority has acted arbitrarily, whimsically and unreasonably by posting the petitioner as Technical Adviser to Hon'ble Minister(Power) against non-sanctioned post, there being no necessity to issue such illegal order. Moreso, the impugned order has been issued at the best of respondent No. 4, within few days of assuming his duties as Minister of Power and entire matter processed purely on the basis of U.O. Note issued by the respondent No. 4, only to accommodate the respondent No. 3, there being no public interest while issuing the same.

**4].** The petitioner is still holding and discharging the post of Chief Engineer, Power Central Electrical Zone so it is prayed to the respondent authorities to allow the petitioner to continue his post without any disturbance, in view of the above backdrops.

**5].** So far as the contention of the State Respondent Nos.1 and 2, it has been submitted(in their affidavit-in-opposition), that although the post of Technical Adviser is not a sanctioned post but the same is an existing post by virtue of the prerogative of the Govt. as a matter of policy decision in the interest of public service. The State Govt. takes various policy decisions in order to bring and implement various special projects, and the Hon'ble Minister of Power who is not from the technical field is in constant need of add and advice in initiating and taking up various decisions. The petitioner being senior person has been placed in the post of Technical Adviser in the public interest and in doing so, petitioner has not been prejudiced in any manner as his status in the rank of Chief Engineer has not been disturbed. Further the senior most Superintending Engineer/Respondent no.3 has been temporarily allowed to take charge of the Chief Engineer for greater interest of the Department and it does not amount to superseding the charges of Chief Engineer. Moreover, the representation filed by the petitioner is devoid of merit as it is a temporary arrangement of the Govt. concerned and it does not violate the transfer.

**6].** Regarding the posting of respondent no.3 it has been submitted that the instant temporary arrangement is not made in the form of officiating/functional basis or out of turn promotion basis, but he has been just endorsed to look after the works of the petitioner for the reasons mentioned above. The respondent no.3 being the senior most from the next lower cadre can be given the charge during administrative

exigency. Further it is contended that the Hon'ble concerned Minister has every right to add an advice the placement of employee for streamlining the department for a public interest. In the matter of transfer and posting the guidelines does not give enforceable right to an employee which is always subject to action taken in the public interest. The petitioner herein has already completed normal tenure of posting for two years and he has not been transferred from one place to another place and he is in the same office premises and as such there is no question of malafide.

**7].** On the next, the respondent No.3 is the person who has been allowed to look after the charge of the petitioner who has also filed affidavit in opposition supporting the impugned transfer order. He has opposed the contention raised by the petitioner that he has been brought illegally without promotion and assigned the charge of Chief Engineer. It submits that he is one of the senior most Superintending Engineer deserving promotions to the post of Chief Engineer since 21.03.2015 and the impugned order is stated to be a temporary arrangement keeping in view the large number of flagship projects that has been sanctioned by the Govt. of India and the Minister of power requires the guidance and experience of senior officer like petitioner for which the impugned order has been issued in the greater public interest. It is not a case of out of turn promotion and /or functional posting of respondent no.3 as has been contended by the petitioner. Supporting the affairs of the Minister of Power it has been contended that only for streamlining the functioning of department as well as to implement the schemes. Such arrangement has been made and there is no violation of Govt. order as has been indicated by the petitioner. Lastly, it is submitted that in pursuance of the impugned transfer order dated 17.02.2017 he has already submitted his joining letter on the same day i.e. on 17.02.2017 and assumed charged of Chief Engineer on 23.02.2017, before passing of stay order by this Court and as such petition is liable to be dismissed.

**8].** No affidavit-in-opposition has been filed on or behalf of respondent no.4. The learned counsel appearing on behalf of respondent no.4, Mr. Ratan, had made his verbal submission on the basis of official file that has been produced before this Court. Supporting the case of the other respondents (as has been narrated in their affidavit-in-opposition), it has been submitted that private respondent No.3 was temporarily assigned to look after the duties of the petitioner. Being the Minister of the concerned

department, he has every right to enter into the affairs of the department for smooth functioning as well as proper implementation of the schemes of the Govt. through proper person/officer. The petitioner has no enforceable right to challenge the affairs of the Minister of Powers, who holds the field in his department.

**9].** As against the stand taken by the respondents, the petitioner herein choose to file affidavit-in-reply wherein it has been specifically contended that as admittedly there is no sanction post of Technical Adviser to the Minister then how the respondent authorities can say that the Technical Adviser post is in existent, which is not only illogical but also confusing. It is urged that respondent no.3 though may be senior most Superintending Engineer but he cannot be given the promotion post by throwing out the higher senior officer to a non-existent post (misnomer). All other averments are repetitions of the petition.

**10].** As regards the Office Memorandums dated 10.02.2016 and 11.02.2016 which have been mentioned by the petitioner vide Annexure-4 series, it can be found that the Government of Arunachal Pradesh, by the said Office Memorandums, has made a direction that no officiating posting or promotion outside the merit/seniority on functional basis, should be allowed to junior level functionaries. In that regard, the Chief Secretary to the Government of Arunachal Pradesh, Itanagar, had issued the following guidelines vide O.M. dated 11.02.2016:

**"3. It has been decided that henceforth, no officiating/functional promotion outside the seniority/merit would be allowed to any junior level functionaries of any Dept/Organizations/Offices of the Government of Arunachal Pradesh. In case, any officiating/functional arrangement is required to be made for a short period in exceptional circumstances, the same may be considered only as an exception for which written approval of the Chief Secretary has to be obtained in advance.**

**4. Meanwhile, it is hereby directed that all irregular officiating/functional appointments and out of turn promotions made are to be cancelled forthwith and the lower level functionaries must be reverted back from the irregularly appointed higher posts to the original substantive posts from which they were promoted/appointed on officiating/functional basis. Therefore, all Pri.**

***Secretaries/Secretaries & Heads of Departments are directed to comply the above instructions accordingly with intimation to the Secretary to the Governor for information of HE.***

***5. Compliance report on the above instructions should be submitted within 10 days of receipt of the OM."***

**11].** Again as per the Circular dated 02.06.1998 issued by the Department of Personnel, Government of Arunachal Pradesh, wherein, it has been clearly reflected in 1(d) and (e) that officers should not be transferred one year before retirement as it may affect preparation of their pension papers, etc., and that no transfer should take place in the last three months of the financial year.

**12].** Mr. Jini, learned counsel for the petitioner, has basically centred around his argument under contention that impugned transfer order has been issued most arbitrarily undermining the long experience and expertise of senior officer like petitioner, that too, he has been forcefully thrown to a non-existent and ex-cadre post and replaced by a junior officer without taking any consent of the petitioner, at the behest of the respondent No. 4 only to accommodate respondent No. 3, while the petitioner is at the verge of superannuation. Further, deliberation of the learned counsel for the petitioner, is that, at best, could have been posted to other post of similar rank and the respondent authorities by flouting their own govt. Circular has allowed the respondent No. 3 to officiate, the promotional post.

**13].** In support of the contention that the transfer outside the cadre cannot be effected without the consent of the transferee, the learned counsel for the petitioner has referred the decision of ***2002 (3) GLT 646 (R. Thansanga -vs- State of Mizoram & ors.); 2008 (2) GLT 718 (T. Thoiva Singh-vs- State of Manipur & Ors.); and 2013 (1) GLT 267 (M. Imomacha Singh -vs- State of Manipur & ors.)***.

**14].** Further, the learned counsel has referred the decisions as reported in ***Sarvesh Kumar Augusty -vs- Jal Nigam (2003) 11 SCC 740***, and ***1993 (4) SCC 357***, wherein, it has been held that the transfer orders required to be affected on the basis of set norms of guidelines. The power of transferring an officer cannot be wielded arbitrarily, *mala fide* or an exercise against efficient and independent officer or at the instance of politicians. Similarly, in another decision referred by the learned counsel for the

petitioner **2012(4) GLT 808 (M. Imomacha Singh -Vs- State of Manipur & Ors.)**, wherein, it has been held that while making temporary arrangement to hold the charge of promotional post, a junior officer cannot be allowed to hold the charge as long as senior officer is available.

**15].** As against the contention that has been raised by the respondent side that the status of the petitioner not affected by the impugned order, it has been submitted by the learned counsel for the petitioner that the mere fact the post of the petitioner carried the same scale of pay is not enough in judging that the status of the petitioner as Chief Engineer and the Technical Adviser are equivalent post. The true criteria for equivalence is the status and nature of responsibility of the duties attached to the two posts. It has been vehemently urged that while the post of Technical Adviser is a non-existent post, all averment made by the respondents is of no substance and accordingly, the impugned transfer order, though it has been termed as a temporary arrangement can no way illegally sustainable.

**16].** Per Contra, the contention of the learned counsel for all the respondents is that the transfer being within the power of government in terms of FR 11 & 15, the petitioner cannot challenge the impugned order, by which he has been transferred as Technical Adviser to the special project. In this respect, the learned counsel for the respondent No. 4 has referred the decision **1993 (4) SCC 357 Union of India & ors. - vs- S.L. Abbas**. The learned counsel for the respondent Nos. 1 and 2 Mr. Ete, learned Sr. Addl. Advocate General by relying decision of the **(E.P. Rovappa-vs-State of T. N. ) 1974 (4) SCC 3, Union of India -vs- S.L. Abbas 1993 (4) SCC 357, N. K. Singh-vs- Union of India, 1994 (6) SCC 98, 2011 (4) GLT 724, State of Assam-vs- Dilip Kr. Sharma, 2008 (2) GLT 786**, it has been contended that an order of transfer is an incident to the govt. Service and a govt. Servant is at the disposal of the government and merely because the order has been made at the behest of the minister of the concerned Department, the petitioner cannot challenge the transfer order unless such decision is vitiated by *mala fide* or infraction of any professed norms or principle governing the transfer. Accordingly, it has been contended that the Minister of the concerned Department, who is well aware about the status of officers of the Department has rightly decided the matter of posting of petitioner and the Court has limited power for judicial review in such matter of transfer.

**17].** The learned counsel for the respondent No. 3 has also justified the impugned order on the ground that it is a temporary arrangement for streamlining the function of the Department and there is no necessity to interfere into the aforesaid order.

**18].** I have considered the rival contention of both the parties and gone through the documents annexed as well as perused official file that has been produced. It appears from the official file No. PWRS/E-2313/2012 that has been produced before the Court that the Minister of Power and Industries himself moved the Office Note on 13.02.2017 as follows:-

***"It has been noticed that the Chief Engineers of Western and Central Electrical Zone have to visit New Delhi very frequently for undertaking medical check up after undergoing major surgeries in the recent past which effect the functioning of Zonal Officers. Since, we are in the flag end of financial year and therefore, in the interest of work, it is proposed to allow the following Sr. Superintending Engineers of Power (Elect.) Department to look after the charges as below with immediate effect"***

1. Shri Gumdo Doji, SE (E) to look after the charges of western electrical zone.
2. Shri C.T. Namchoom, SE (E) Miao to look after the charges of Chief Electrical Inspector in addition to his present assignment.
3. Shri Bar Takum, SE (E) Ziro to look after the Charges of Central Elect. Zone.
4. Shri Rubu Tago, SE (Elect.), Nlg to look after the charges of SE (Elect.) Ziro in addition to his present assignment.

While doing so we may advise both the incumbents Chief Engineers (Power) of WEZ and CEZ to avail leave on medical ground till such time they became fit enough to discharge their duties upto the desired level and make them OSD/technical to Minister/HCM.

**19].** On approval of the aforesaid proposal, the impugned transfer order was issued on 17.02.2017, whereby the petitioner has been appointed as Technical Adviser to the Hon'ble Minister(Power). The aforesaid order itself reveals that it is a pure matter of transfer although the word temporary arrangement has been used. It is also undisputed facts that the post of Technical Adviser is non-existent post at the time of passing the order till date. In that view of the matter, the impugned transfer order is palpably illegal and cannot be sustained in law. This warrants interference of

the Court and on the ground alone, the impugned transfer order can be quashed and set aside, without going to all other contentions raised by the learned counsel for the petitioner.

**20].** However, this Court deem it fit to discuss the other important feature of the case of the respondent. It is the plea of the respondent in their affidavit that the petitioner herein has been temporarily allowed to the post of Technical Adviser to the Special Project in the public interest for implementation of project. But such plea is found quite contradictory after going through the relevant file of the Department that has been produced before this Court (as mentioned above). The respondent No. 4 being the Minister of Power, Govt. of A.P., *suo motu* made an U.O. Note (as has been mentioned above) that as the petitioner is suffering from ill health and frequently undergoing medical check-ups so he was advised to avail leave or make him Technical Adviser. Such a finding on the part of respondent No. 4 is not supported by any other official correspondence. That apart, the file should have been moved from the Department concerned along with necessary documents as well as actual status of the petitioner. There is nothing emerging in this aspect that no report was obtained in this regard prior to issuance of the impugned order. It is suffice to hold the arbitrariness on the part of the respondent authority while passing the impugned order and the discretion has been exercised without sound principle of law. The petitioner is at the verge of superannuation and it is hard to accept the rational of the State respondent in allowing a junior officer to hold the charge of Chief Engineer and thereby what public interest is being served by such order.

**21].** In *M. Imomacha Singh* (supra) para-5, it has been held that the law relating to transfer in public employment that as long as senior officer is available, a junior officer cannot be allowed to hold the charge of higher post until such post is filled up on regular basis, if no longer *res integra*. More so in the given case as per the standing O.M. issued by the government, a junior officer cannot be allowed to officiate even on functional basis which is not followed by the respondent authority while passing the impugned order. It is also quite surprising as to how the state respondent tried to justify such transfer of the petitioner to a non-existent post, not to speak of same cadre.

**22].** The learned counsel for the respondent No. 3 has submitted in his affidavit that the transfer has already been carried out and effected as such question of quashing does not arise. This submission cannot be sustained as the impugned order is not only a case of arbitrariness but also in violation statutory provision. The Apex Court by a Constitutional Bench in **1974 (4) SCC 3 (E.P. Royappa -vs- State of T.N. & anr.)** held that Articles 14 & 16 strikes at arbitrariness of the State action and to ensure fairness, the State action must be based on valid and relevant principles which are applicable alike to all similarity situated and it must not be guided by extraneous and irrelevant consideration. In the instant case, the impugned order has been issued without all fairness to the petitioner as he has not been given any opportunity of being heard prior to passing such order and he has been replaced by a junior officer. There is nothing more than arbitrary than this action of the State government. Although, there is limited scope for judicial review of transfer matter and normally transfer order issued by authority is not interfered with except in case where the transfer order is in violation of statutory provisions and is fraught with arbitrariness and *mala fide* and the case in hand is apparently hit by the aforesaid principles which have already been discussed above and also settled by the Apex Court times and again.

**23].** From what has been discussed in the foregoing paragraphs, this Court is of the considered opinion that the impugned order, dated 17.02.2017, is fraught with palpable illegality and also without sanction of law and cannot sustain in the eye of law.

**24].** The instant writ petition, therefore, succeeds. Resultantly, the impugned transfer order, dated 17.02.2017, is hereby quashed and set aside. The petitioner will continue his substantive post he holds in the cadre and at the place he is presently continuing. The State respondents will do the needful as about the private respondent No. 3.

**25].** No order as to costs.

**26].** The writ petition accordingly stands disposed of.

**27].** Return the concerned file to the learned Government Advocate.

**JUDGE**

Taleem/bikash