

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

ITANAGAR PERMANENT BENCH

WP(C) No. 422 (AP) 2017

Petitioner

Shri Tanya Ronya, S/o Lt. Taba Ronya,
presently serving as Director-cum-Member Secretary,
Arunachal Pradesh, State Council for Science & Technology,
Govt. of Arunachal Pradesh, Itanagar.

By Advocates:

D. Panging
K. Bogo
V. Jamoh
D. Tamuk
M. Doji
E. Perme
M. Tamut
M. Gibi
H. Kadu

- **Vs** -

Respondents:

1. The State of Arunachal Pradesh represented by the Chief Secretary, Govt. of Arunachal Pradesh, Itanagar.
2. The Secretary, Department of Science & Technology, Government of Arunachal Pradesh Itanagar.
3. The Under Secretary (Personnel), Department of Personnel, Government of Arunachal Pradesh, Itanagar.
4. Shri Chau Dhanya Mungyak, presently serving as Joint Director, Information Technology & E-Governance, Government of Arunachal Pradesh.
5. Shri Bamang Mangha, Chairman, Arunachal Pradesh State Council for Science & Technology, Government of Arunachal Pradesh.
6. Arunachal Pradesh State Council for Science & Technology, Bhawan Govt. of India, New Delhi
7. Deptt of Science and Technology, Ministry of Science and Technology, Bhawan, Govt. of India. New Delhi.

By Advocate:

GA (AP)
N. Taje
D. Gumbo
N. Anju
B. Taka
D. Mibang
K. Riba
MRA Apang Sr. Adv
J. Baga
A. Apang

B E F O R E

THE HON'BLE MR. JUSTICE S. SERTO

Date of hearing : 09.11.2017

Date of Judgment : 7.12.2017

J U D G M E N T A N D O R D E R (CAV)

Heard Mr. Kali Bogo, learned counsel for the petitioner and also heard Mr. R.H. Nabam, learned Add. Advocate General assisted by Ms. T. Sering Wangmu, learned Government Advocate appearing on behalf of the State respondents No. 1 to 3. Heard also Mr. Ajin Apang, learned senior advocate assisted by Ms. Nani

Anju, learned counsels appearing on behalf of the State respondents No. 4. Mr. T.K Tiwari, learned senior advocate assisted by Mr. Nillam Tazi, learned counsels appearing on behalf of the private respondents No. 5 is also heard.

2. The brief facts and circumstances which led to the filing of this writ petition are as follows:-

That the petitioner was appointed vide Order dated 25.5.2011, issued by the Commissioner (IT, Science & Technology, as Director cum Member Secretary of Arunachal Pradesh) as Director cum Member Secretary of Arunachal Pradesh, State Council for Science & Technology, a (Registered Society under Registration Act, 1860, funded by the Government of India as well as the State Government. Thereafter, the Chief Secretary, Government of Arunachal Pradesh issued an Order No. SC (PF)- 192/2007-2008/130-142 dated 01.09.2011, by which the petitioner was permanently absorbed in the APSCST. In the year 2011 vide notification dated DIT/S&T/155/2011 dated 30.05.2011, issued by the Chief Secretary, Govt. of Arunachal Pradesh, the APSCST was bifurcated into Arunachal Pradesh State Council for Science & Technology and State Council for Information Technology and e-governance, under the Govt. of Arunachal Pradesh. Following the same, the employees/staffs of the APSCST were given option to choose between the 2 (two) newly created councils. As per the option offered the petitioner opted for the APSCST and joined as Joint Director and the private

respondent No. 4 opted for Scientist/B Post under the State Council for Information Technology and e-governance.

After serving as Joint Director for 3 (three) years, the petitioner was appointed to the post of Director cum Member Secretary APSCST and continued as such till the impugned Order i.e PERS/AIS-03/99 (Pt-i)/1815, date 04.06.2016 was issued by the Chief Secretary by which the petitioner was appointed on deputation to the post of Chief Engineer cum Chairman, inter Disciplinary Disaster Management Committee, Arunachal Pradesh for a period of 1 (one) year. Being aggrieved by this order, the petitioner has approached this Court under Section 226 of the Constitution of India, praying for quashing and setting aside the same and also to quash and set aside the Order No. SECY (S&T)/16/17-18/426 dated 19.06.2017, issued by the Secretary, Department of Science & Technology, Govt. of Arunachal Pradesh by which the respondent No. 4 was brought in to his place as Director cum Member Secretary, APSCST.

3. The case of the petitioner as submitted by his learned counsel Mr. Kali Bogo is as follows:-

(i) That the post of Chief Engineer cum Chairman, inter Disciplinary Disaster Management Committee, Arunachal Pradesh is a non existent post. Therefore, the

petitioner who is appointed to a sanctioned post cannot be send on deputation to such imaginary post.

(ii) That Arunachal Pradesh State Council for Science & Technology, is a Society Registered under Society Registered Act, 1860, as such, it is an Autonomous Body. Therefore, an employees of such an Autonomous Body who has ceased to be a Government Servant cannot be transfer or send on deputation to any ex-cadre post.

The learned counsel, in support of his submission cited the decision of the High Court of Jharkhand, in the case of **Dr. Sudip Roy Vs. the State of Jharkhand & Ors**, passed in W.P. (C) No. 1672/2016, particularly para 12 of the judgment. The contains of the para 12 are reproduced here below:-

"12. Having heard learned counsels for both the sides and upon going through the record, we find that only question to be decided in this writ application is as to whether the State Government had the authority to transfer and post the petitioner outside the RIMS Ranchi, once the service of the petitioner stood absorbed in RIMS Ranchi. This question is no more res-integra, and has been decided by this Court (Dr.) LalitMinz's case (supra) and in Dr. Krishna Kuma Lal's case (supra). In view of the fact that

admittedly the petitioner was posted as Medical Officer in the RIMS since the very inception of RIMS in the year 2002, he exercised his option to continue his service in RIMS, Ranchi, on 05.10.2002 vide Annexure-1/1 to the writ petition, and the Governing Body of the RIMS, Ranchi, accepted the option exercised by all such employees vide its notification bearing No. 123 dated 08.01.2005 absorbing their services in RIMS Ranchi, with effect from 15.08,2002, which was also approved by the State Government, in its Department of Health, Medical Education and Family Welfare, by notification contained in Memo No. 144 (7B) dated 08.07.2008, the service of the petitioner stood absorbed in the RIMS Ranchi, with effect from 15.08.2002. RIMS Ranchi, being an autonomous body under the RIMS Act, the State Government had no jurisdiction to transfer or post the petitioner from the RIMS Ranchi to elsewhere."

(iii) That assuming that the petitioner can be transfer or deputed his consent was required to be obtained before his deputation or transfer. In this case, the petitioner's consent was not obtained, therefore, the transfer order is arbitrary and thus illegal. In support of his submission, the learned counsel cited the judgment of this High Court passed in the case of **Bijendra Pratap Singh Vs State of**

Arunachal Pradesh & Ors, reported in 2004 (suppl) GLT 827 particularly para 38 of the same. The contains of para 38 are reproduced here below:-

(a) *"38. Let me, now, come to the question as to whether the writ petitioner could have been transferred to the post of OSD, APSERC. While dealing with this aspect of the matter, it is of utmost importance to note that Recruitment Rules of 1993 do not, admittedly, cover the post of OSD, APSERC. Thus, the post of OSD aforementioned is an ex-cadre post. To an ex-cadre post, an employee cannot be sent without his or her consent. Transfer of a person to an ex-cadre post basically can be only on deputation and if he has to be sent on deputation, his consent is required to be obtained. In the case at hand, no consent whatsoever of the writ petitioner was, admittedly, obtained and no such consent exists on record. Thus, the impugned order transferring the writ petitioner to an ex-cadre post, such as, OSD, APSERC, is wholly illegal and cannot be sustained in law. Reference made by Mr. BC Das, in this regard, to Tilak Raj Vs. State of Punjab, reported in 1988 LIC 167, is not wholly misplaced Inasmuch as in Tilak Raj (supra), the Apex Court has laid down to the effect that a Government servant cannot,*

against his wishes, be transferred to a post outside the cadre of his service."

(b) The learned counsel also cited the judgment of this High Court Passed in the case of **Mangsatabam Imomacha Singh Vs State of Manipur & Ors**, reported in 2013 1 GLT 267 para 8. The contains of the said para are also reproduced here below:-

"8. In the instant case, the post of Secretary (Technical) in the PHED is not included in the cadre strength of Chief Engineer, PHED, and is concededly outside the cadre of the Recruitment Rules for the post of Chief Engineer, PHED. Therefore, it can be safely assumed that the post of Secretary (Technical), PHED is nothing but an ex-cadre post. The term "ex-cadre post" normally means a post outside the cadre of the posts comprised in the service. Posts can be created de hors the cadre of a service, and these are known as ex cadre posts. In the case at hand, it is not the case of the respondent authorities that the post of Secretary (Technical) is a cadre post. Nor is it the case of the respondents authorities that either the Recruitment Rules have been amended to include this post as one of the cadre posts of the Chief Engineer in the PHED. In any case, the fact that this post is created outside the cadre of the posts comprised

in the service of Chief Engineer in the PHED is borne out by the proposed payment of salary for the post from the Head of Account of the General Administration Department as evident from the post creation order dated 11.05.2012 (Annexure-C/1 to the writ petition), and not from the Head of Account of the PHED and also from the admission of the respondent authorities that the posting of the incumbent is made by transfer from the PHED. On the basis of the aforesaid facts and circumstances, there is no difficulty in holding that the post of Secretary (Technical), PHED is not a cadre post, but is in pith and substance an ex-cadre post. Once it is found that this post is an ex-cadre post, the inevitable and logical conclusion that follows is that the petitioner cannot be transferred to the post of Secretary (Technical), PHED, which is demonstrably outside his cadre or Department without first obtaining his consent. Indisputably, the consent of the petitioner was never obtained by the respondent authorities before transferring him to the post of Secretary (Technical), PHED. In that view of the matter, the impugned order of transfer is illegal and cannot be sustained in law. This warrants the interference of this Court. Since the impugned order of transfer can be quashed on this ground alone, it is not necessary for me to deal

with the order contentions raised by the learned counsel for the petitioner on the principle that Courts do not decide more than what is necessary."

(iv) The learned counsel for the petitioner submitted that the transfer of the petitioner was initiated on the basis of U.O Note dated 29.05.2017 of the Chairman of APSCST (respondent No. 5) marked to the Parliamentary Secretary (Science & Technology) requesting the latter to apprise the Hon'ble Chief Minister of Arunachal Pradesh to consider promotion of the petitioner to the post of Chief Engineer cum Chairman, inter Disciplinary Disaster Management Committee, Arunachal Pradesh, initially for a period of one year. Pursuant there to the Parliamentary Secretary, took up the matter to the Hon'ble Chief Minister and it was thereafter, that the impugned order was issued by the Chief Secretary. The learned counsel submitted that this initiative was taken by the Chairman with malafide intention to move him from the APSCST and to bring in a man of his choice, therefore, the impugned order appointing the Chief Engineer cum Chairman inter Disciplinary Disaster Management Committee, and the Order appointing the respondent No. 4 in his place as Secretary cum Director, APSCST are liable to be quashed and set aside.

3. Mr. T.K. Tiwari, learned senior Advocate, appearing on behalf of respondent No. 5, submitted that the APSCST is not an Autonomous Body, established under a

statute but it is only a society established, administered or control by the Government of Arunachal Pradesh. Therefore, it is only an extended arm of the State Government.

The learned Counsel also submitted that as per the memorandum of association of APSCST, the Chairman and all the functionaries including the Director cum Member Secretary are appointed and paid by the State Government. Therefore, they are under the discretion of the State Government. The learned senior counsel further submitted that the society is not a creation of a statute but is only a registered body under Registration Act, 1860. Therefore, it cannot have the status of an Autonomous Body created under a statute.

The learned senior counsel further submitted that no malafide intention can be imputed on the deputation of the petitioner because of the the U.O Note, initiated by the Chairman of the APSCST. In fact, it was a proposal to promote him to a higher post. The learned senior counsel also submitted that the petitioner had accepted the deputation conditionally through a letter send to the Chief Secretary. Therefore, this writ petition has become infructuous.

The learned senior counsel lastly submitted, that the fact that the Department of Personnel does not have the record of creation of the post of Chief Engineer cum Chairman, inter Disciplinary Disaster Management Committee, does

not mean that the post is not there. Because, the pay scale is given and there are people who have been appointed to this post before.

4. Mr. R.H. Nabam, learned Addl. Advocate General, presenting the State respondents submitted that the APSCST is a society, functioning under the Budgetary Control and Administrative Supervision of Science & Technology Department of the Govt. of Arunachal Pradesh. Therefore, it is never an Autonomous Body. In fact, it is an extension of the Department of Science & Technology, the fact

that it is a society, registered under Society Registration Act, does not make it an Autonomous Body and its non Government employees.

The learned Addl. Advocate General also submitted that the post of Chief Engineer cum Chairman, inter Disciplinary Disaster Management Committee, has been in existence since 1988 and it was held by different persons, therefore, it cannot be said that such a post does not exist. Further, the learned Addl. Advocate General submitted, by the impugned order the petitioner is only transferred to a post, higher than his post, therefore, there is no need of taking his consent. Besides, the learned Addl. Advocate General, submitted that just because the Chairman has initiated a U.O Note does not make the transfer order of the

petitioner vitiated. In support of his submission, the learned counsel cited the following cases:-

- (i) The case of **Mohd. Masood Ahmad Vs State of U.P and Ors**, reported in **2007 8 SCC 150** para 7 & 8, the contains are reproduced below:-

"7. The scope of judicial review of transfer under Article 226 of the Constitution of India has been settled by the Supreme Court in Rajendra Roy Vs. Union of India, National Hydroelectric Power Corpn. Ltd. Vs. Shri Bhagwan, State Bank of India v. Anjan Sanyal. Following the aforesaid principles laid down by the Supreme Court, the Allahabad High Court in Vijay Pal Singh v. State of U.P and Onkar Nath Tiwari v. Chief Engineer, Minor Irrigation Deptt, has held that the principle of law laid down in the aforesaid decisions is that an order of transfer is a part of the service conditions of an employee which should not be interfered with ordinarily by a court of law in exercise of its discretionary jurisdiction under Article 226 unless the court finds that either the order is mala fide or that the service rules prohibit such transfer, or that the authorities who issued the orders, were not competent to pass the orders.

8. Learned counsel for the appellant submitted that the impugned transfer order of the appellant from Muzaffarnagar to Mawana, District Meerut was made at the instance of an MLA. On the other hand, it has been stated in the counter affidavit filed on behalf of Respondents 1 and 2 that the appellant has been transferred due to complaints against him. In our opinion, even if the allegation of the appellant is correct that he was transferred on the recommendation of an MLA, that by itself would not vitiate the transfer order. After all, it is the duty of the representatives of the people in the legislature to express the grievances of the people and if there is any complaint against an official the State Government is certainly within its jurisdiction to transfer such an employee. There can be no hard-and-fast rule that every transfer at the instance of an MP or MLA would be vitiated. It all depends on the facts and circumstances of an individual case. In the present case, we see no infirmity in the impugned transfer order."

- (ii) **1993 4 SCC 357 Union of India & Ors Vs S.L Abbas para 6 & 7**
contains are reproduced here below:-

"6. An order of transfer is an incident of Government service. Fundamental Rule 11 says that "the whole time of a Government servant is at the disposal of the Government which pays him and he may be employed in any manner required by proper authority". Fundamental Rule 15 says that "the President may transfer a Government servant from one post to another". That the respondent is liable to transfer anywhere in India is not in dispute. It is not the case of the respondent that the order of his transfer is vitiated by mala fides on the part of the authority making the order, - though the Tribunal does say so merely because certain guidelines issued by the Central Government are not followed, with which finding we shall deal later. The respondent attributed "mischief" to his immediate superior who had nothing to do with his transfer. All he says is that he should not be transferred because his wife is working at Shillong, his children are studying there and also because his health and suffered a setback some time ago. He relies upon certain executive instructions issued by the Government in that behalf. Those instructions are in the nature of guidelines. They do not have statutory force.

7. Who should be transferred where, is a matter for the appropriate authority to decide. Unless the order of transfer is vitiated by mala fides or is made in violation of any statutory provisions, the court cannot interfere with it. While ordering the transfer, there is no doubt, the authority must keep in mind the guidelines issued by the Government on the subject. Similarly if a person makes any representation with respect to his transfer, the appropriate authority must consider the same having regard to the exigencies of administration. The guidelines say that as far as possible, husband and wife must be posted at the same place. The said guideline however does not confer upon the Government employee a legally enforceable right."

(iii) 2006 3 GLT 624 Kalyankr. Sarkar Vs Alok Kanti Paul Choudhury & Ors, para 7, 9, 13, the contains are reproduced here below:-

"7. The writ court can exercise its power of judicial review under Article 226 of the Constitution of India only when the person seeking such writ establishes that his fundamental or other legal right has been infringed. The writ court can issue a writ for enforcement of any of the rights conferred by Part III of the Constitution of Indian and also for enforcement of

any other legally enforceable right. The High Court can issue a writ of mandamus also to secure the performance of a public or statutory duty in the performance of which the person who seek such writ has a sufficient legal interest. In the instant case as discussed above one of the ground for challenging the order of transfer dated 7.2.2006 is the violation of the transfer guideline/policy issued by the Chief Secretary as well as by the Commissioner, personnel department of the Government of Assam. Such guideline or the transfer policy has no statutory backing, those are merely the instructions and cannot be enforced in the courts of law. Such guideline/policy having no statutory force no right can be claimed on such guideline/policy and those cannot be enforced. Those administrative guidelines regulating the transfer and containing the transfer policy at the best may afford the opportunity to the officer concerned to approach their higher authorities but cannot have the consequence of depriving or denying the competent authority to transfer a particular officer from any place in public interest as long as official status is not affected adversely and there is no infraction of any career prospect such as seniority, scale of pay and secured emoluments.

Therefore, the first ground of challenge to the order of transfer dated 7.2.2006 falls through.

9. No doubt an order of transfer can be interfered with if the same is passed malafide. The burden of establishing malafide is very high on the person who alleges it and it being a very serious allegation against a person, it demands proof of a higher order of credibility and must be supported by the foundational facts. The person against whom the malafide is alleged must also be impleaded as party so that he gets an opportunity to controvert such allegation. It is very easy to allege malafide than to prove. At the same time it may not always be possible to demonstrate malice in fact with full and elaborate particulars and in appropriate case it may be permissible to draw reasonable inference of malafide from the facts pleaded and established. But for drawing such inference there must be firm foundational facts pleaded and established and such inference cannot be drawn on the basis of insinuations conjectures and surmises.

13. The said decision is not applicable in the present case. The transfer being an incident of service, the Government has ample power to transfer one person from one place to

another in public interest as well as in administrative exigencies. Such order of transfer is open to judicial review by the High Court in exercise of the power conferred under Article 226 of the Constitution of India only if it is not issued in the interest of public service or issued in violation of any statutory provision or the order suffers from vice of mala fide or passed by an authority who is not competent to pass such order of transfer or if it affects the service conditions such as seniority, scale of pay, secured emoluments etc. but in the instant case as discussed above, the respondents/writ petitioner could not demonstrate any of such ground to interfere with the order of transfer. The learned Single Judge has set aside the order of transfer on the ground of violation of the transfer guideline and on the ground that such order was passed as desired by the Minister Social Welfare, about which we have already discussed.”

The learned Addl. Advocate General finally submitted that the petitioner has already joint his posting and after he had joint, have written a letter dated 28.06.2017 to the Commissioner Transport, asking for allotment of Vehicle and the same has been allotted to him. Therefore, he has waved his right to pursue this writ petition.

5. Mr. Apang, senior Advocate, who appears on behalf of private respondent No. 4 submitted that the respondent No. 4 has already assumed charge of the Director cum Member Secretary, APSCST on 20.06.2017. The learned counsel further submitted that the APSCST and Arunachal Pradesh State Council for Science & Technology and State Council for Information Technology and e-governance, are under the same department, though they are bifurcated, therefore, appointment to the post of Secretary cum Director APSCST, for the respondent No. 4 is just a change of portfolio, it is not even a repatriation as wrongly worded in the order.

6. It appears from the service rule of Director Cum Member Secretary, notified under notification No. SC (E)-287/2810/11 dated 19.09.2013 in the Arunachal Pradesh Gazette, that the Director Cum Member Secretary is an employee of Arunachal Pradesh State Council for Science & Technology, Govt. of Arunachal Pradesh. The post as per the rule is to be filled up 100% by promotion on merit cum seniority amongst Scientist/technologist of Arunachal Pradesh, Science & Technology Council, failing which by transfer on deputation. The post on which the petitioner is appointed i.e, Chief Engineer cum Chairman inter Disciplinary Disaster Management Committee belongs to a totally different body, which does not come under Department of Science & Technology. Therefore, it is all together a different cadre. Though the word deputation is not use in the Order dated 04.07.2017, No. PERS/ AIS-03/99/(Pt-1) issued by the Chief Secretary, in essence the appointment

order is deputation only because, the petitioner is send out from his cadre and Department to a totally different body. It is no longer res integra that where a Govt. servant is to be sent out of his cadre and department on deputation his or her deputation on consent has to be first obtained. It appears in this case that such consent was never obtained from the petitioner. Since such pre requisite or requirement of law has not been complied with the order deputing the petitioner to the post of Chief Engineer cum Chairman, inter Disciplinary Disaster Management Committee is not valid in law, therefore, cannot be upheld. The concept of deputation and the necessity to obtain prior consent of the person intended to be deputed has been dealt with in catena of cases, however, I may mention here only of such cases. **State of Punjab & Ors Vs. Inder Singh & Ors**, reported in **1997 8 SCC 372**. The relevant portion of the judgment is at para 18 and contents of the same are reproduced here below:-

"18. The concept of "deputation" is well understood in service law and has a recognized meaning. "Deputation" has a different connotation in service law and the dictionary meaning of the word "deputation" is of no help. In simple words "deputation" means service outside the cadre or outside the parent department. Deputation is deputing or transferring an employee to a post outside his cadre, that is to say, to another department on a temporary

basis. After the expiry period of deputation the employee has to come back to his parent department to occupy the same position unless in the meanwhile he has earned promotion in his parent department as per the Recruitment Rules. Whether the transfer is outside the normal field of deployment or not is decided by the authority who controls the service or post from which the employee is transferred. There can be no deputation without the consent of the person so deputed and he would, therefore, know his rights and privileges in the deputation post. The law on deputation and repatriation is quite settled as we have also seen in various judgments which we have referred to above. There is no escape for the respondents now to go back to their parent departments and working there as Constables or Head Constables as the case may be."

Guided by this principle of law, which has been followed consistently in many cases, by the Courts of this Country including this High Court as cited by the learned counsel of the petitioner, this Court is of the view that the impugned Order No. PERS/AIS-03/99 (Pt-i) dated 04.06.2017, issued by the Chief Secretary appointing the petitioner to the post of Chief Engineer cum Chairman, Inter Disciplinary Disaster Management Committee has violated the settled principle of

law. In view of this conclusion, the impugned order mentioned above is quashed and set aside. In consequence, the Order/Notification No. PERS/AIS-03/99 (Pt-i) dated 04.06.2017, appointing the respondent No. 4 to the post of Director cum Member Secretary is also quashed and set aside. Since the impugned orders could quashed and set aside on the ground stated above alone, I do not find the necessity to go into the other issues raised by the learned counsels. Therefore, the writ petition is disposed of in terms of the conclusion drawn above.

JUDGE

Manghaki

M