

**THE HIGH COURT OF SIKKIM : GANGTOK**  
(Civil Extra Ordinary Jurisdiction)

**DATED: 20<sup>th</sup> November, 2018**

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**SB: HON'BLE MR. JUSTICE VIJAI KUMAR BIST, CHIEF JUSTICE**  
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**WP(C) No. 15 of 2018**

**Petitioner** : Shri Deepesh Chandra Sharma,  
S/o late K.P. Sharma,  
R/o Gyalshing,  
West Sikkim,  
P.O. Gyalshing,  
P.S. Tikjuk,  
Pin-737111.

**Versus**

**Respondents** : 1. State of Sikkim,  
Through the Chief Secretary,  
Government of Sikkim,  
Gangtok.  
2 The Secretary,  
Health Care, Human Services &  
Family Welfare Department,  
Government of Sikkim,  
Gangtok,  
East Sikkim.

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**Appearance:**

Dr. Doma T. Bhutia, Advocate with Mr. Shakil Karki and  
Mr. Ratan Gurung, Advocates for the Petitioner.

Mr. J.B. Pradhan, Additional Advocate General with Mr. S.K.  
Chettri, Mrs. Pollin Rai, Asst. Govt. Advocates and Mrs. Neera  
Thapa, Advocate (HC, HS & FW Department) for the State-  
Respondents No. 1 & 2.

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**J U D G M E N T**

**Chief Justice**

**1.** Petitioner was appointed on compassionate ground as  
Male Ward Attendant in the year 2005 in the Health Care, Human  
Services & Family Welfare Department, Government of Sikkim, vide

Order dated 20.09.2005. On being appointed, he was posted at Gyalshing District Hospital w.e.f. 20.09.2005. Thereafter, on 01.08.2013, the petitioner was transferred to Namchi District Hospital. On 03.09.2014, the petitioner was again transferred to Shipsu PHC under District Hospital Singtam. On 01.05.2015, he was posted at Shipsu Health Post. On 28.12.2015, he was sent back to District Hospital Singtam and then on 01.05.2016 again transferred to Shipsu PHC, East. In the year 2017, the petitioner moved a joint application for mutual transfer. His prayer for mutual transfer was accepted and order was passed on 25.04.2017 transferring him from Sipchu to Rimbik. On 03.03.2018, a transfer order was passed again and the petitioner was transferred from Rimbik to STNM Hospital, Gangtok. There were some technical mistakes in the transfer Order dated 03.03.2018 which were corrected by another order dated 07.04.2018. Aggrieved by the transfer order, present writ petition is filed.

**2.** The case of the petitioner is that the order impugned has been passed with a *mala fide* intention to harass the petitioner. It is submitted that the petitioner has let out one flat on rent to run the office of the opposition party 'Sikkim Krantikari Morcha (SKM) on monthly rent of Rs.5000/- (Rupees five thousand) only. The petitioner was pressurized and asked to get the office of the SKM vacated from his rental premises but the petitioner could not do so without following due process of law i.e. by filing eviction suit and the petitioner had no money to proceed for eviction suit. Due to this reason, the petitioner was harassed and he has been frequently

transferred to all the odd places despite resistance from public. It is submitted that the petitioner has performed his duty very sincerely and diligently. It is submitted that most of the Primary Health Sub Centers (PHSCs) are dependent on the health attendant for minor ailment and to provide services to public and most of the villagers cannot travel far flung, as such their basic needs are dependent upon PHSCs. The villagers of Rimbik area approached the Chief Medical Officer (CMO) for retaining the petitioner at Rimbik. The concerned CMO told the villagers that transfer of petitioner has been done as per the order of the higher authority. The villagers also approached the concerned area MLA. He also categorically stated that transfer of the petitioner cannot be stopped because he has let out his house on rent to run the office of opposition party SKM. The case of the petitioner is that the transfer of the petitioner is not done for professed purposes, such as in normal course or in public interest or administrative interest or in exigencies of service but for other purpose with a *mala fide* intention at the instance of outside or extra-legal authority to harass him. Same is a punitive transfer.

**3.** Dr. Doma T. Bhuta, learned Counsel for the petitioner submitted that the transfer order is arbitrary and unreasonable. The petitioner is a Class-IV employee and none of the other employees has been transferred from one place of posting to another and the petitioner alone was picked up for transfer. It is also contended that even the petitioner has not been paid any travelling allowances whereas it was the duty of the respondents to pay the travelling allowances. It is also contended that the transfer order is against

the public interest which is clear from the fact that public of the area also made a representation for retaining the petitioner at his place of posting. She submitted that by keeping the petitioner at Rimbik, the villagers will be benefitted. It is also contended that the transfer order is also against the Indian Public Health Standards (IPHS) norms.

**4.** Learned counsel for the petitioner further submitted that the transfer order is in violation of Article 14 and 15 of the Constitution of India, as it is not only arbitrary but discriminatory also. It is submitted by learned counsel for the petitioner that it is a rarest of the rare cases where transfer order has been passed with mala fide intention and the Court should interfere with the same. Learned counsel also submitted that the place from where the petitioner has been transferred, no one has been posted there and people of that area are suffering. Learned counsel for the petitioner submitted that the petitioner has already joined his place of posting at STNM Gangtok. Learned counsel also submits that the petitioner is ill, his wife is illiterate, he has two minor children and his place of present posting i.e. Gangtok, costing him a lot as Gangtok is a costly city. Therefore, it is not possible for the petitioner to maintain himself. It is submitted that the petitioner could be sent back to his previous place of posting at Rimbik. Learned counsel submitted that the petitioner was transferred from east to west and west to east. It is submitted that the transfer order is full of mala fide which is clear from the fact that only after the petitioner gave accommodation to the opposition political party, he was transferred several times. It is

reiterated by the counsel for the petitioner that the transfer order has been passed at the behest of the present ruling party and the same deserves to be set aside.

**5.** In support of her arguments, Dr. Doma T. Bhuta, learned counsel for the petitioner referred to paragraphs 8, 11, 13, 16 of the judgment passed by Kerala High Court in ***G. Babu vs. C.E. (PS & GL) and Others : (1990) ILL J 202 Ker***, which are reproduced below:

"8. On the first question, I am reasonably certain that the power of transfer also shall be exercised only for bona fide purposes and any such order is liable to be reviewed on grounds of absence of good faith or abuse of power. There is certainly an area of discretion in the Authority in such matters. But that discretion may have to be tested on the touch-stone of reasonableness when it is challenged on grounds of arbitrariness or unreasonableness, absence of good faith or abuse of power. It is elementary that all wielding of power shall be bona fide and reasonable and shall not amount to abuse of power. In *E.P. Royappa v. State of Tamil Nadu* [A.I.R. 1974 SC 555] the question was considered with specific reference to transfer of a Senior Civil Servant. The following observations are relevant in this context:

"... 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 considerations, it would amount to mala fide exercise of power and that is hit by Articles 14 and 16..."

Almost to the same effect are the observations of the Supreme Court in *Venkataraman S.R. (Smt.) v. Union of India* [1978-IIL L.M. 479]. The Court held at page 481:

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"It is, however, not necessary to examine the question of malice in law in this case, for it is trite law that if a discretionary power has been exercised for an unauthorised purpose, it is generally immaterial whether its repository was acting in good faith or in bad faith. As was stated by Lord Goddard C. J., in *Pilling v. Abergele Urban District Council* (1950) 1 KB 636, where a duty to determine a question is conferred on an authority which state their reasons for the decision,

"... and the reasons which they state show that they have taken into account matters which they ought not to have taken into account, or that they have failed to take matters into account which they ought to have taken into account, the Court to which an appeal lies can and ought to adjudicate on the matter."

Reliance was placed on the observations of Lord Goddard, C.J. in *Pilling v. Abergele Urban District Council*, (1950) 1 KB 636 and Lord Esher M.R. in *The Queen on the Prosecution of Richard Westbrook v. The Vestry of St. Pancras* [1890 (23) Q.B.D. 371]. The same position is covered by the decisions of Lord Greens in *Associated Provincial Picture Houses v. Wednesbury Corporation* [1947 (2) All ER 680] of Lord Parker C.J. in *Taylor v. Munrow* [1960 (1) All ER 455] and Lord Macnaghtan in *Kennedy v. Birmingham Licensing Planning Committee* [1972 (2) All ER 305]. Decisions in this regard are a legion. I do not propose to multiply authority on this point. It is, sufficient for me to follow *E.R. Royappa* case (AIR 1974 S.C. 555) (vide supra). I am therefore of the opinion that the claim of the Authority that it shall not subject itself to any guideline, any principle, any standard, in the matter of ordering transfer of its employees cannot be accepted.

.....

11. The Supreme Court had occasion to consider the effect of the recital of such statutory formula on the scope of judicial review of administrative action in *Narayan v. State of Maharashtra* [A.I.R. 1977 S.C. 183]. The Court held:

"32. It is also clear that, even a technically correct recital in an order or notification stating that the conditions precedent to the exercise of a power have been fulfilled may not debar the Court in a given case from considering the question whether, in fact, those conditions have been fulfilled. And, *a fortiori*, the Court may consider and decide whether the authority concerned has applied its mind to really relevant facts of a case with a view to determining that a condition precedent to the

exercise of power has been fulfilled. If it appears, upon an examination of the totality of facts in the case, that the power conferred has been exercised for an extraneous or irrelevant purpose or that the mind has not been applied at all to the real object or purpose of a power, so that the result is that the exercise of power could only serve some other or collateral object, the Court will interfere."

13. The same question was considered by this Court and the Supreme Court in a number of decisions. Perhaps one of the earliest among the decisions of this Court is by K.K. Mathew, J., as he then was, in *Abdul Khader v. R.D.D. Ernakulam* [1967-K.L.T. 354]. It was clearly laid down that the power of transfer shall be used only in a reasonable manner even in the exigencies of service, and shall not be used for collateral purposes or as an instrument of harassment or for punishing an employee.

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16. Recent decisions of the Supreme Court have put the position regarding the scope of review of orders of transfer of government employees beyond controversy. In *Varadha Rao (B.) v. State of Karnataka* [1986-II L.L.N. 753], the Court observed in Paras. 5 and 6, pages 755 and 756:

". . . It is no doubt true that if the power of transfer is abused, the exercise of the power is vitiated".

x x x

One cannot but deprecate that frequent, unscheduled and unreasonable transfers can uproot a family, cause irreparable harm to a Government servant and drive him to desperation. It disrupts the education of his children and leads to numerous other complications and problems and results in hardship and demoralisation. *It should be reasonable and fair and should apply to everybody equally. But, at the same time, 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 interest and therefore we find that even from the British times the general policy has been to restrict the period of posting for a definite period. . . "*

(emphasis supplied)

*Gujarat Electricity Board v. Atmaram Sungomal Poshani* [1989-II L.L. N. 299], dealt with a case

of discharge from service of an employee who refused to comply with an order of transfer. The Gujarat High Court held, that the discharge was violative of the principles of natural justice. Relying on clause 113 of the Service Regulations, which provided for summary discharge from service without the necessity of disciplinary proceedings under the relevant rules, the 'Supreme Court allowed the appeal filed by the employee. In that context the Court made the following observations in Para. 4, at page 303:

"Transfer of a Government servant appointed to a particular cadre of transferable posts from one place to the other is an incident of service. No Government servant or employee of Public Undertaking has legal right for being posted at any particular place. Transfer from one place to other is generally a condition of service and the employee has no choice in the matter. Transfer from one place to other is necessary in public interest and efficiency in the public administration. Whenever a public servant is transferred he must comply with the order, but if there be any genuine difficulty in proceeding on transfer, it is open to him to make representation to the competent authority for stay, modification or cancellation of the transfer order. If the order of transfer is not stayed, modified or cancelled the concerned public servant must carry out the order of transfer. In the absence of any stay of the transfer order a public servant has no justification to avoid or evade the transfer order merely on the ground of having made a representation, or on the ground of his difficulty in moving from one place to the other. If he fails to proceed on transfer in compliance to the transfer order, he would expose himself to disciplinary action under the relevant Rules, as has happened in the instant case. The respondent lost his service as he refused to comply with the order of his transfer from one place to the other."

Counsel for the third respondent sought to rely on the above observations to contend that orders of transfer cannot be challenged in proceedings under Article 226 of the Constitution of India."

**6.** *Per contra*, case of the Respondent is that the petitioner's appointment order clearly provided that the appointment carries with it the liability to serve in any part of the state. Therefore, now the petitioner cannot be permitted to challenge the transfer order. It is also the case of the respondent that the petitioner never objected to any of his transfer orders except the present one. In fact, he himself requested for mutual transfer in the year 2017. On his request, mutual transfer order was passed and he was given posting of his choice. The allegation of mala fide has no leg to stand. It is also the case of the respondents that the transfer order has been passed in routine manner. The same has neither been passed on administrative ground nor on any disciplinary ground.

**7.** Mr. J. B. Pradhan, learned Additional Advocate General, submitted that the allegation made by the petitioner is absolutely incorrect. It is submitted by him that accommodation was given by the petitioner on rent to run the office of the opposition party in the year 2013. He was transferred thereafter but he had not made any complaint against the transfer orders. In the year 2017, the petitioner made a request for mutual transfer, which was accepted by the authority. This clearly shows that there was no element of bias against the petitioner. He submitted that petitioner has not been subjected to discrimination as other employees have also been transferred which is clear from Annexure P-5, which shows that other similarly placed persons were also transferred. He submitted that transfer is an incident of service career and authority is

competent enough to transfer its employee in public interest or interest of work. He submitted that scope of judicial review in the transfer matter is very limited and High Court should not interfere in such matter unless it is proved that power is exercised by the authority in total arbitrary manner with mala fide intention, which is not found in the present case.

**8.** Learned Additional Advocate General also referred to Rule 9 of the Sikkim Government Service Rules, 1974, which provides that government employee can be transferred from one post to another. Learned Additional Advocate General further submitted that it was and is open for the petitioner to raise his grievances before the authority concerned. And such grievances will be dealt with in accordance with law.

**9.** Learned Additional Advocate General in support of his arguments placed reliance on various judgments passed by the Hon'ble Supreme Court in ***Registrar General, High Court of Judicature of Madras vs. R. Perachi & Ors : (2011) 12 SCC 137, N.K. Singh vs. Union of India and Others : (1994) 6 SCC 98, Rajendra Singh and Others vs. State of Uttar Pradesh and Others : (2009) 15 SCC 178, Mohd. Masood Ahmad vs. State of U.P. and Others : (2007) 8 SCC 150, State of U.P. and Others vs. Gobardhan Laal with D.B. Singh vs. D.K. Shukla and Others : (2004) 11 SCC 402, State of U.P. and Others vs. Ashok Kumar Saxena and Another : (1998) 3 SCC 303, Govt. of Andhra Pradesh vs. G. Venkata Ratnam : (2008) 9 SCC 345, Rajendra Singh and Others vs. State of Uttar Pradesh and Others : (2009) 15 SCC 178, Rajendra Roy vs. Union of India and Another : (1993) 1 SCC 148, Airports Authority of India vs. Rajeev Ratan Pandey and Others : (2009) 8 SCC 337, Ratnagiri Gas and Power***

***Private Limited vs. RDS Projects Limited and Others : (2013) 1 SCC 524***  
and ***G. Jayalal vs. Union of India and Others : (2013) 7 SCC 150.***

**10.** I have considered the submissions of learned counsel for the parties.

**11.** It is settled law that in a matter of transfer of a government employee, scope of judicial review is limited and the High Court should not interfere with the order of transfer lightly, be it at interim stage or final stage. This is so because the courts do not substitute their own decision in the matter of transfer. It is also settled position of law that an order of transfer is a part of the service conditions of an employee which should not be interfered in exercise of its discretionary jurisdiction under article 226 of the Constitution of India. The government servant has no vested right to remain in a particular place of posting for a long period. He can also not insist that he must be posted at a particular place because the people of that area want him to continue at the place of posting. Transfer order can be set aside when transfer order is vitiated by violation of some statutory provisions or suffers from mala fides. Transfer order can also be set aside when same is passed by an authority who is not competent to pass such orders. It can also be set aside when by such order the person is sent to a lower post.  
***[Mohd. Masood Ahmad vs. State of U.P. and Others : (2007) 8 SCC 150, Rajendra Singh and Others vs. State of Uttar Pradesh and Others : (2009) 15 SCC 178, Rajendra Singh and Others vs. State of Uttar Pradesh and Others : (2009) 15 SCC 178].***

**12.** This Court is conscious of the fact that the allegations of mala fide should not be accepted lightly by the court. The Hon'ble Supreme Court in the case of ***State of U.P. and Others vs. Govardhan Lal (supra)***, observed that allegations of mala fides must inspire confidence of the court and ought not to be entertained on the mere asking of it or on consideration borne out of conjectures and surmises and except for strong and convincing reasons, no interference could ordinarily be made with an order of transfer. The burden of proving mala fide is on a person leveling such allegations and the burden is heavy, admits of no legal ambiguity. Mere assertion or bald statement is not enough to discharge the heavy burden that the law imposes upon the person leveling allegations of mala fides, it must be supported by requisite materials.

**13.** In ***Ratnagiri Gas and Power Private Limited vs. RDS Projects Limited and Others (supra)***, similar view was taken by the Hon'ble Supreme Court. The Hon'ble Supreme Court observed that as and when allegations of mala fides are made, the persons against whom the same are leveled need to be impleaded as parties to the proceedings to enable them to answer the charge. In the absence of the person concerned as a party in his/her individual capacity it will neither be fair nor proper to record a finding that malice in fact had vitiated the action taken by the authority concerned. It is important to remember that a judicial pronouncement declaring an action to be mala fide a serious indictment of the person concerned that can lead to adverse civil consequences against him. Courts have therefore, to be slow in drawing conclusions when it comes to

holding allegations of mala fides to be proved and only in cases where based on the material placed before the court or facts that are admitted leading to inevitable inferences supporting the charge of mala fides that the court should record a finding in the process ensuring that while it does so, it also hears the person who was likely to be affected by such a finding.

**14.** The main argument advanced by counsel for the petitioner is that the transfer order is bad in law as same has been passed by the authority with mala fide intention. It is contended that the petitioner rented out one flat to run the office of the opposition party 'SKM' on a monthly rent of Rs.5000/- (Rupees five thousand) only. The ruling party got annoyed by this action of the petitioner and pressurized the office of the petitioner to transfer him from that place. It is contended by learned counsel for the petitioner that transfer order was passed under pressure. In the present case, this Court finds that only general allegations has been leveled that due to the fact that since the petitioner rented out his flat to run office of the opposition party 'SKM', the petitioner has been transferred. Nothing more has been said. That sentence in itself is not sufficient to prove that transfer order vitiates from mala fides. Nothing is said that in what manner the authority was influenced by the ruling party. Neither allegation has been made against a particular person nor has any person been impleaded as a respondent. Therefore, this Court is of the view that the petitioner has not been able to substantiate that the impugned order of transfer was passed with mala fide intention him.

**15.** Next argument of learned counsel for the Petitioner is that the petitioner has been transferred several times from one place to another, only to harass him. It is also contended that authorities should not be permitted to transfer a government employee frequently. No doubt, a government employee should not be transferred frequently, as frequent transfers cause unnecessary hardships not only to such government employee but also to his family members and his children who are pursuing their studies. It is true that before 2017, the petitioner was transferred from one place to another but the petitioner never raised that issue. In 2017, he himself made a representation for mutual transfer which was accepted by the authority concerned. Therefore, the petitioner should not have any grievances, so far, transfer orders passed before 2017 are concerned. The petitioner has now been transferred from Rimbik to Gangtok, which is admittedly a better place. The learned Additional Advocate General referred to Rule 9 of the Sikkim Government Service Rule, 1974, and submitted that it was and it is always open for the petitioner to raise his grievances before the authority concerned. He is fair enough to suggest that in case such grievances are made by the petitioner before the authority concerned, the same will be dealt in accordance with law.

**16.** Learned counsel for the petitioner then submitted that the petitioner has been transferred from one place to another but he has not been paid travelling allowance which should have been paid to him as per law. She submitted that non-payment is deliberate and to harass the petitioner. On this, learned Additional Advocate

General submitted that in fact, the petitioner himself did not submit any travelling bills in time, therefore, the amount was not paid to him. (This fact was again denied by learned counsel for the petitioner.) Learned Additional Advocate General fairly submitted that in case the petitioner submits his travelling bills, those bills will be processed and the petitioner will be paid the travelling allowance as per law. This statement of learned Additional Advocate General is recorded and it is expected that payment of travelling allowance will be made to the petitioner at the earliest.

**17.** Case law cited by learned counsel for the petitioner, also does not support the case of the petitioner.

**18.** In view of all of the above, I am of the view that the impugned transfer order cannot be set aside. His prayer for quashing the transfer order is rejected.

**19.** However, considering the fact that the petitioner is a Class-IV employee and also considering the fact that he has some personal problems, this Court permits the petitioner to move before the competent authority by filing a representation. In case, such a representation is moved on or before 31<sup>st</sup> December, 2018, the authority concerned is directed to decide the same within a period of three months from the date of filing of the representation.

**20.** During the course of hearing, it came to the notice of this Court that the State Government has neither made Transfer Act

nor any Rules have been framed in this regard. Even Guidelines have also not been framed by the State Government. In fact, for proper functioning of government departments, at least some guidelines regarding transfer of its employees should be framed by the Government. The State-Government is requested to look into the matter and to either frame Guidelines or Rules or Act regarding transfer of its employees, at the earliest.

**21.** Accordingly, the Writ Petition stands disposed of with the above directions.

**22.** No order as to costs.

**23.** Let a copy of this judgment be sent to the Chief Secretary of the State.

**( Vijai Kumar Bist )**  
**Chief Justice**  
**20.11.2018**

Approved for reporting : **Yes**  
Internet : **Yes**