

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

ITANAGAR PERMANENT BENCH
WP(C) No.257(AP)/2016

Shri Niapung Konia,
S/o. Shri Tade Konia,
Presently serving as Executive Engineer,
PHE & WS, Daporijo Division, Upper Subansiri,
Arunachal Pradesh. *Petitioner*

..... *Vs*.....

1. State of Arunachal Pradesh,
Represented by the Commissioner, PHE & WS,
Govt. of Arunachal Pradesh, Itanagar, Arunachal Pradesh.

2. Shri Panka Bage,
Hon'ble Parliamentary Secretary, Home,
Govt. of Arunachal Pradesh, Itanagar.

3. Shri Kumar Murtem,
Hon'ble MLA, Raga, Upper Subansiri District,
Daporijo, Arunachal Pradesh.

4. Shri Binga Gara,
Executive Engineer (Functional),
PHE & WS, Yachuli Circle, Lower Subansiri District,
Yachuli, Arunachal Pradesh, Itanagar. *Respondents*

Advocates for the petitioner : Mr. P Taffo, Advocate,
Mr. J Doji, Advocate,
Mr. B Lego, Advocate.

Advocates for the respondents : Mr. K Ete, Addl. Advocate General,
Arunachal Pradesh.
Mr. K Jini, Advocate.

Date of hearing : **27.09.2016.**

Date of Judgment : **28.09.2016.**

BEFORE
HON'BLE MR. JUSTICE UJJAL BHUYAN

01. Heard Mr. P Taffo, learned counsel for the petitioner, Mr. K Ete, learned Senior Addl. Advocate General, Arunachal Pradesh and Mr. K Jini, learned counsel for respondent No.4.

02. Case was heard yesterday and today is fixed for delivery of judgment. Accordingly, judgment is dictated in the open Court.

03. By filing this petition under Article 226 of the Constitution of India, petitioner seeks quashing of the order dated 02.05.2016, issued by the Commissioner, Public Health Engineering & Water Supply, Govt. of Arunachal Pradesh, transferring the petitioner from Daporijo to Yachuli and transferring respondent No.4 from Yachuli to Daporijo in place of the petitioner.

04. Case of the petitioner is that he had entered service in the Public Health Engineering & Water Supply (PHE & WS) Department, Govt. of Arunachal Pradesh as an Assistant Engineer (Civil) on 15.04.1998 through a due selection process conducted by the Arunachal Pradesh Public Service Commission (APPSC). In the course of his service, petitioner was posted in different stations in the State of Arunachal Pradesh. Ultimately, he was promoted to the post of Executive Engineer on 07.08.2009 following recommendation of the Departmental Promotion Committee (DPC). Consequent upon such promotion, petitioner was posted as Executive Engineer (Civil), Daporijo PHE Division. It is stated that since then, petitioner has been rendering satisfactory service at Daporijo without any blemish whatsoever.

05. In the meanwhile, respondent No.4, whose substantive post in the PHE & WS Department is Assistant Engineer (Civil), was allowed to hold functional charge of Executive Engineer (Civil) on temporary basis in his own scale of pay band/grade pay as Assistant Engineer (Civil) without extra remuneration vide order dated 14.12.2015, issued by the Departmental Commissioner. It is seen from the said order that as many as 15 Assistant Engineers were so allowed to hold functional charge of Executive Engineer. In the second part of the order

dated 14.12.2015, petitioner was posted as Executive Engineer (Head Quarter) in the office of Superintending Engineer, PHE & WS Circle, Yachuli.

06. It is further stated that Governor of Arunachal Pradesh had issued Office Memorandum (OM) dated 10.02.2016 observing that officials in the Engineering Departments serving in lower substantive posts, like, Junior Engineer, Assistant Engineer etc. were allowed to officiate or function as Executive Engineer, Superintending Engineer on officiating or functional basis, which was some kind of out of turn promotion in an irregular or even illegal manner, thereby depriving the seniors of their due right to promotion or posting in the higher posts. Further observing that such unhealthy practice was a major cause of corruption besides having a demoralizing effect on senior officers, the OM directed that all such officiating or functional appointments and promotions made on out of turn basis be cancelled forthwith and the lower level functionaries be reverted back to their original substantive posts. Following the said OM dated 10.02.2016, Commissioner (Rural Development and Panchayati Raj), issued order dated 12.02.2016 directing all the Departmental officials to submit personal files of such officials who were irregularly allowed to hold higher post for compliance.

07. Notwithstanding the same, impugned order dated 02.05.2016 was issued by the Departmental Commissioner transferring respondent No.4 from Yachuli to Daporijo and in place of respondent No.4 transferring the petitioner from Daporijo to Yachuli. Representation filed by the petitioner before the Departmental Commissioner on 12.05.2016 failed to elicit any response, compelling the petitioner to approach this Court by filing the present writ petition.

08. This Court by order dated 19.05.2016 had issued notice whereafter, respondent No.4 has filed affidavit. In the said affidavit, it is stated that petitioner served at Daporijo for nearly seven years whereas, respondent No.4 has served in a number of places during the equivalent period. Therefore, petitioner cannot have any vested right to continue at Daporijo for years together. Normal tenure of posting of a Government servant in Arunachal Pradesh is two years, which period the petitioner had completed long back. Therefore, writ petition is without any merit and should be dismissed.

09. Petitioner has filed additional-affidavit to bring on record the recommendations of one MLA i.e., MLA of 25 Raga (ST) LAC and Parliamentary Secretary (Home), requesting the Departmental Minister to approve the proposal for transfer and posting of respondent No.4 at Yachuli.

10. In response thereto, respondent No.4 has filed an affidavit explaining that the above two requests were made by way of proposal to the concerned Minister and should not be seen as interference in administrative decision making within the Department by outside political functionaries. On the contrary, it is the petitioner who has misused his influence with politicians thereby ensuring prolonged stay in his current place of posting.

11. State has not filed affidavit.

12. Mr. P Taffo, learned counsel for the petitioner submits that impugned order of transfer is wholly illegal inasmuch as, his reliever i.e., respondent No.4 does not belong to the same cadre as the petitioner. There can be inter-se transfer only between members of the same cadre and not between members of different cadres. While acknowledging that petitioner being a Government servant is bound to carry out orders of transfer and posting of the Government in the public interest, he, however, submits that on that pretext illegality cannot be heaped on the petitioner by way of asking a junior officer to replace him. This is not permissible, he submits. Departmental authorities should have the courage to withstand political interference in administrative decision making. In support of his submissions, learned counsel for the petitioner has placed reliance on the following decisions: -

1. (2001) 6 SCC 260 (*Tarlochan Dev Sharma Vs. State of Punjab & Ors.*),
2. 2009 (2) GLT 956 (*Toheli Sumi Vs. State of Nagaland*),
3. 2009 (3) GLT 635 (*Potsangbam Super Singh & Ors. Vs. State of Manipur & Ors.*).

13. Countering the submission made on behalf of the petitioner, Mr. K Ete, learned Senior Addl. Advocate General submits that though the State has not

filed affidavit, he has the record with him which he has placed before the Court for perusal. Mr. Ete submits that the petitioner has to succeed on the strength of his own cause and not lean on an alleged illegality committed by respondents. In the instant case, petitioner has challenged an order of transfer. Petitioner is being transferred out after serving for more than 7 years in his current place of posting at Daporijo; he cannot continue in the same station for years together. Therefore, petitioner cannot have any grievance to the impugned order of transfer. Defect pointed out by the petitioner to his replacement by respondent No.4 is only incidental and does not vitiate the basic order of transfer. He submits that allowing Government servants long tenure in a particular station may give rise to vested interest and, therefore, Government is well within its right to transfer the petitioner. There is no infirmity or illegality in the impugned order to warrant interference. In support of his submissions, learned Senior Addl. Advocate General places reliance on the following decision: -

1. (1993) 3 SCC 357 (*Narpatchand A Bhandari Vs. Shantilal Moolshankar Jani & Anr.*),
2. (1998) 6 SCC 9 (*Om Prakash & Anr. Vs. State of UP & Ors.*),
3. (2007) 8 SCC 150 (*Modh. Masood Ahmad Vs. State of UP & Ors.*),
4. 2016 (3) GLT 288 (*Manash Das Vs. State of Assam*).

14. Mr. K Jini, learned counsel for respondent No.4 has adopted the submissions made by learned Senior Addl. Advocate General. Additionally, he submits that respondent No.4 has completed the qualifying service and all other eligibility criteria for promotion to the next higher post of Executive Engineer. Infact, because of delay in such promotion, respondent No.4 has been conferred financial upgradation as a palliative to service stagnation. In such circumstances, making respondent No.4 functional Executive Engineer and on that basis giving him posting cannot be said to be illegal or untenable. He also submits that allowing a Government servant long tenure may encourage development of vested interest which should not be permitted by the administration. In support of his submission, learned counsel has placed reliance on a decision of this Court

in *Assam State Electricity Board Vs. Gajendra Nath Pathak & Ors.*, reported in 1997 (3) GLT 1.

15. Submissions made by learned counsel for the parties have received the due consideration of the Court. Also perused the record produced by learned Senior Addl. Advocate General.

16. Though issue raised, at the first instance, appears to be short and simple, on a careful analysis of the rival submissions made at the Bar as well as the materials on record would reveal that an ancillary issue of considerable significance has got inter-twined with the transfer order of the petitioner which calls for a deeper scrutiny of the Court.

17. No doubt transfer and posting of Government servant is within the domain of the administration. Courts are ordinarily reluctant to interfere in matters of transfer and posting save and except, in cases where there is breach of statutory provision or where *malafide* exercise of power is demonstrated. Court may also examine a challenge to an order of transfer on the ground of violation of Article 14 of the Constitution of India. It is also true that a Government servant cannot insist that he be posted in a particular station. It is for the administration to decide where to post whom. Having said that, it is also to be noted that when there is a case of inter-se transfer, the transfer is to be carried out within the members of the same cadre. Admittedly, in this case, petitioner belongs to the cadre of Executive Engineer in the PHE & WS Department, Govt. of Arunachal Pradesh. On the other hand, respondent No.4 belongs to the cadre of Assistant Engineer in the same Department. As per service hierarchy, post of Assistant Engineer is subordinate to the post of Executive Engineer. By an order dated 14.12.2015, respondent No.4 and 14 others, who are all in the cadre of Assistant Engineer, were allowed to hold charge of Executive Engineer on temporary basis in the scale of pay of Assistant Engineer without any extra remuneration. It was mentioned that such functional charge of Executive Engineer was a purely stop gap arrangement and would automatically be terminated as and when regular Executive Engineer is posted, further clarifying that holding of additional charge of Executive Engineer would not confer upon those 15 Assistant Engineers any right to claim regular

promotion to the cadre of Executive Engineer. On that basis, respondent No.4 was posted in the office of the Superintending Engineer, PWE & WS Department, Yachuli whereafter, vide the impugned order, he was transferred to Daporijo.

18. Be it stated that Government of Arunachal Pradesh in its OM dated 10.02.2016 had completely disapproved such officiating/functional arrangements and had directed cancellation of all such officiating/functional appointments and promotions. Notwithstanding the same, impugned order came to be issued.

19. A closer scrutiny of the impugned order would go to show that respondent No.4 has been described or referred to as Executive Engineer and as Executive Engineer, he has been asked to take over charge from the petitioner at Daporijo. The fact of the matter is respondent No.4 is not an Executive Engineer. His substantive post is Assistant Engineer. By the order dated 14.12.2015, he was only allowed to hold additional charge of Executive Engineer. The concept of allowing additional charge would presuppose holding of substantive post to enable taking over of additional charge. As noticed above, substantive post of respondent No.4 is Assistant Engineer and he could have been transferred only to a substantive post of Assistant Engineer, in this case at Daporijo. Only after taking over charge in his substantive post of Assistant Engineer would the respondent No.4 be able to hold the additional charge of Executive Engineer, if the exigencies of service so requires, An Assistant Engineer could not have been and cannot be transferred to the post of Executive Engineer. Moreover, the sheet anchor of respondent No.4 i.e., order dated 14.12.2015 makes it abundantly clear that he would continue to draw the salary of Assistant Engineer. It is not understood as to how respondent No.4 by holding the office of Executive Engineer at Daporijo would draw salary of Assistant Engineer. Such arrangement, as noticed by the Govt. OM dated 10.02.2016, may reflect gross administrative indiscipline. As already noticed above, transfer of the petitioner has got inter-twined with the transfer of respondent No.4 as Executive Engineer; since it is a transfer inter-se and cannot be adjudicated *de hors* transfer of respondent No.4.

20. Judgments cited at the Bar lay down well recognized principles in law, but none of the judgments deal with a case similar to the one which has surfaced in this litigation.

21. In view of the discussions made above, Court is of the considered opinion that impugned order dated 02.05.2016 is vitiated by a fundamental error and, therefore, cannot be sustained. Though other issues have been raised, such as, interference by political functionaries, having regard to the finding arrived at as above, it may not be necessary to delve into the other aspects of the matter.

22. Accordingly and in the light of the above, impugned order dated 02.05.2016 cannot be sustained and is accordingly set aside and quashed.

23. Writ petition is allowed. No costs. Record produced by learned Senior Addl. Advocate General is returned back.

BIPLAB

Judge