IN THE HIGH COURT OF KERALA AT ERNAKULAM

PRESENT

THE HONOURABLE MR.JUSTICE A.K.JAYASANKARAN NAMBIAR

&

THE HONOURABLE MR.JUSTICE MOHAMMED NIAS C.P.

WEDNESDAY, THE 2ND DAY OF NOVEMBER 2022/11TH KARTHIKA, 1944

W.A.NO.1381 OF 2022

AGAINST THE JUDGMENT DATED 01.09.2022 IN W.P(C).NO.27982/2022 OF HIGH COURT OF KERALA

APPELLANT/PETITIONER IN W.P.(C):

S.KRISHNAKUMAR
AGED 59 YEARS
S/O.R.SUKUMARAN NAIR, DISTRICT & SESSIONS JUDGE,
KOZHIKODE, RESIDING AT A1, JUDGES QUARTERS,
CHEROOTY ROAD, KOZHIKODE, PIN - 673032

BY ADV.SRI.V.V.SIDHARTHAN (SR.)(S-455)
BY ADV.SRI.DINESH MATHEW J.MURICKEN
BY ADV.SRI.VINOD S. PILLAI
BY ADV.SMT.NAYANA VARGHESE
BY ADV.SRI.AHAMMAD SACHIN K.

RESPONDENTS/RESPONDENTS IN W.P.(C):

1 STATE OF KERALA
REPRESENTED BY THE CHIEF SECRETARY,
SECRETARIAT, STATUE JUNCTION, PALAYAM.P.O,
THIRUVANANTHAPURAM DISTRICT, PIN - 695001

2 HIGH COURT OF KERALA
ERNAKULAM, KOCHI, REPRESENTED BY THE REGISTRAR GENERAL,
PIN - 682031

3 THE REGISTRAR GENERAL
HIGH COURT OF KERALA, ERNAKULAM,
KOCHI, PIN - 682031

4 THE REGISTRAR (DISTRICT JUDICIARY)
HIGH COURT OF KERALA, ERNAKULAM,
KOCHI, PIN - 682031

BY SRI.BIJOY CHANDRAN,GOVERNMENT PLEADER(B/O)
BY SRI.ELVIN PETER P.J., SC

THIS WRIT APPEAL HAVING COME UP FOR ADMISSION ON 25.10.2022, THE COURT ON 02.11.2022 DELIVERED THE FOLLOWING:

'C.R.'

JUDGMENT

A.K. Jayasankaran Nambiar, J.

> *"If in every case where an order of a subordinate court is found to be faulty a disciplinary action were to be initiated, the confidence of the subordinate judiciary will be shaken and the officers will be in constant fear of writing a judgment so as not to face a disciplinary enquiry and thus judicial officers cannot act independently or fearlessly."* [1]

The appellant before us is the Principal District and Sessions Judge at Kozhikode, and he is aggrieved by the judgment dated 01.09.2022 of a learned Single Judge who dismissed his writ petition that impugned an order transferring him from the post of Principal District and Sessions Judge, Kozhikode to the post of Presiding Officer, Labour Court, Kollam.

2. The appellant states that he was posted as the Principal District and Sessions Judge at Kozhikode with effect from 01.06.2022 and that, contrary to clause 3 and 4 of the extant transfer norms, that stipulated that a judicial officer would not ordinarily be transferred

1 Ishwar Chand Jain v. High Court of Punjab and Haryana and another – [(1988) 3 SCC 370]

from a station before he completed three years therein unless such transfer was warranted in the exigencies of service, he was transferred out of his present station to Kollam. It is his case that his transfer, although disguised as a routine transfer, was in fact a punitive transfer in that it was seen necessitated on account of certain observations he had made in an order granting bail to a person accused of committing offences under Sections 354A(2), 341 and 354 of the Indian Penal Code. The observations were perceived as derogatory to women in general, and the victim in particular, and were met with severe criticism in the print, visual and social media and the transfer order is stated to have been issued as a response to such public criticism.

3. Per contra, the counter affidavit filed on behalf of the High Court on its administrative side states that the transfer was one that was necessitated in the exigencies of service and that in ordering so there was no violation of the extant transfer norms. It is pointed out that it was usual for District Judges to be posted as Presiding Officers of the Labour Courts in the State since they all formed part of the same cadre of posts in the Higher Judicial Service in the State. Referring to the orders passed by the appellant in certain bail applications, it is stated that the said orders point to the cussedness of

the approach of the appellant and portrayed the entire judiciary in a poor light among the general public, and also had the propensity to erode public confidence in the institution.

4. The learned Single Judge who considered the writ petition found that the appellant could not be said to be prejudiced in any manner by his posting as a Presiding Officer of the Labour Court since that was a post borne on the cadre of District Judge, and the State Government was admittedly filling the post by appointing District Judges on the recommendation of the High Court. The transfer was also seen as necessitated in the exigencies of service and therefore not liable to be interfered with.

5. In the appeal before us, the learned senior counsel Sri. Sidharthan, duly assisted by Sri. Dinesh Mathew J Murikan, the learned counsel on behalf of the appellant, re-iterated the contentions urged before the writ court and added that the circumstances leading to the transfer order clearly pointed to the order being punitive in nature and therefore legally unsustainable since it was not preceded by any disciplinary proceedings against the appellant. He placed reliance on the judgment in **Krishna Prasad Verma (D) thr. L.R's v. State of Bihar & Ors. - [AIR Online 2019 SC 2686]** to remind us

that action should not be taken against judicial officers only because wrong orders are passed by them and that the High Court should also take on the role of protectors and guardians of the judges falling within their administrative control. As regards the transfer as Presiding Officer of the Labour Court, he points out that the said posting had to be seen as a deputation and hence could not have been done without obtaining the consent of the appellant. Reliance was placed on the decision in **State of Punjab & Ors. v. Inder Singh & Ors. – [(1997) 8 SCC 372]** to fortify the said contention.

6. Responding to the said contentions, Sri. Elvin Peter, the learned counsel appearing for the Registrar of the High Court, points out that the transfer of the appellant to Kollam and his posting there as the Presiding Officer of the Labour Court cannot be seen as punitive in nature or as a deputation. He contends that deputation normally arises when a person is transferred to a post in a different service and not when, as in the instant case, the appellant was transferred to another post in the same service and borne in the same cadre. He also brings to our notice the judgment of the Supreme Court in **Aparna Bhat & Ors. v. State of Madhya Pradesh & Anr. – [AIR 2021 SC 1492]** where the court issued directions regarding the manner in which bail applications were to be disposed, especially in

matters relating to sexual violence. In particular he refers to the direction therein that mandates that bail conditions and orders should avoid reflecting stereotypical or patriarchal notions about women and their place in society, and that discussion about the dress, behaviour or past conduct or morals of the prosecutrix, should not enter the verdict granting bail. It is his contention that the appellant could not feign ignorance of the said directions of the Supreme Court and ought to have avoiding making the observations that he did in the bail order that attracted public criticism.

7. We have considered the pleadings on record and the submissions made on either side.

8. It is settled law that in matters of transfer of an employee, this court would ordinarily refuse to interfere with the decision of an employer that is taken in the administrative exigencies of the service concerned. That said, it is also well settled that this court cannot remain a silent spectator to actions of an employer that are vitiated by *mala fides*, either factual or legal, or are otherwise arbitrary in nature. This court would also interfere with the orders of transfer if it finds that the order is punitive in nature and has not been preceded by a disciplinary enquiry as mandated by the service rules in vogue.

9. In the instant case, the transfer of the appellant, who is presently working as a Principal District & Sessions Judge in Kozhikode, is to Kollam, where he has been posted as the Presiding Officer of the Labour Court. The transfer order was issued in the immediate aftermath of media reports that criticized the appellant for certain observations that he had made in an order granting bail to an accused. There appears to be no other reason that necessitated the transfer. The observations of the appellant in the bail order were indeed derogatory to women and, in our view, wholly uncalled for. That said, the question that arises for our consideration today is whether the appellant was merely discharging his judicial role as a District & Sessions Judge while passing the said order and making those observations, or whether, by making the said observations, he had occasioned a misconduct warranting punitive action ?

10. Ordinarily, the propriety of making observations in a judgment or judicial order would depend upon the issue that arises for consideration before the judge in the particular case. If the observations do not have any nexus with the issue that is being considered by the court, the judge’s observations, if derogatory in nature, cannot claim any immunity from either public criticism or legal

action. Such immunity, on the other hand, will ordinarily be available to those observations that are made in connection with the issue being considered by the court, whether or not they are in conformity with the popular view held in society. The only remedy available to a person who is aggrieved by such latter order, or the observations made therein, is to seek judicial redress against the same before the higher judicial forum.

11. In the instant case, the observations of the learned Judge were rendered while granting bail to a person who was charged with committing the offences under Sections 354A(2), 341 and 354 of the IPC. The observations in question were of a kind that was specifically denounced and deprecated by the Supreme Court in **Aparna Bhat & Ors. v. State of Madhya Pradesh & Anr. – [AIR 2021 SC 1492]** where at paragraphs 42 to 45, the Court observed as follows:

> "42. This Court therefore holds that the use of reasoning/language which diminishes the offence and tends to trivialize the survivor, is especially to be avoided under all circumstances. Thus, the following conduct, actions or situations are hereby deemed irrelevant, e.g. - to say that the survivor had in the past consented to such or similar acts or that she behaved promiscuously, or by her acts or clothing, provoked the alleged action of the accused, that she behaved in a manner unbecoming of chaste or "Indian" women, or that she had called upon the situation by her behaviour, etc. These instances are only illustrations of an attitude which should never enter judicial verdicts or orders or be considered relevant while making a judicial decision; they cannot be reasons for

granting bail or other such relief. Similarly, imposing conditions that implicitly tend to condone or diminish the harm caused by the accused and have the effect of potentially exposing the survivor to secondary trauma, such as mandating mediation processes in non-compoundable offences, mandating as part of bail conditions, community service (in a manner of speaking with the so-called reformative approach towards the perpetrator of sexual offence) or requiring tendering of apology once or repeatedly, or in any manner getting or being in touch with the survivor, is especially forbidden. The law does not permit or countenance such conduct, where the survivor can potentially be traumatized many times over or be led into some kind of non-voluntary acceptance, or be compelled by the circumstances to accept and condone behavior what is a serious offence.

43. The instances spelt out in the present judgment are only illustrations; the idea is that the greatest extent of sensitivity is to be displayed in the judicial approach, language and reasoning adopted by the judge. Even a solitary instance of such order or utterance in Court, reflects adversely on the entire judicial system of the country, undermining the guarantee to fair justice to all, and especially to victims of sexual violence (of any kind from the most aggravated to the so-called minor offences).

44. Having regard to the foregoing discussion, it is hereby directed that henceforth:
(a) Bail conditions should not mandate, require or permit contact between the accused and the victim. Such conditions should seek to protect the complainant from any further harassment by the accused;
(b) Where circumstances exist for the court to believe that there might be a potential threat of harassment of the victim, or upon apprehension expressed, after calling for reports from the police, the nature of protection shall be separately considered and appropriate order made, in addition to a direction to the accused not to make any contact with the victim;
(c) In all cases where bail is granted, the complainant should immediately be informed that the accused has been granted bail and copy of the bail order made over to him/her within two days;
(d) Bail conditions and orders should avoid reflecting stereotypical or patriarchal notions about women and their place in society, and must strictly be in accordance with the requirements of the Cr.PC. In other words, discussion about the dress, behaviour, or past “conduct” or “morals” of the prosecutrix, should not enter the verdict granting bail;
(e) The courts while adjudicating cases involving gender related crimes, should not suggest or entertain any notions (or encourage

> any steps) towards compromises between the prosecutrix and the accused to get married, suggest or mandate mediation between the accused and the survivor, or any form of compromise as it is beyond their powers and jurisdiction;
> (f) Sensitivity should be displayed at all times by judges, who should ensure that there is no traumatization of the prosecutrix, during the proceedings, or anything said during the arguments, and
> (g) Judges especially should not use any words, spoken or written, that would undermine or shake the confidence of the survivor in the fairness or impartiality of the Court.
>
> 45. Further, courts should desist from expressing any stereotype opinion, in words spoken during proceedings, or in the course of a judicial order, to the effect that (i) women are physically weak and need protection; (ii) women are incapable of or cannot take decisions on their own; (iii) men are the "head" of the household and should take all the decisions relating to family; (iv) women should be submissive and obedient according to our culture; (v) "good" women are sexually chaste; (vi) motherhood is the duty and role of every woman, and assumptions to the effect that she wants to be a mother; (vii) women should be the ones in charge of their children, their upbringing and care; (viii) being alone at night or wearing certain clothes make women responsible for being attacked; (ix) a woman consuming alcohol, smoking, etc. may justify unwelcome advances by men or "has asked for it"; (x) women are emotional and often overreact or dramatize events, hence it is necessary to corroborate their testimony; (xi) testimonial evidence provided by women who are sexually active may be suspected when assessing "consent" in sexual offence cases; and (xii) lack of evidence of physical harm in sexual offence case leads to an inference of consent by the woman."

12. No doubt, it could be argued that, as a Principal District Judge, the appellant ought, ideally, to have taken note of the above guidelines issued by the Supreme Court, and also brought the said guidelines to the notice of the many judicial officers functioning under his administrative supervision in the District concerned. However, merely because he did not do so, could he have been taken to task

without ascertaining the circumstances under which he passed the order in question? We do not think so. In our view, a distinction has to be drawn between wrong orders passed by judicial officers in the discharge of their judicial function and other conduct that cannot be attributed to a legitimate exercise of their judicial function. The former category of errors are ordinarily to be corrected in proceedings brought by an aggrieved person before the higher courts in the judicial hierarchy. The latter category of cases, on the other hand, are to be corrected through disciplinary action initiated against the erring officer by the High Court, on its administrative side. Non-adherence to the guidelines issued by the Supreme Court, except when established to be wilful and deliberate, cannot be seen as a misconduct on the part of a judicial officer. When the non-adherence to the guidelines issued by the higher court, is on account of the ignorance or non-comprehension of the judicial officer, it ought to be viewed as a mistake occasioned by the officer in the discharge of his judicial function, and one that can be corrected by the higher courts in the judicial hierarchy. Holding otherwise could have the deleterious effect of stifling the thought process of judicial officers who have to be accorded sufficient intellectual freedom if they are to function effectively under our legal system.

13. On the facts of the instant case, we find that the two orders passed by the appellant, in the bail applications mentioned by the High Court in its counter affidavit, were subjected to appeal and revision before this Court and the derogatory observations made therein have since been expunged by this court. If the High Court, on its administrative side, was of the view that the observations of the appellant in the judicial orders passed by him were of such nature as warranted the initiation of disciplinary action against him, then it ought to have called for an explanation from the appellant first and then established the misconduct in a disciplinary enquiry instituted for the purpose. It was only thereafter, and after arriving at a finding of misconduct, that an appropriate punishment could have been imposed on him. Such action, however, was never initiated against the appellant by the High Court, which even in the counter affidavit filed before us maintains that the order of transfer was not punitive but in public interest and in the exigencies of the service.

14. As already noticed, the transfer order was passed in the immediate aftermath of an order passed by the appellant in a bail application, which order contained observations that were derogatory to women generally and the victim in particular. The counter affidavit filed on behalf of the High Court suggests that it is the widespread

criticism of the said order in the media that led to the order of transfer. Further, although the post of Presiding Officer of a Labour Court is one that can be filled through the deputation of a District & Sessions Judge, in practice and by convention, persons who have been posted as Principal District & Sessions Judges are not transferred and posted as Presiding Officers of the Labour Courts in the State. Viewed in the above backdrop and in the light of the settled practice and convention in the State, therefore, the impugned transfer order does appear to be punitive in nature so far as the appellant is concerned, and one that was not preceded by any valid enquiry.

15. As we have already observed in the decision in **Divyamol v. The Director General of Central Industrial Security Force and Others - [2022 (5) KHC 732]**, the SLP against which was dismissed by the Supreme Court, a transfer is liable to be interfered if it is seen as an order by way of punishment without first holding any disciplinary proceedings to establish the guilt of the employee. However, there may arise cases where the continuance of an employee in a particular station is detrimental to the maintenance of discipline in that station and in such cases it may seem prudent to the employer to transfer the employee to a different station so that the twin objectives of maintaining discipline at one station, whilst

simultaneously availing the service of the employee at another station, are achieved without casting any aspersion on the character or conduct of the employee. The intention behind such transfer is not to punish an employee but to relocate him/her in order to maintain discipline within the force. Such transfer orders do not call for interference from courts because they are merely measures taken by an employer in the exigencies of service and for efficient administration thereof without causing any prejudice/stigma or affecting future prospects of the employee. In such cases, we had clarified that there need not be any enquiry conducted to first ascertain whether there was misbehaviour or conduct unbecoming of an employee, for to hold otherwise would frustrate the very purpose of transferring an employee in public interest or exigencies of administration to enforce decorum and ensure probity. In the instant case however, the transfer order cannot be clothed with a similar immunity because in effect it is prejudicial and stigmatic to the appellant as he would be forced to work in a post that is not perceived by those in the service to be of the same status as that of the Principal District & Sessions Judge. We are also of the view that upholding a transfer order such as the one impugned in these proceedings would, apart from meting out injustice to the appellant, also have a deleterious effect on the morale of the judicial officers in the State.

16. There is yet another aspect of the matter. After the judgment of the Supreme Court in **K.S. Puttaswamy and Another v. Union of India and Others - [(2017) 10 SCC 1],** an employer that answers to the description of "State" within the meaning of the term under Article 12 of the Constitution, including the High Court in the discharge of its administrative functions, cannot ignore the dignity of the employee concerned, and the possible harm that may be caused to his reputation while in service, while ordering his transfer to another workplace. The reputation of an employee, as perceived by his fellow employees in the service, is an important aspect of his dignity, which as a fundamental right traceable to Article 21 of the Constitution, has to be respected by the employer. In the case of the appellant, although his transfer order states that his transfer is in the exigencies of service, the circumstances under which he was transferred, and that too to a post that is not perceived by those in the service, to be of the same status as that of the Principal District & Sessions Judge in the Higher Judicial Service in the State, persuades us to view the same as punitive in nature and unfair to the appellant.

17. We cannot also overlook the fact that the transfer order comes at a time when the appellant has less than a year to retire from

the service on superannuation. He is also presently undergoing treatment for various ailments at a hospital in Kozhikode. Subjecting him to a transfer under the said circumstances would be unfairly prejudicial to the appellant. We therefore allow this appeal by setting aside the impugned judgement of the learned Single Judge and allowing the writ petition by setting aside the transfer order as legally unsustainable.

The Writ Appeal is allowed.

Sd/-
A.K.JAYASANKARAN NAMBIAR
JUDGE

Sd/-
MOHAMMED NIAS C.P.
JUDGE

prp

APPENDIX OF W.A.NO.1381/2022

APPELLANT'S ANNEXURES:

ANNEXURE A1 **TRUE COPY OF THE OFFICIAL MEMORANDUM ISUSED BY THE ASSISTANT REGISTRAR (H.G.), HIGH COURT OF KERALA DATED 20.11.2019.**

RESPONDENTS ANNEXURES: **NIL.**

//TRUE COPY//