
(2000) 03 J&K CK 0006
In the Jammu And Kashmir High Court
Case No : S.W.P. No. 106 of 2000

Ghulam-ud-Din

APPELLANT

Vs

State of Jammu & Kashmir and Others

RESPONDENT

Date of Decision : 07-03-2000

Acts Referred:

Citation : (2001) 1 LLJ 952

Hon'ble Judges : Nisar Ahmad Kakru, J

Bench : Single Bench

Advocate : M.A. Qayoon, for the Appellant; G. Ali, for the Respondent

Final Decision : Dismissed

Judgement

Nisar Ahmad Kakru, J.—The petitioner, a Girdhawar Qanoongo has been transferred by the Divisional Commissioner Kashmir vide order

bearing No. Div. Com Estt K 132 of 2000 dated January 20, 2000 which is impugned by the medium of this writ petition. The respondents have

filed objections to the admissibility of writ petition to which, the petitioner has reacted through a CMP accompanied by an affidavit seeking

permission to read it in opposition to the objections of the State. Mr. G. Ali is averse to the motion but has no objection if the petition is finally

disposed of at this very stage. In this view of the matter, I admit this writ petition to hearing. Mr. G. Ali adopts the objections filed by him as

counter and the affidavit sought to be filed by the petitioner is taken on record, treating it to be the rejoinder and the writ petition is taken up for

final hearing.

2. The transfer of a Government servant is a normal feature of service, administrative in character and an incident of service, therefore. Courts are

loathe to display indulgence, unless it is shown to be without jurisdiction or violative of statutory rules or mala fide, which are the well settled

exceptions and as a corollary an aggrieved person has to be protected, if his case falls within any of these exceptions. How far these exceptions

are attracted in the case in hand has to be examined in the light of grounds of challenge thrown to the order impugned.

3. The impugned order is challenged on the ground that the petitioner has been transferred to a village, which is at a distance of 30 kilometres from

his home town. Claiming to be the father of four children, it is canvassed that the order is likely to uproot his family. . Since no rule has been

brought to the notice of the Court, which would suggest any violation of a condition of petitioner's service therefore, I decline to interfere,

obviously, no expression of opinion in respect of merit of the ground is called for. However, it needs to be observed that in case petitioner

apprehends any inconvenience he cannot seek indulgence of this Court on this ground and the proper course for him is to represent to the

respondents.

4. It is next contended that the order has been passed to accommodate the respondent No. 6 and the averment is couched in the following words:

..... that the respondents 3 and 4 have issued order dated January 20, 2000 only to accommodate respondent No. 6 at the cost of the petitioner.

It is a well settled proposition of law that where an order of transfer is issued by an authority for purposes of accommodating any official at the cost

of the order, the order is mala fide and legally unsustainable. The impugned order dated January 20, 2000 having been issued by respondents 3

and 4 only to accommodate respondent No. 6 at the cost of the petitioner, therefore, the order is mala fide and being based on extraneous

considerations, is therefore, liable to be set aside.....

5. It is settled position in law that one, who alleges mala fides, onus lies on him to prove it and it is not possible on the basis of a bald assertion to

hold that the order impugned is actuated by mala fide considerations. The ground of mala fides reproduced hereinabove, is not well founded

because material facts are wanting, therefore it is not possible to draw an inference on such vague suggestion.

6. How the Apex Court deals with the situation where mala fide is a ground

advantageous it is to refer to Rajendra Roy Vs. Union of India (UOI)

and Another, in which it has been held:

It does not appear to us that the appellant has been moved out just to get rid of him and the impugned order of transfer was passed mala fide by

seizing an opportunity to transfer Shri Patra to Orissa from Calcutta. It may not be always possible to establish malice in fact in case, it is possible

to draw reasonable inference of mala fide action from the pleadings and antecedent facts and circumstances. But for such inference there must be

firm foundation of facts pleaded and established.....

7. Applying the principle of law laid down by the Apex Court in the judgment supra, the conclusion available is that the petitioner has miserably

failed to substantiate his contention that the impugned order of transfer emanates from mala fides or has been issued to achieve an oblique motive,

therefore, challenge fails.

8. It is further contended that the Government had at a point of time issued guidelines laying down procedure for transfer and posting of its officers

but the guidelines have not been placed before the Court. The respondents, in their reply, have not deemed it proper to say anything about it in

express words, excepting ""the contention no more has any substance in it."" This stand of respondents leads nowhere and I am left with no option

but to proceed on the assumption that the guidelines are there. What is the scope of these guidelines, it is appropriate to refer to Mohammad

Sikendar Bhat v. State of J. & K. reported in 1989 KLJ 186 at 192 in which the Division Bench has held:

.....From the reading of the aforesaid authorities it is to be concluded that any instruction, circular or order issued by the Executive under its

plenary powers can be made justiciable only when it relates to condition of service of a member of service and is consistent with the rules already

framed in this regard. If it does not relate to the condition of service, the employee of the State would not get any right to enforce the circular,

instruction or the order.....

The Bench has further held in para 16 as under:

.....In the present case we are faced with a circular which does not at all govern the condition of service. The circular governs incident or exigency

of service. This will not afford cause of action to a Government servant if it is not followed by the Government. By not following the transfer policy

none of the rights of the Government servant, legal, constitutional or statutory can be said to be violated.

9. The petitioner's contention about the prematurity of tenure advanced on the basis of guidelines need no further deliberation in view of the

judgment of the Division Bench *supra*, for, the judgment furnishes a very complete answer to the issue raised. Accordingly, I hold that on the

strength of guidelines be it in the form of circulars, instructions or whatever name be given to it, no right whatsoever accrues to a Government

servant to continue for a particular period, at a particular place for the simple reason that a transfer made in breach of a policy does not violate any

of the legal or constitutional rights of such Government employees.

10. This brings me to the order issued by the Financial Commissioner bearing No. FC(NG) 125 of 1999 dated June 8, 1999 and the relevant

paras which are pressed into service are reproduced hereunder:

5. The stay of patwari in halqa shall not ordinarily exceed a period of 3 years. Under no circumstances the premature transfers be countenanced

except in cases where the Deputy Commissioner may recommend for reasons to be recorded and the Financial Commissioner shall grant

permission on merits of such case.

6. No transfer shall be made affecting the composition of the Survey Teams. Any change in the Survey Team shall be effected under the orders of

Financial Commissioner.

8. Any transfer made against the guidelines shall have no validity.

11. Adverting to the order of Financial Commissioner, I find from the instructions reproduced in the preceding para that the object of these

instructions is to divest the authorities of the Revenue department of a power which flows to them from the statute. Being Head of the Department

he may have the powers to issue guidelines but same have to be in conformity with the Rules and not in contravention. These instructions have the

effect of taking away statutory power, which is not permissible, therefore void ab initio. It is appropriate to notice that through the rejoinder

affidavit the petitioner has claimed the relief on the basis of the aforementioned instructions alleging the impugned order of transfer to be in breach

of said instructions. Since these instructions are without competence, therefore, incapable of implementation, obviously, no enforceable right is conferred upon the petitioner.

12. In the result the writ petition is dismissed along with CMPs. Interim direction is vacated.