
(2009) 08 J&K CK 0019

In the Jammu And Kashmir High Court

Case No : Service Writ Petition (SWP) No. 1063 Of 2009, CMP No. 1410 Of 2009 And CMP No. 1482 Of 2009

Mohd.Sadiq

APPELLANT

Vs

State & Ors.

RESPONDENT

Date of Decision : 25-08-2009

Acts Referred:

Civil Service Regulations, 1956 — Article 39, 21

Citation : (2009) JKJ 54 Supp

Hon'ble Judges : Nisar Ahmad Kakru, J

Bench : Single Bench

Advocate : Sahazad Azeem, Sunil Sethi, Neeru Goswami, AG, S.Sukhvinder Singh, D.S.Chouhan, Advocates appearing for the Parties

Judgement

1. In furtherance of an endeavour to be positioned as Incharge Deputy Chief Education Officer, Mendhar (Poonch), the petitioner Incharge

Principal Govt. Higher Secondary School, Mankote (Mendhar) has set out a challenge to the order of modification introduced to the general order

of transfer on the ground that it is not within the competence of the Government to modify the order of transfer if already implemented. The

challenge needs to be appreciated in the factual background that the petitioner Incharge Principal Govt. Higher Secondary School Mankote

(Mendhar) was transferred and posted as Incharge Deputy Chief Education Officer, Mendhar (Poonch) by Govt. Order bearing No.504 of 2009

dated 18.06.2009 which came to be modified vide Order No.525Edu of 2009 dated 24.06.2009 having the effect of continuance of the petitioner

as Incharge Deputy Chief Education Officer, Mendhar (Poonch) and respondent5 as Incharge Principal Higher Secondary School, Mankote

(Mendhar). To bring home the point, reliance is placed by Mr. Chouhan on Mahmood Azam Siddique v. State of Bihar and others reported in

2000 LAB.I.C.655. Relying upon rules 51 and 56 of the Bihar Service Code, it was held that order of transfer once implemented, could not be

modified but with respects I don't subscribe to the view for the reasons detailed hereinafter. He has also referred to the judgment titled Rameshwar

Pandey v. Addl. Director (All.) reported in Service Law Reporter Vol. 113, 1996(3) but reliance is misplaced because this judgment has

conceded to the power of modification of the order of transfer to the competent authority. On the basis of the judgments supra, emphasis was laid

by him on Annexures B and D to the writ petition, the two communications one hand written on the letter head of Govt. Higher Secondary School

Mankote (Mendhar) dated 19.06.2009 and the other typed one styling both to be the relieving orders. It is not understandable why two relieving

orders. If the petitioner had relieved the respondent5 on 19.06.2009 why again on 20.06.2009. Be that as it may contention is controverted by

Mr. Sethi on the strength of communications of the Chief Education Officer, Poonch dated 20.06.2009 and 29.06.2009 showing that the

respondent5 was in position of the post of the Dy. Chief Education Officer even on 30.06.2009. A copy of attendance register is also brought on

record. Going by the communications of the Chief Education Officer, Poonch, it emerges that the order of transfer was not given effect, therefore,

judgment supra is inapplicable to the facts of this case. For another reason also that is absence of rules 51 and 56 of Bihar Service Code on our

statute.

2.1 would now like to examine the contention on the touchstone of rules those govern the controversy on hand and advantageous it is to refer to

article 39 of the Civil Service Regulations which reads:

Unless for special recorded reasons (which must be of a public nature), the authority under whose orders the transfer takes place, permits or

requires it to be made in any particular case, elsewhere, or otherwise, the charge of an office must be made over at its headquarters both the

relieving and relieved officers being present.

3. A plain reading of the extracted article reveals that handing over and taking over of the charge of an office by the relieving and relieved officers

can alone amount to relieving under article 39 with an exception empowering the authority under whose orders, the transfer takes place to direct

otherwise and in all fairness. Mr. Chouhan has admitted that there was no direction passed to the contrary commanding the petitioner and the

respondent⁵ not to handover and take over the charge in accordance with article 39. Analyzing rival contentions about implementation of the

order, it is crystal clear that the basic order of transfer was neither implemented in law nor on facts.

4. This brings me to the contention of lack of power to modify the order of transfer on the part of the authority who has passed it. To have the

answer relevant it is to reproduce section 21 of the General Clauses Act:

21. Power to make, to include power to add, to amend, vary or rescind orders, rules or bylaws. Where, by an Act or Regulation, a power to

issue notifications, orders, rules or bylaws is conferred then that power includes a power, exercisable in the like manner and subject to the like

sanction and conditions (if any), to add, to amend, vary or rescind any notifications, orders, rules or bylaws so issued.

The language of the section is clear enough that an authority having the power to pass an order has also the power to add, amend, vary or rescind

it and that is end of it.

5. Next ground of challenge was sought to be developed by Mr. Chouhan with reference to para⁷ of the reply filed by the official respondents

wherein it is pleaded that the order was modified because of good performance of the respondent⁵ as Incharge Deputy Chief Education Officer

followed by demand of public representatives including MLAs which according to him is not countenanced in law.

6. Considering the challenge in the light of the reply filed by the State, it transpires that there was public demand for modification of the order of

transfer, accordingly modified but certainly not modified to punish the petitioner and consequence of modification being petitioner's continuation as

a Principal, obviously does not entail his dislodgement. Moreso, a transfer would not be vitiated by itself because it is made on the

recommendation of the MLAs. In taking this view, I am fortified by a judicial pronouncement handed down by the Supreme Court in Mohd.

Masood Ahmad v. State of U.P. and others reported in (2007) 8 SCC150, para 8

whereof is reproduced hereunder:

In our opinion, even if the allegation of the appellant is correct that he was transferred on the recommendation of an ML A, that by itself would not

vitate 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

hardandfast rule that every transfer at the instance of an MP or ML A 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.

7. A reading of the extracted para of the judgment supra of the apex court would make it clear that it is the facts and circumstances of an individual

case which assume significance to arrive at a conclusion as to whether a transfer at the instance of MP/MLA would be vitiated or not. Thus

situations are conceivable where order of transfer may be malafide and politically motivated. In such a case the court cannot refuse interference.

Suffice it to say that the case on hand is not like that, for, modification was necessitated in the public interest.

8. In the aforementioned backdrop, writ petition fails and is dismissed along with connected CMP(s). However, no order as to costs. Interim

direction dated 30.06.2009 shall stand vacated.