

(2018) 04 J&K CK 0054
In the Jammu And Kashmir High Court
Case No : OW104--158 OF 2017

PRESIDENT D.A.V COLLEGE MANAGING COMMITTEE	APPELLANT
Vs	
POONAM MAHAJAN AND OTHERS.	RESPONDENT

Date of Decision : 02-04-2018

Acts Referred:

Constitution of Jammu and Kashmir, 1956 Section 104
Code Of Civil Procedure, 1908 — Section 151
Government of India Act of 1915 — Section 107
Indian High Courts Act 1861 — Section 15

Citation : (2018) 04 J&K CK 0054

Hon'ble Judges : SANJEEV KUMAR

Bench : Single Bench

Final Decision : Disposed Of

Judgement

1. In this petition, the petitioners have invoked the power of superintendence conferred on this Court by Section 104 of the Constitution of J&K for

setting aside the order dated 09.10.2017 passed by 1st Additional District Judge, Jammu (hereinafter called "the Appellate Court") whereby the

order of City Judge, Jammu (hereinafter called "the Trial Court") dated 08.04.2017 has been upheld.

2. The genesis of the controversy involved in this petition lies in three orders issued by petitioner No. 3 on 21.03.2017, whereby the respondents have

been transferred to Vidya Peeth Public Higher Secondary School, Chowgan Slathian, Jammu, Maharaja Hari Singh DAV Public School, R.S Pura and

Maharaja Hari Singh DAV Central Public School, Akhnoor respectively. The respondents have challenged the orders of their transfers by filing a civil

suit before the trial Court seeking declaration that the orders of their transfers issued by the petitioner No. 3 are illegal, null and void and contrary to

the provisions of law with consequential relief of permanent prohibitory injunction for restraining the petitioners from forcibly relieving the respondents or pressurizing them to join at their new places of postings

3. As is apparent from the records, the suit was primarily based on the allegations of the respondents that their transfer was not a routine

administrative affair but was actuated by mala fide considerations and, therefore, a substitute for punishment. The suit as well as the application filed

by the respondents for temporary injunction under Order 39 Rule 1 and 2 read with Section 151 CPC was contested by the petitioners. The stand

taken by the petitioners before the trial Court was that transfer of the respondents was purely in the interest of administration and the same was in the

exercise of legitimate power reserved by the petitioners. It was also pleaded by the petitioners that the transfer of the respondents had not violated

any service rights of the respondents inasmuch as all service benefits viz pay and perks had been kept intact. The learned trial Court after hearing

learned counsel for the parties came to the conclusion that impugned orders had not been issued in the interest of administration but had been passed

keeping in view the alleged activities of the respondents which had been highlighted by the petitioners in their written statements. The trial Court,

therefore, was prima facie of the view that the orders of transfer challenged in the suit were punitive in nature and were, therefore, prohibited under

Rule 10.1 (2) of the administrative manual of the DAV College Management Committee. The trial Court without going further into the other aspects

like "Balance of convenience" and "Irreparable loss" kept all the three orders of transfer in abeyance till the culmination of the trial.

4. Aggrieved, the petitioners filed an appeal under Order 43 Rule 1 (r) of the Code of Civil Procedure before the 1st Additional District Judge, Jammu.

Appeal of the petitioners was accepted and the order of the trial Court dated 08.04.2017 was set aside by the 1st Additional District Judge, Jammu

vide its order dated 17.05.2017. The respondents did not accept this order and assailed the same in Petition U/S 104 No. 66/2017. A Bench of this

Court vide its order dated 22.05.2017, set aside the order impugned and remanded the matter to the Appellate Court i.e 1st Additional District Judge,

Jammu to decide the appeal afresh. Before this Court, the respondents for the first time appear to have taken the plea of jurisdiction of petitioner No.

3 to pass the impugned transfer orders. In paragraph (8) of the judgment dated 22.05.2017, the Single Bench prima-facie observed that the orders of transfer were required to be passed by the Governing Body and the same were to be issued by the President/General Secretary of the College Management Committee. However, while parting with the judgment, the Court also made it clear that the observations made by it in the order were only for the purpose of deciding the petition and the Lower Appellate Court would not be influenced by any of the observations and would decide the appeal afresh. This is how the appeal was considered afresh by the Appellate Court who vide its order impugned upheld the order of the trial Court dated 08.04.2017.

5. I have considered the submissions made by the learned counsel for the parties and perused the record.

6. Before I proceed to analyse the merits of controversy in the light of the submissions made by the learned counsel for the parties, I would like to deal with the preliminary objection raised by Sh. Sunil Sethi, learned Sr. Advocate with regard to the maintainability of this petition under Section 104 of the Constitution of J&K.

7. The argument of learned counsel is that in view of the concurrent findings of fact returned by the trial Court and the Appellate Court, this Court, in the exercise of its powers of superintendence, may not interfere, for the scope of interference under Section 104 is limited and circumscribed by the set parameters of law. Learned Sr. Counsel would argue that in the exercise of jurisdiction under Section 104, this Court cannot act as Court of appeal and it is only if the order impugned is found to be vitiated by perversity, the same can be interfered with and on no other ground. The legal position on the subject is now firmly settled. Though each time a case under Section 104 comes before this Court, learned counsel appearing for the party against whom such power is sought to be invoked, does not lose any opportunity to remind this Court of the limitations put on it on the exercise of this power of superintendence. In the instant case also, it is vehemently argued that in the given facts and circumstances of this case and in view of the set parameters laid down, this Court should not venture to interfere with the order impugned. 8. A very short and significant judgment on the point was delivered by the Constitution Bench of the Supreme Court in the case of Waryam

Singh and another Vs. Amarnath and another; AIR 1954 SC 215.

The observations of the Supreme Court in paragraph 13 and 14 of the judgment may be noticed with advantage:-

“(13) Re.2.- The material part of Article 227 substantially reproduces the provisions of section 107 of the Government of India, Act 1915 except

that the power of superintendence has been extended by the Article also to Tribunals. That the Rent Controller and the District Judge exercising

jurisdiction under the Act are Tribunals cannot and has not been controverted. The only question raised is as to the nature of the power of

superintendence conferred by the Article. Reference is made to clause (2) of the Article in support of the contention that this Article only confers on

the High Court administrative superintendence over the Subordinate Courts and Tribunals. We are unable to accept this contention because clause (2)

is expressed to be without prejudice to the generality of the provisions in clause (1). Further the preponderance of judicial opinion in India was that

section 107 which was similar in terms to section 15 of the High Courts Act, 1861, gave a power of judicial superintendence to the High Court apart

from and independently of the provisions of other laws conferring revisional jurisdiction on the High Court.

In this connection it has to be remembered that section 107 of the Government of India Act, 1915 was reproduced in the Government of India Act,

1935 as section 224. Section 224 of the 1935 Act, however, introduced sub-section (2), which was new, providing that nothing in the section should be

construed as giving the High Court any jurisdiction to question any judgment of any inferior Court which was not otherwise subject to appeal or

revision. The idea presumably was to nullify the effect of the decisions of the different High Courts referred to above. Section 224 of the 1935 Act

has been reproduced with certain modifications in Article 227 of the Constitution. It is significant to note that sub-section (2) to section 224 of the 1935

Act has been omitted from Article 227.

This significant omission has been regarded by all High Court in India before whom this question has arisen as having restored to the High Court the

power of judicial superintendence, it had under section 15 of the High Courts Act, 1961 and section 107 of the Government of India Act, 1915. See the

cases referred to in--- “Moti Lal v. The State”, AIR 1952 All 963 at p. 966(A).

Our attention has not been drawn to any case which has taken a different view and, as at present advised, we see no reason to take a different view.

(14) This power of superintendence conferred by Article 227 is, as pointed out by Harries, C.J., in --- â??Dalmia Jain Airways Ltd. V. Sukumar

Mukherjee?, AIR 1951 Cal 193 (SB) (B), to be exercised most sparingly and only in appropriate cases in order to keep the Subordinate Courts within

the bounds of their authority and not for correcting mere errors. As rightly pointed out by the Judicial Commissioner in the case before us the lower

Courts in refusing to make an order for ejectment acted arbitrarily. The lower Courts realized the legal position but in effect declined to do what was

by section 13(2)(i) incumbent on them to do and thereby refused to exercise jurisdiction vested in them by law. It was, therefore, a case which called

for an interference by the Court of the Judicial Commissioner and it acted quite properly in doing so.

In our opinion there is no ground on which in an appeal by special leave under Article 136 we 1954 S. C./28 should interfere. The appeal, therefore,

must stand dismissed with costs.â??

9. Thereafter, the issue came to be debated on several occasions before the Supreme Court and there is a long line of judicial precedents on the issue.

The decision of the Supreme Court in Surya Dev Rai vs Ram Chander Rai & Ors.; 2003 (6) SCC 675 (overruled on the amenability of the judicial

orders of Civil Court to the writ jurisdiction under Article 226 of the Constitution) is noteworthy. The issue once again racked up before the Supreme

Court in Shalini Shyam Shetty and another Vs. Rajendra Shanker Patil; 2010 (8) SCC 329. The Supreme Court after elaborate discussion and

referring to the case law on the subject starting from Waryam Singhâ??s case (supra) succinctly culled out principles on the exercise of High

Courtâ??s jurisdiction under Article 227 of the Constitution which were delineated in para 49 of the Judgment. Para 49 of the judgment reads thus:-

â??49. On an analysis of the aforesaid decisions of this Court, the following principles on the exercise of High Court's jurisdiction under Article 227

of the Constitution may be formulated:

(a) A petition under Article 226 of the Constitution is different from a petition under Article 227. The mode of exercise of power by the High Court

under these two articles is also different.

(b) In any event, a petition under Article 227 cannot be called a writ petition. The history of the conferment of writ jurisdiction on High Courts is

substantially different from the history of conferment of the power of superintendence on the High Courts under Article 227 and have been discussed above.

(c) High Courts cannot, at the drop of a hat, in exercise of its power of superintendence under Article 227 of the Constitution, interfere with the orders of tribunals or courts inferior to it. Nor can it, in exercise of this power, act as a court of appeal over the orders of the court or tribunal subordinate to it. In cases where an alternative statutory mode of redressal has been provided, that would also operate as a restraint on the exercise of this power by the High Court.

(d) The parameters of interference by High Courts in exercise of their power of superintendence have been repeatedly laid down by this Court. In this regard the High Court must be guided by the principles laid down by the Constitution Bench of this Court in *Waryam Singh* and the principles in *Waryam Singh* have been repeatedly followed by subsequent Constitution Benches and various other decisions of this Court.

(e) According to the ratio in *Waryam Singh*, followed in subsequent cases, the High Court in exercise of its jurisdiction of superintendence can interfere in order only to keep the tribunals and courts subordinate to it, within the bounds of their authority.

(f) In order to ensure that law is followed by such tribunals and courts by exercising jurisdiction which is vested in them and by not declining to exercise the jurisdiction which is vested in them.

(g) Apart from the situations pointed in (e) and (f), High Court can interfere in exercise of its power of superintendence when there has been a patent perversity in the orders of the tribunals and courts subordinate to it or where there has been a gross and manifest failure of justice or the basic principles of natural justice have been flouted.

(h) In exercise of its power of superintendence High Court cannot interfere to correct mere errors of law or fact or just because another view than the one taken by the tribunals or courts subordinate to it, is a possible view. In other words the jurisdiction has to be very sparingly exercised.

(i) The High Court's power of superintendence under Article 227 cannot be curtailed by any statute. It has been declared a part of the basic structure

of the Constitution by the Constitution Bench of this Court in *L.Chandra Kumar v. Union of India* and therefore abridgment by a constitutional

amendment is also very doubtful.

(j) It may be true that a statutory amendment of a rather cognate provision like Section 115 of the Civil Procedure Code by the Civil Procedure Code

(Amendment) Act, 1999 does not and cannot cut down the ambit of High Court's power under Article 227. At the same time, it must be remembered

that such statutory amendment does not correspondingly expand the High Court's jurisdiction of superintendence under Article 227.

(k) The power is discretionary and has to be exercised on equitable principle. In an appropriate case, the power can be exercised *suo motu*.

(l) On a proper appreciation of the wide and unfettered power of the High Court under Article 227, it transpires that the main object of this article is to

keep strict administrative and judicial control by the High Court on the administration of justice within its territory.

(m) The object of superintendence, both administrative and judicial, is to maintain efficiency, smooth and orderly functioning of the entire machinery of

justice in such a way as it does not bring it into any disrepute. The power of interference under this article is to be kept to the minimum to ensure that

the wheel of justice does not come to a halt and the fountain of justice remains pure and unpoluted in order to maintain public confidence in the

functioning of the tribunals and courts subordinate to the High Court.

(n) This reserve and exceptional power of judicial intervention is not to be exercised just for grant of relief in individual cases but should be directed

for promotion of public confidence in the administration of justice in the larger public interest whereas Article 226 is meant for protection of individual

grievance. Therefore, the power under Article 227 may be unfettered but its exercise is subject to high degree of judicial discipline pointed out above.

(o) An improper and a frequent exercise of this power will be counterproductive and will divest this extraordinary power of its strength and vitality.â??

10. There are several other judgments on the subject from the Supreme Court but the same are not being referred to for the reason that in the light of

clear principles of law laid down in the case of *Shalini Shyam Shetty and anr.*

(supra), the discussion of other judgments on the same points would only be at the cost of burdening this judgment unnecessarily.

11. In the backdrop of this legal position and being alive to the nature of jurisdiction vested in this Court U/S 104 of the J&K Constitution, I have

considered the whole controversy involved in this petition. Admittedly, the declaratory suit filed by the respondents is subjudice before the trial Court.

The rights of the parties are required to be determined by the trial Court after a full fledged trial. However, with a view to preserve the lis and to

maintain the equilibrium, the trial Court is called upon to provide for interim measures which power the trial Court exercises under Section 94 read

with Order 39 Rule 1 and 2 of the Code of Civil Procedure. Grant of temporary injunction is governed by three cardinal principles i.e prima-facie case;

balance of convenience; and irreparable injury. The existence of prima-facie case is a sine qua non but the consideration of other two principles is

equally important and at least one of the aforesaid two principles should also exist before the Court grants the discretionary relief of interim injunction.

There is plethora of judicial pronouncements on the subject but reference to the judgment of the Supreme Court rendered in the case of Zenit

Mataplast Pvt. Ltd. Vs. State of Maharashtra and others; (2009) 10 SCC 388 would be sufficient to deal with the instant case. Paragraph 30 to 34 of

the judgment is reproduced hereunder:-

â??30. Interim order is passed on the basis of prima facie findings, which are tentative. Such order is passed as a temporary arrangement to preserve

the status quo till the matter is decided finally, to ensure that the matter does not become either infructuous or a fait accompli before the final hearing.

The object of the interlocutory injunction is to protect the plaintiff against injury by violation of his right for which he could not be adequately

compensated in damages recoverable in the action if the uncertainty were resolved in his favour at the trial. (vide Anand Prasad Agarwalla vs.

Tarkeshwar Prasad & State of Assam Vs. Barak Upatyaka D.U. Karmachari Sanstha.

31. Grant of an interim relief in regard to the nature and extent thereof depends upon the facts and circumstances of each case as no straitjacket

formula can be laid down. There may be a situation wherein the respondent-defendant may use the suit property in such a manner that the situation

becomes irretrievable. In such a fact situation, interim relief should be granted (vide *M. Gurudas v. Rasaranjan*; and *Shridevi v. Muralidhar* . Grant of temporary injunction is governed by three basic principles i.e. prima facie case; balance of convenience; and irreparable injury, which are required to be considered in a proper perspective in the facts and circumstances of a particular case. But it may not be appropriate for any court to hold a mini trial at the stage of grant of temporary injunction [Vide *S.M. Dyechem Ltd. Vs. Cadbury (India) Ltd.*, and *Anand Prasad Agarwalla*, SCC p. 570, para 6].

32. In *Colgate Palmolive (India) Ltd. v. Hindustan Lever Ltd.*, this court observed that the other considerations which ought to weigh with the Court hearing the application or petition for the grant of injunctions are as below (SCC p.14, para 24):

- â??24. (i) extent of damages being an adequate remedy;
- (ii) protect the plaintiff's interest for violation of his rights though, however, having regard to the injury that may be suffered by the defendants by reason therefor ;
- (iii) the court while dealing with the matter ought not to ignore the factum of strength of one party's case being stronger than the other?s;
- (iv) no fixed rules or notions ought to be had in the matter of grant of injunction but on the facts and circumstances of each case- the relief being kept flexible;
- (v) the issue is to be looked at from the point of view as to whether on refusal of the injunction the plaintiff would suffer irreparable loss and injury keeping in view the strength of the parties' case;
- (vi) balance of convenience or inconvenience ought to be considered as an Â important requirement even if there is a serious question or prima facie case in support of the grant;
- (vii) whether the grant or refusal of injunction will adversely affect the interest of the general public which can or cannot be compensated otherwise.

33. In *Dalpat Kumar v. Prahlad Singh*, AIR 1993 SC 276, the Supreme Court explained the scope of the aforesaid material circumstances, but observed as under: (SCC p. 722, para 6)

6.....The phrases `prima facie case', `balance of convenience' and `irreparable

loss' are not rhetoric phrases for incantation, but words of width and elasticity, to meet myriad situations presented by men's ingenuity in given facts and circumstances, but always is hedged with sound exercise of judicial discretion to meet the ends of justice. The facts are eloquent and speak for themselves. It is well nigh impossible to find from facts prima facie case and balance of convenience.

34. This Court in *Manohar Lal Chopra v. Rai Bahadur Rao Raja Seth Hira Lal*, AIR 1962 SC 527 held that the civil court has a power to grant interim

injunction in exercise of its inherent jurisdiction even if the case does not fall within the ambit of provisions of Order 39, Code of Civil Procedure.

After taking note of the several judicial precedents, the Supreme Court in paragraph 37 concluded as under:-

Thus, the law on the issue emerges to the effect that interim injunction should be granted by the court after considering all the pros and cons of

the case in a given set of facts involved therein on the risk and responsibility of the party or, in the case he loses the case, he cannot take any

advantage of the same. The order can be passed on settled principles taking into account the three basic grounds i.e prima-facie case, balance of

convenience and irreparable loss.

12. In the light of the legal principles laid down by the Supreme Court which are required to be considered by the trial Court while exercising its power

to grant interim injunction pending disposal of civil suits, I have examined the judgment impugned. Admittedly, the learned trial Court in its order dated

08.04.2017 considered only one aspect i.e existence of prima-facie case in favour of the respondents and did not deal with other two equally important

ingredients i.e balance of convenience and irreparable loss. The Appellate Court who considered the appeal afresh after the remand from this Court

has concluded that prima-facie case in favour of the respondents exists as the orders of their transfer impugned in the suit have been passed by the

petitioner No. 3 who, in terms of condition No. 7 of the order of appointment of the respondents, was not authority competent to do so. The Appellate

Court has disagreed, though covertly, with the prima-facie findings of fact recorded by the trial Court with regard to the existence of the prima-facie

case. The observation of the trial Court that orders of transfer challenged in the suit were by way of a substitute of punishment has not found in

favour with the Appellate Court who has found the existence of prima-facie case in favour of respondents on the ground of lack of jurisdiction of the petitioner No. 3 to issue the impugned orders of transfer. Case of lack of jurisdiction to issue transfer orders is not set up in the plaint. He too has missed to consider the other two cardinal principles i.e. "balance of convenience" and "irreparable loss". Although, in these proceedings, it may not be proper for this Court to delve deep into the merits of the controversy, yet to appreciate the prima-facie findings of fact arrived at by the Appellate Court, I have examined the transfer policy of the petitioners and also seen the stipulation in their order of appointment. Condition No. 7 of the orders of appointment of the respondents is reproduction of opening paragraph of chapter 10 of the Administration Manual of the Society. From a plain reading of condition No. 7, it is abundantly clear that the petitioners at the time of appointment of the respondents made it clear to them that they were being appointed on a transferable post and their appointment was not restricted to the school where they were being posted. The stipulation in the condition "DAV College Managing Committee reserves its right to transfer him/her to any other institution at any place under its management" signifies the aforesaid intention of the petitioners. In paragraph 10.1 of the transfer policy, it is manifest that an incumbent serving in one DAV institution can be transferred to other DAV institution to meet the administrative exigencies. There is no dispute that in clause (2) of Section 10.1, it is also provided that transfer should not be treated as a substitute for punishment. Regarding jurisdiction clause (1) of Section 10.1, provides that only the President/General Secretary of the Governing Body has the authority to transfer. Reading opening paragraph of the transfer policy contained in chapter 10 of the Administration Manual as also condition No.7 contained in the orders of appointment of the respondents in conjunction with Sub Clause 1 of Section 10.1, there is, prima-facie, enough indication that the petitioner No. 3 has the authority to issue transfer orders with regard to the respondents. This issue, however, has not been considered by the trial Court at all and by the Appellate Court, in right perspective. The Appellate Court appears to have been persuaded by the observation passingly made by the Court in the order dated 22.05.2017 passed in Petition U/S 104 No. 66/2017, perhaps, not realising that in the same judgment, this Court made it clear that the observations made by it in the judgment were only

for the purpose of deciding the aforesaid petition and the Lower Appellate Court would not be influenced by any such observations made by the Court

and the matter would be decided afresh.

13. Without discussing much, which could be seen as reflection of opinion of this Court on the merits of the case, it would be sufficient to hold that the

order of the Appellate court is perverse having been passed in ignorance of the cardinal principles required to be considered at the time of disposing of

the prayer of the party for grant of interim injunction.

14. In these circumstances, the exercise of jurisdiction under Section 104 of the Constitution of J&K becomes imperative to ensure that the law is

followed by the Courts by exercising jurisdiction which is otherwise vested in them.

15. In view of the above, this petition is allowed and orders passed by the Appellate court dated 09.10.2017 and the trial Court dated 08.04.2017 are

Â set aside. The matter is remitted to the trial Court to consider the application of the respondents for interim relief afresh keeping in view the cardinal

principles of law laid down by the Supreme Court and referred to above, which regulate the exercise of discretion in the matter of grant or refusal of

the interim injunctions, and pass appropriate orders thereon without being influenced by the observations made by this Court which may have

incidentally touched upon the merits of the controversy.

16. Disposed of.