

(2023) 06 SHI CK 0080
In the High Court Of Himachal Pradesh
Case No : Civil Writ Petition No.890 Of 2023

Rishi Pal Sharma

APPELLANT

Vs

State Of H.P. And Others

RESPONDENT

Date of Decision : 28-06-2023

Acts Referred:

Constitution Of India, 1950 — Article 226

Citation : (2023) 06 SHI CK 0080

Hon'ble Judges : Tarlok Singh Chauhan, J; Satyen Vaidya, J

Bench : Division Bench

Advocate : K.B. Khajuria, Anup Rattan, Ramakant Sharma, Sharmila Patial, Priyanka Chauhan, Sanjeev Bhushan, Rakesh Chauhan, Virender Thakur

Final Decision : Disposed Of

Judgement

Satyen Vaidya, J

1. By way of instant petition, petitioner has assailed notification dated 28.02.2023, Annexure P-4, whereby the petitioner has been ordered to be transferred from DIET Nahan (SMR) to GSSS Jaihar (SMR) and respondent No.3 has been ordered to be transferred from GSSS Dadahu (SMR) to DIET Nahan vice petitioner.

2. Petitioner has taken exception to the impugned transfer notification on the ground that the same is neither for any administrative exigency nor in public interest, rather has been effected only to accommodate respondent No.3 at the instance of local MLA (respondent No.4). It is also the case of petitioner that his transfer is in violation of the norms fixed by the Government of Himachal Pradesh for the personnel serving DIET, which prescribes minimum five years tenure for the principal. Petitioner has also levelled allegations of bias against respondent number 4.

3. The official respondents have contested the prayer of the petitioner on the ground that the petitioner is holding Class-I (Gazetted) State cadre post and is

liable to be posted anywhere in the State on administrative requirement. As per respondents No. 1 and 2, since the pay, seniority, status and scale of the petitioner has not been affected in any manner, therefore, he cannot have any grievance against the notification dated 28.02.2023. It is further submitted that the guidelines formulated by the State Government cannot have the consequence of depriving or denying the right of competent authority to transfer an employee in public interest or in exigency of service.

4. Reply has also been filed on behalf of respondent No.4. It is submitted that respondent No.3 is one of the constituents of the Assembly Constituency represented by respondent No.4. He had made a request for his posting at Nahan on account of old age and ailment of his mother and the hardships faced by his family. Respondent No.4 had recommended the transfer of respondent No.3 to Nahan on this score alone. The allegations of respondent No.4 having any grievance or ill-will against petitioner have been denied in entirety.

5. We have heard learned counsel for the parties and have also gone through the records of the case carefully.

6. The official respondents have placed on record copy of D.O. Note issued by respondent No.4 recommending the transfer of petitioner and respondent No.3 and also the U.O. Note issued by the office of Hon'ble Chief Minister of Himachal Pradesh, approving such recommendation. It is clearly made out from the contents of the D.O. note issued by respondent No.4 that he had made specific recommendation to transfer respondent No.3 to DIET, Nahan vice the petitioner, whose transfer was further recommended to GSSS Jaihar or GSSS Bongil-Khech in District Sirmaur. The D.O. note as such was approved by the office of Hon'ble Chief Minister. It is nowhere revealed from the records that the recommendation made by respondent No.4 was dealt with by the Administrative Department by applying independent mind.

7. The above modus operandi used for transfer of employees of the State Government has met with strong disapproval of this Court more than once. It will be gainful to recapitulate some of such instances. In CWP No. 8590 of 2014, titled Raj Kumar vs. State of H.P. and others, decided on 31.12.2014, a co-ordinate bench of this Court taking note of a number of precedents has held as under:

"10. This precise question came up for consideration before this court more than three and half decades back in Ram Krishan vs. District Education Officer, ILR (Himachal Series) (1979) 8 HIM, 481, wherein this court held as follows: -

"8. We hereby record our strong disapproval of such type of interference from outsiders in day today administration of the State. If such interference is to be allowed, it would only mean that the government servants should run after those who are taking part in public life and in politics for getting better terms of service and a better place for their postings, and should do everything to please them and not to please the department by their ability, honesty and integrity. It need

not be emphasized that such interference of outsiders in day- to-day administration of the State is highly detrimental to the public interest as it would result in nepotism and corruption wherein only those who can wield influence and purse, can succeed. Therefore, we want by this judgment to bring it to the notice of all concerned that sooner this type of interference is discouraged and stopped, the better for the administration and the people of this State.”

11. In A.K. Vasudeva vs. State of H.P. and others ILR (Himachal Series) (1981) 10 HIM 359, this court while dealing with a case in which the transfer of a teacher had been made at the behest of a Member of the Legislative Assembly has held as follows:-

21. The practice of effecting transfers of teachers at the behest of every M.L.A. and other influential persons seems to be rampant in the department of Education in the State. The record is full of it. Indeed, when the transfer proposals are prepared there is a column No. 8 which is to show “recommended / proposed by”. I find that a transfer has been made even at the instance of the President Youth Congress (I) Subathu of a teacher Alaxender from Kanda to Subathu. It appears that no transfer is made except at the instance of somebody. Why was Shri Chaman Lal reluctant to admit his role, and why did he depose that he had nothing to do with the posting and transfer of any teacher? I had expected him to come out openly and frankly. He is not only a member of the Legislative Assembly but at the moment owns a responsible position as Chairman of a public corporation.

12. Thereafter referring to the judgement in Ram Krishan’s case (supra), this court went on to hold as follows:

28. It is unfortunate indeed that despite the aforementioned pronouncement by this Court the malady of the politicians interfering in the administration of the Education Department is as rampant as before, if not worse. Apparently, no one is bothered about any discipline in this department and the teachers and others are perhaps encouraged by this method to be beholden to the political persons instead of relying on the honesty and the integrity of the Director of Education and other officers for administering the department and ordering transfers.

13. In CWP No. 1105 of 2006, titled Sushila Sharma vs. State of H.P and others, this court has held as follows:-

“We, however, direct that a copy of this judgment be sent to the Chief Secretary to the Govt. of H.P., who shall ensure that a proper transfer policy is formulated to ensure that the transfers are made only on administrative grounds and not on any others grounds. In the policy to be framed, it shall be ensured that all the employees are treated fairly and equally and every employee during his tenure of service serves in tribal/ hard areas and also in remote /rural areas. When transfers are made, the administrative department shall ensure that the employees who have already served in tribal/ hard areas as well as remote/ rural areas are not again sent to these areas and there is a continuous process of

change whereby all the employees have a chance to serve in tribal/hard areas as well as remote/ rural areas. In the policy so framed, it should also be ensured that the transfer orders are not cancelled without making reference to the administrative department to put forth its views. In the policy, measures shall be provided to ensure that employees (obviously influential) who have managed to remain posted in the urban areas/cities are posted to rural/remote areas and hard/tribal areas in the transfer season when the transfers are made. The transfer policy should also ensure that people, who are posted in remote/rural areas, join their place of postings and do not manage to get their transfers cancelled on frivolous grounds as has happened in the present case. The policy be framed and filed in Court within two months from today." Consequent to these directions, a policy was framed, but has been observed more in breach."

14. In CWP No. 3530 of 2011 titled Babita Thakur vs. State of H.P. and others, a learned single Judge of this court held as follows:-

9. It is true that it is for the employer to see where the Government servant is to be posted. However, it is equally true that there is no arbitrariness in the action. The transfer cannot be used as an instrument to accommodate/ adjust the persons without there being any administrative exigency.

The underline principle for transfer is public interest or administrative exigency. In the instant case, neither there was any public interest nor any administrative exigency necessitating the transfer of the petitioner from government Primary School, Chadyara (Sadar) to Government Primary School, Khanyari (Chachoit1)."

15. In CWP No. 2844 of 2010 titled Pratap Singh Chauhan vs. State of H.P. & others decided on 18.6.2011, a learned single Judge of this court after considering various judgements of Hon'ble Supreme Court held as follows:-

10. We are governed by the Constitution of India. As per the constitutional scheme there are three pillars of democracy; the Legislature; the Judiciary and the Executive. Each has to work in its own sphere. This is a system of checks and balances where each can check the other, but it must be clearly understood that none of the three organs can encroach upon the jurisdiction of the other. The jurisdiction vested in this Court under Article 226 of the Constitution of India is indeed very wide. Wider the jurisdiction, more care should be taken to exercise it with greater discretion, so that questions are not raised about the functioning of the Judiciary. The Apex Court has in no uncertain terms laid down a note of caution that Courts should not interfere in transfer matters except on very strong grounds.

11. Having held so, this Court is also not oblivious to the factual position which exists on the spot and the situation is that day in and day out this Court is flooded with writ petitions in which employees challenge the order of their transfer on various grounds. On more than one occasion this Court has found that there are notes sent by public representatives such as Members of the Legislative Assembly recommending the transfers. No doubt, public

representatives have a right to make recommendations, but these can only be recommendations and cannot be taken to be the final word.”

16. In *Sant Ram Pant vs. State of H.P. and others* 2009 (3) Shim. L.C. 206, a Division Bench of this court held as follows:-

8. When transfers are made, an employee may be aggrieved by his transfer. An employee has a right to make a representation against such transfer. It is also the right of the employer, including the State, to look into the grievances of the employees and if the grievance made by the employee is found to be genuine, the State is well within its right to redress the grievance of the employee and cancel the order of transfer. However, the grounds for passing an order of cancellation within two weeks of the original order must be borne out from some material on the record. In the present case, despite two opportunities being given the State has not produced any representation made by the respondent No. 3 or any other communication addressed to the office of the Hon'ble Chief Minister on behalf of the respondent No. 3 which would justify the issuance of the note dated 1.1.2009.”

17. A treatise on this subject is a judgement of Division Bench of this court in *Amir Chand's case* (supra), wherein this court after taking into consideration the entire law as settled by the Hon'ble Supreme Court as also various High Courts including this court issued the following directions:-

“1. The State must amend its transfer policy and categorize all the stations in the State under different categories. At present, there are only two categories, i.e. tribal/ hard areas and other areas. We have increasingly found that people who are sent to the hard/ tribal areas find it very difficult to come back because whenever a person is posted there, he first manages to get orders staying his transfer by approaching the political bosses and sometimes even from the Courts. Why should the poor people of such areas suffer on this count. We are, therefore, of the view that the Government should categorize all the stations in the State in at least four or five categories, i.e. A, B, C, D and E also, if the State so requires. The most easy stations, i.e. urban areas like Shimla, Dharamshala, Mandi etc. may fall in category A and the lowest category will be of the most difficult stations in the remote corners of the State such as Pangti, Dodra Kwar, Kaza etc. At the same time, the home town or area adjoining to home town of the employee, regardless of its category, otherwise can be treated as category A or at least in a category higher than its actual category in which the employee would normally fall. For example, if an employee belongs to Ghumarwin, which is categorized in category B, then if the employee is serving in and around Ghumarwin, he will be deemed to be in Category A.

2. After the stations have been categorized, a database must be maintained of all the employees in different departments as to in which category of station(s) a particular employee has served throughout his career. An effort should be made to ensure that every employee serves in every category of stations. Supposing

the State decides to have four categories, i.e. A, B, C, D, then an employee should be posted from category A to any of the other three categories, but should not be again transferred to category A station. If after category A he is transferred to category D station, then his next posting must be in category B or C. In case such a policy is followed, there will be no scope for adjusting the favourites and all employees will be treated equally and there will be no heart burning between the employees.

3. We make it clear that in certain hard cases, keeping in view the problems of a particular employee, an exception can be made but whenever such exception is made, a reasoned order must be passed why policy is not being followed.

4. Coming to the issue of political patronage. On the basis of the judgements cited hereinabove, there can be no manner of doubt that the elected representative do have a right to complain about the working of an official, but once such a complaint is made, then it must be sent to the head of the administrative department, who should verify the complaint and if the complaint is found to be true, then alone can the employee be transferred.

5. We are, however, of the view that the elected representative cannot have a right to claim that a particular employee should be posted at a particular station. This choice has to be made by the administrative head, i.e. the Executive and not by the legislators. Where an employee is to be posted must be decided by the administration. It is for the officers to show their independence by ensuring that they do not order transfers merely on the asking of an MLA or Minister. They can always send back a proposal showing why the same cannot be accepted.

6. We, therefore, direct that whenever any transfer is ordered not by the departments, but on the recommendations of a Minister or MLA, then before ordering the transfer, views of the administrative department must be ascertained. Only after ascertaining the views of the administrative department, the transfer may be ordered if approved by the administrative department.

7. No transfer should be ordered at the behest of party workers or others who have no connection either with the legislature or the executive. These persons have no right to recommend that an employee should be posted at a particular place. In case they want to complain about the functioning of the employees then the complaint must be made to the Minister-in-Charge and/ or the Head of the Department. Only after the complaint is verified should action be taken. We, however, reiterate that no transfer should be made at the behest of party workers."

(underlining supplied by us)

18. Here it is pertinent to observe that the aforesaid decision of this court has been affirmed by the Hon'ble Supreme Court as noted in para-22 of the judgement in Sanjay Kumar vs. State of H.P. & others Latest HLJ 2013 (HP) 1051.

19. Yet again the matter regarding transfer on the basis of D.O. Notes was the

subject matter of consideration in Sanjay Kumar's case (supra) wherein after a lucid analysis and taking note of various judgements of Hon'ble Supreme Court and this court, it was held as follows:-

"30. The transfer at the instance of a person, who has no role to play in the Government, will not only be extraneous consideration, but also against public policy. It shakes the confidence of the people and creates an impression in the mind of a common man that the centre of power is somewhere else and not the Government. In order to curb this tendency and inspire confidence in general public and more particularly in the employees, it is necessary that no one should get an impression that employee can be transferred for asking at the instance of a person, who has no concern with the Government. This, if goes unchecked, is bound to affect the morale of the employees and their independent working and will not be in the interest of general public. There is, however, one caveat. That, any person has a right to make a complaint against an employee regarding his conduct to his superior or Chief Minister and even request for his transfer. It is, however, only for the competent authority to consider the request and to take appropriate action in accordance with law. Further, it is unfathomable that such large number of transfers could be made at the instance of a person who is not in the Government, nor a people's representative as such. Issuing transfer orders at the instance of an outsider, who incidentally happens to be a Party worker, cannot be a co - incidence, but a concerted effort of the duty holders, who were otherwise responsible to preserve rule of law. Such action not only shakes the conscience of the Court, but also, inevitably, impinges upon the validity of such orders as the same are the product of colourable exercise of power."

20. Notably, the State Government challenged the aforesaid decision before the Hon'ble Supreme Court, which was dismissed vide order dated 27.9.2013 in the following terms:

"Heard learned counsel for the petitioner. We do not see any cogent reason to interfere with the impugned judgement and order in these petitions. The special leave petitions are dismissed. However, we clarify that the State is entitled to make the transfer as per the transfer policy adopted by the State for the particular time and particular department."

21. Tested on the touchstone of aforesaid exposition of law, it can safely be concluded that the transfer of the petitioner cannot withstand judicial scrutiny as the basis and foundation of the transfer happens to be the various complaints made by the public representatives against the petitioner. The transfer has been made on the basis of the U.O. note issued by the office of Hon'ble Chief Minister and whereas, no proposal for transfer has been originated from the concerned administrative department. The impugned transfer order, therefore, is not sustainable being arbitrary and vitiated because the same has been issued under dictation.

8. A similar reiteration was made by this Court while deciding CWP No. 5751 of

2021, titled Pomila vs. State of H.P. and others vide judgment dated 8.10.2021 as under:

"19. As already observed above, the Chief Minister and Ministers/ elected representatives may recommend the transfer of an employee as has already been held by this Court in Sanjay Kumar and Amir Chand's cases (supra), however, the transfer orders are ultimately to be issued by the administrative head after independent application of mind that too after subjective satisfaction without being influenced by the recommendations so made by the elected representatives."

9. Despite enunciation of principles and their reiteration as noted above, nothing seems to have changed for official respondents. In the instant case also, no independent decision has been taken by the administrative department, rather, there was no scope left for said purpose as the proposal and recommendations made by the local MLA was categorical. In such circumstances, our Constitutional obligation, does not allow us to sit as silent spectators. We are constrained to observe that the arrogance of official respondents and even the concerned public representative towards the judicial dictum rendered by the Constitutional Court definitely is not in line with the Constitutional scheme of governance. Come what may, the hegemony of the rule of law must prevail and its breach or even abrasion may entail inevitable legal consequences in accordance with law.

10. No doubt, the Member of Legislative Assembly or Ministers concerned, have right to make recommendations but these recommendations cannot be taken to be the final word. The underlying principle for transfer is public interest or administrative exigency, which can be made out only from the reasons assigned for the transfer by the Administrative Department.

11. As noticed above, the administrative functioning of the official respondents has been found lacking in many aspects despite the repeated judgments passed by this Court. Most of the time the recommendations made through the D.O. Notes, are approved as it is by the competent authority and more often than not the application of mind by the administrative department/ authority is completely missing. The same is the case here. Thus, the impugned notification Annexure P-4 qua respondent number 3 is clearly unsustainable.

12. The petitioner has also contended that his transfer is in violation of the norms adopted by the Government of Himachal Pradesh for the employees of DIET. As per him, petitioner could not have been transferred before completion of fixed tenure of five years. Since the petitioner was posted in DIET Nahan in November, 2019, he had not completed his tenure and on this ground also, his transfer is vitiated.

13. Without adjudicating upon the justiciability of the norms fixed by the Government of Himachal Pradesh for the employees of DIET, we proceed to hold that in the given facts of the case, petitioner is not entitled to raise the contention as noted above for the simple reason that he cannot be allowed to

approve and disapprove. From perusal of the norms for the employees of DIET notified by the Government of Himachal Pradesh, it is revealed that not only the fixed tenure for Principals and Lecturers has been prescribed, but there is also a specific reference to centralized selection process for induction of employees in the DIET. Petitioner was posted as District Project Officer-cum-Principal, DIET in November, 2019 on the basis of his transfer from GSSS Mehando-Bag, District Sirmour, where he was posted as Principal. Thus, in the case of petitioner no selection process was undertaken and in such view of the matter, petitioner cannot be allowed to take the benefit of only that norm which suits him by ignoring all other aspects. Noticeably, as per the norms transfer has not been one of the suggested modes for filling the posts in DIET. Further, the petitioner otherwise is estopped from raising such a plea for the reason that the official respondents have placed on record copies of documents which clearly demonstrate that the petitioner was also transferred from GSSS Mehando-Bag to DIET, Nahan on the basis of a D.O. Note of the then Speaker, H.P. 'Vidhan Sabha' as approved by the Hon'ble Chief Minister of the State.

14. In the given facts of the case, the grounds on which notification dated 28.02.2023, Annexure P-4, has been held to be unsustainable as regards transfer of respondent No.3, the same will apply to the petitioner also, who himself has not only been the recipient of the D.O. Note for managing his posting as Principal, DIET in November, 2019, he had also not undergone the required selection process for the post of Principal, DIET, Nahan. Petitioner cannot have different yardstick for himself than what he intends to apply against others.

15. In light of above discussion, the impugned notification dated 28.02.2023, Annexure P-4, is quashed and set-aside to the extent it relates to respondent No.3 with direction to official respondents to take decision on the transfer of respondent No.3, if required, by considering the parameters of public interest or exigency of service administratively. The petitioner, however, shall comply with the impugned notification dated 28.02.2023, Annexure P-4, whereby he has been transferred from DIET, Nahan (SMR) to GSSS Jaihar (SMR) forthwith. Needless to say, for filling up the consequent vacancy of principal DIET Nahan, the administrative department expectedly will take steps strictly in accordance with observations made hereinabove.

The petition is accordingly disposed of in the aforesaid terms, so also the pending miscellaneous application(s), if any.

Let a copy of this order be sent to the Chief Secretary to the Government of Himachal Pradesh, for compliance.