

(2021) 02 J&K CK 0100
In the Jammu And Kashmir High Court
Case No : Writ Petition (C) No. 2976 Of 2019

Syed Muhammad Rafiq Shah

APPELLANT

Vs

State Of Jk And Ors

RESPONDENT

Date of Decision : 18-02-2021

Acts Referred:

Constitution Of India, 1950 — Article 226

Citation : (2021) 02 J&K CK 0100

Hon'ble Judges : Vinod Chatterji Koul, J; Ali Mohammad Magrey, J

Bench : Division Bench

Advocate : S. R. Khawar, B. A. Dar

Final Decision : Dismissed

Judgement

1. Through the medium of the instant petition, the petitioner has craved the indulgence of this Court in granting him the following relief(s):

i. By a Writ of Certiorari, any other/Eviction notice passed by the respondents may be quashed.

ii. By a Writ of Prohibition, the respondents may be restrained from evicting the petitioner from the allotted accommodation Set No.M4

Tanki Block, Tulsi Bagh, Srinagar.

iii. By a Writ of Mandamus respondents may be commanded to process the case of the Petitioner for appropriate/ Z security category with

the further direction to respondents to extend the allotment order regarding flat No. M-4, Tanki Block Tulsi Bagh, Srinagar.

iv. Any other relief which this Honâ??ble Court may deem fit and proper in the circumstances of the case may also be granted in favour of

the petitioner.

2. Objections stand filed on behalf of the respondents, resisting and controverting the averments made by the petitioner in his petition.

3. We heard learned counsel for the parties, perused the pleadings on record and have considered the matter.

4. At the very outset, we wish to observe that it is unfortunate that some former Ministers/ Legislators/ Retired Officers/ Politicians/ Political

persons, etc., have illegally/ unauthorizedly managed to continue to stay in the residential accommodation provided to them by the Government of

Jammu and Kashmir, though they are no longer entitled to such accommodation. Many of such persons continue to occupy residential accommodation

commensurate with the office(s) held by them earlier and which are beyond their present entitlement. The unauthorized occupants must realize that

rights and duties go correlative to each other, inasmuch as the rights of one person entail the duties of another person, whereas, the duties of one

person entail the rights of another person. In this context, the unauthorized occupants must appreciate that their act of overstaying in the premise

directly infringes the right of another. No law or direction can entirely control this act of disobedience, but for self-realization among the unauthorized

occupants.

5. Apart from the above perspective, it, needs, must be said that the natural resources, public lands and the public goods, like Government bungalows/

official residence are public property that belong to the people of the country. The "Doctrine of Equality", which emerges from the concepts of

justice and fairness must guide the State in the distribution/ allocation of the same. Any former Minister/ Legislator/ Retired Officer/ Politician/

Political person, once he/ she demits the office, is on a par with the common citizen, though by virtue of the office held, he/ she may be entitled to

security and other protocols as per assessment of the concerned filed agency. But allotment of Government bungalow, to be occupied during the

lifetime of such persons, would not be guided by the constitutional principle of equality.

6. Hon'ble the Supreme Court has also had the occasion, many a times, to deliberate upon this issue of unauthorized/ illegal occupation of

Government accommodation and, in two leading cases, being (i) "S. D. Bandi v. Divisional Traffic Officer, Karnataka: (2013) 12 Supreme Court

Cases 631â??; and (ii) â??Lok Prahari v. State of Uttar Pradesh & Ors. (2016) 8 Supreme Court Cases 389â??, it has not only held that such illegal

and unauthorized occupation is bad in law, but has also directed the authorities concerned to recover appropriate rent from the occupants of the said

government accommodation for the period during which they were in unauthorized occupation of the said accommodation.

7. Viewed in the above context, the legal position is quite clearly uncomplicated qua the allotment of Government quarter/ accommodation to a public

servant. The petitioner, in the instant case, is in possession and occupation of the premises in question for years now on the interim order of this Court

obtained by him on 14th of October, 2019, which makes it manifest that the eviction proceedings have been hijacked for years by the unauthorized

occupant/ petitioner herein. The status quo order obtained by the petitioner cannot be allowed to run till eternity, thereby prejudicing the interests and

rights of those who are waiting in queue having earned a right for allotment of such Government accommodation.

8. The other issue that requires consideration of this Court is whether in denying the continuous possession/ occupation of the Government

accommodation in question to the petitioner, any of the rights of the petitioner stands violated, thus, warranting issuance of a â??Writ of

Mandamusâ?? from this Court, as sought in this petition. â??Mandamusâ?? literally means a command. The essence of â??Mandamusâ?? is that it

is a command issued for directing performance of a public legal duty. A â??Writ of Mandamusâ?? is issued in favour of a person who establishes a

legal right in himself. A â??Writ of Mandamusâ?? is issued against a person who has a legal duty to perform, but has failed and/ or neglected to do

so. Such a legal duty emanates from either in discharge of a public duty or by operation of law. The â??Writ of Mandamusâ?? is of a most extensive

remedial nature. The object of mandamus is to prevent disorder from a failure of justice and is required to be granted in all cases where law has

established no specific remedy and whether justice, despite demanded, has not been granted.

9. Law on the subject is no more res integra. Honâ??ble the Supreme Court, while dealing with the scope of mandamus, in case titled â??State of

Kerela V. Smt. A. Lakshmikutty & Ors.â??, reported as â??(1986) 4 Supreme Court Cases 632â??, the Apex Court of the country, at paragraph

No.34, has observed as under:

34. We must refer to the case of Mani Subrat Jain v. State of Haryana & Ors., (supra) which was relied upon by learned counsel for the

State Government. It is well-settled that a writ of mandamus is not a writ of course or a writ of right, but is, as a rule, discretionary. There

must be a judicially enforceable right for the enforcement of which a mandamus will lie. The legal right to enforce the performance of a

duty must be in the applicant himself. In general, therefore, the Court will only enforce the performance of statutory duties by public

bodies on application of a person who can show that he has himself a legal right to insist on such performance. Applying the principles

stated in Halsbury's Laws of England, 4th edn., vol. 1, paragraph 122, this Court observed that a person whose name had been

recommended for appointment as a District Judge by the High Court under Art. 233(1) had no legal right to the post, nor was the Governor

bound to act on the advice of the High Court and therefore he could not ask for a mandamus. It was observed:

It is elementary though it is to be restated that no one can ask for a mandamus without a legal right.

The initial appointment of District Judges under Article 233 is within the exclusive jurisdiction of the Government after consultation with the

High Court. The Governor is not bound to act on the advice of the High Court. The High Court recommends the names of persons for

appointment. If the names are recommended by the High Court it is not obligatory on the Governor to accept the recommendation.

The consultation of the Governor with the High Court does not mean that the Governor must accept whatever advice of recommendation is

given by the High Court. Article 233 requires that the Governor should obtain from the High Court its views on the merits and demerits of

persons selected for promotion and direct recruitment.

The existence of a right is the foundation of the jurisdiction of a Court to issue a writ of mandamus. The present trend of judicial opinion

appears to be that in the case of non-selection to a post, no writ of mandamus lies.

10. Again, in the case of State of UP & Ors. V. Harish Chandra & Ors.,

reported as (1996) 9 Supreme Court Cases 309, at paragraph

No.10, has held thus:

10. Notwithstanding the aforesaid Statutory Rule and without applying the mind to the aforesaid Rule the High Court relying upon some

earlier decisions of the Court came to hold that the list does not expire after a period of one year which on the face of it is erroneous.

Further question that arises in this context is whether the High Court was justified in issuing the mandamus to the appellant to make

recruitment of the Writ Petitioners. Under the Constitution a mandamus can be issued by the Court when the applicant establishes that he

has a legal right to the performance of legal duty by the party against whom the mandamus is sought and said right was subsisting on the

date of the petition. The duty that may be enjoined by mandamus may be one imposed by the Constitution or a Statute or by Rules or orders

having the force of law. But so mandamus can be issued to direct the Government to refrain from enforcing the provision of law or to do

something which is contrary to law. This being the position and in view of the Statutory Rules contained in Rule 26 of the Recruitment Rules

we really fail to understand how the High Court could issue the impugned direction to recruit the respondents who were included in the

select list prepared on 4.4.87 and the list no longer survived after one year and the rights, if any, of persons included in the list did not

subsist. In the course of hearing the learned counsel for the respondents, no doubt have pointed out some materials which indicate that the

Administrative Authorities have made the appointments from a list beyond the period of one year from its preparation. The learned counsel

appearing for the appellants submitted that in some cases pursuance to the direction of the Court some appointments have been made but in

some other cases it might have been done by the Appointing Authority. Even though we are persuaded to accept the submission of the

learned counsel for the respondents that on some occasion appointments have been made by the Appointing Authority from a select list even

after the expiry of one year from the date of selection but such illegal action of the Appointing Authority does not confer a right on an

applicant to be enforced by a Court under Article 226 of the Constitution. We

have no hesitation in coming to the conclusion that such appointments by the Appointing Authority have been made contrary to the provisions of the Statutory Rules for some unknown reason and we deprecate the practice adopted by the Appointing Authority in making such appointments contrary to the Statutory Rules. But at the same time it is difficult for us to sustain the direction given by the High Court since, admittedly, the life of the select list prepared on 4.4.87 had expired long since and the respondents who claim their rights to be appointed on the basis of such list did not have a subsisting right on the date they approached the High Court. We may not be understood to imply that the High Court must issue such direction, if the writ Petition was filed before the expiry of the period of one year and the same was disposed of after the expiry of the statutory period. In view of the aforesaid conclusion of ours it is not necessary to deal with the question whether the stand of the State Government that there existed one vacancy in the year 1987 is correct or not.â??

From the perusal of the law laid down above, it is crystal clear that existence of a right is the foundation of the jurisdiction of a Court to issue a

â??Writ of Mandamusâ??. In the case on hand, the petitioner has not been able to show as to which of his right has been violated by the respondents

in denying him the continuous possession of the Government accommodation, which can be directed to be enforced by way of issuing a

â??Mandamusâ?? from this Court. In this context, the irrefutable conclusion which can be drawn is that none of the rights of the petitioner stand

violated by the respondents for which a â??Writ of Mandamusâ?? can be issued in his favour.

11. For all that has been said and done hereinabove, we are of the considered view that there is no merit in this petition, which is, accordingly,

dismissed, alongwith the connected CM(s). Interim directions, if any subsisting as on date, shall stand vacated. As a necessary corollary, the

continuous occupation/ possession of the Government accommodation in question by the petitioner is held to be bad in law. The petitioner thus, shall, if

still in occupation, hand over the possession of the said Government accommodation occupied by him within one month from today and the

Government, in turn, shall also recover appropriate rent from the petitioner for

the period during which he was in authorized/ unauthorized occupation of the same. We, however, make it clear here that insofar as the contention of the petitioner qua threat perception to the life and liberty of his own self as well as his family members is concerned, the petitioner shall be at liberty to approach the competent authority in the Government of Jammu and Kashmir for seeking redressal of this grievance.