
(1998) 04 J&K CK 0003
In the Jammu And Kashmir High Court
Case No : Civil Revision Petition No. 35/93

Union of India

APPELLANT

Vs

Ghulam Nabi Sheikh

RESPONDENT

Date of Decision : 06-04-1998

Acts Referred:

Jammu and Kashmir Civil Procedure Code, 1977 — Order 39 Rule 1, Order 39 Rule 2, 115, 80, 80(3)

Citation : (1998) SriLJ 175

Hon'ble Judges : Syed Bashir-Ud-Din, J

Bench : Single Bench

Advocate : G.Q.Bhat, Anil Bhan, Advocates appearing for the Parties

Judgement

1. The order dated 2171993 of Munsiff, Sub Registrar, Srinagar allowing Ghulam Nabi Sheikh Wireless Operator of Sub Division Office

Telephone, Anantnag, Kashmir to continue to discharge his functions at the place of his posting earlier to his transfer to KargilLadakh, is impugned

in this revision. Ghulam Nabi Sheikh, Plaintiff filed a suit for declaration and permanent injunction on the pleaded grounds that the plaintiff worked

in stints for more than two years at LehLadakh, during his service career on his transfer's to Leh. The plaintiff has been again transferred to Kargil

on 18121992 (order AnnexureD). The petitioner feeling aggrieved of this order challenges the order on the ground mat in view of the plaintiff

having served for more then two years at Leh, during his three stints of transfer to Leh. The present transfer ordered on 18121992 is in violation of

rules, regulations, standing orders and circulars governing the plaintiff's instant transfer case. The plaintiff having crossed 45 years of age, cannot be

transferred to frontier or high altitude area. His case is covered by circulars

which forbid an employer to transfer an employee above 45 years to a high altitude or frontier area. Besides, under the rules of State cadre employees, one month's prior notice has to be served on the employee in connection with transfer to such place. The order of transfer has been passed mala fide and is biased. The transfer order is sought not to be declared null and void and further relief of injuncting the defendants permanently from transferring the plaintiff to any frontier area, is also prayed for.

2. The defendants/respondents appeared and filed written statements/objections. The plaintiff is admitted to be an employee of the Telecommunication department. His transfer and posting at Kargil is also admitted. The transfer is stated to be in the interest of service and public interests. Further, it is stated that there is no rule or order which excludes the plaintiff's case from serving in Kargil, where he has served previously.

The circulars and rules are stated to be not applicable to the plaintiff's case. The suit is stated to be nonmaintainable and bad for omission to serve

section 80 C.P.C. notice on respondents. Even dispensing notice under section 80 C.P.C has not been sought and granted by the court. The said

suit is not maintainable and the Court has no jurisdiction to grant the application for interim relief.

3. On these pleaded grounds, plaintiff/ respondent moved an application for an interim injunction to restrain the petitioners/ defendants from implementing his order of transfer and to allow the respondent to continue to work as Wireless Operator at S.D.O.T. Anantnag, his original place of posting. Objections were filed by the telecommunication department and its officials/ defendants in terms adopting almost all pleas put forth in the written statement referred above.

4. On the application of the applicant (Plaintiff) for interim injunction moved on 4/2/1993, while extending the time for filing the objections to 17/2/1993, the trial court passed an interim order on 9/2/1993 requiring the nonapplicants to allow the applicant to discharge his functions at his place of posting as on that date and this order was further extended on 17/2/1993 and 23/2/1993 till 27/2/1993. The order was limited in operation to 27/2/1993, and the order thereafter lapsed by efflux of time as no order for extension of this direction was passed on 27/2/97 or on any subsequent date till the applicant moved another application on 31/5/93 seeking in effect

preemptive orders against nonapplicants for alleged disobedience of the court order to which application the nonapplicants filed objections. Though there was no application or prayer for an interim injunction or restraint order beyond 27.2.1993, yet the court on 21.7.1993 passed an interim injunction order allowing the applicant to function at the place of posting as SDOT Anantnag, where he has been functioning even before his transfer to Kargil and the orders have been kept contemporaneous with the main suit leaving the contempt application undecided till date.

5. The learned counsel for the petitioner/ Respondent canvasses that while passing the impugned order the trial court has exercised jurisdiction not vested in it and has even improperly exercised jurisdiction in so far as the suit though not maintainable for want of Section 80 CP.C notice, relief has been given to the petitioners/defendants and a valid transfer order passed in the interest of service without any legal or factual basis, has been stayed in derogation of well recognised legal principles. The counsel has further submitted that the interim direction has been extended even when there was no prayer thereto in a contempt matter without deciding the contempt petition itself and further the interim injunction has been passed and given retrospective effect which is unknown to law.

6. The counsel for the respondent has raised a preliminary objection that as the impugned order is appealable, therefore, the revision would not lie.

The counsel for respondent has referred to the judgment entitled State of J and K and Others Vs. Ghulam Rasool Civ. REv No 114 of 193 (See 1998 SLJ 20) decided by a Division Bench of this court on 29.1.1993 wherein, it has been held that in case of nonexercise or illegal exercise of jurisdiction the revisional powers are available to the High Court irrespective of fact whether the impugned order is appealable or not and further one of the learned Judges of the Division Bench has struck down Sub Section 2 of Section 115 of CP.C. to the extent of barring revision in case of appealable orders as ultra vires to the constitution. This case is covered by the aforementioned Division Bench authority and accordingly the objection raised has to be rejected.

7. The counsel for the respondent/plaintiff has supported the impugned order of the trial court and submits that as the order of transfer is mala fide, biased and interrogation of and against the Circulars issued by the department

forbidding posting of its employees who have attained 45 years of

age to Kargil/Leh, therefore, the plaintiff has every right to challenge the order in a regular suit and seek interim directions for the purpose. The

order is not vitiated on any account. The order has been passed within the confines of law.

8. On examination of record, it emerges that there has been non compliance with the mandatory provisions of Section 80 C.P.C. in so far as suit

has been instituted in respect of official acts purported to be done by the respondent public officials in their official capacity was two months

required statutory notice has not been tendered to the defendants.

9. Section 80 C.P.C. provides, that the plaint shall contain statement that the prescribed statutory notice has been so delivered or left with the

defendants. The plaint in this case does not contain an averment that such notice has been left or delivered to defendants. Instead in para 6 of the

plaint it is stated:

That the notice under section 80 C.P.C. could not be served upon the defendants, because, the matter is of an emergent nature and statutory

period of two months cannot be waited for.

Even, Section 80(3) C.P.C. provides that if in a suit, an urgent or immediate relief against the Government or its public officer is sought in respect

of official act(s) without serving the prescribed notice, the court has to be satisfied after hearing the parties, that such urgent or immediate relief is

required and then to give to the government or to the public officer a reasonable opportunity of showing cause in respect of the relief prayed for in

the suit.

10. In this case, nothing as required above has been done or sought to be done. The provisions of section 80 C.P.C appear to have been followed

more in breach than in compliance. From record, it is seen that the order directing the petitioners to allow the respondent to discharge his functions

at S.D.O.T Circle Anantnag, was in force from 921993 to 2721993, (as extended from date to date). There was no such order beyond 2721993

till 21793. During this period as per the case of telecommunication Department, respondent was relieved to join at Kargil.

11. By the impugned order, not an application from extension of adinterim injunction, but in a contempt motion the then Munsiff (Sub Registrar)

Srinagar not only directed the petitioners to allow the Respondent to function as SDOT. Circle Anantnag, but also gave the order retrospective

effect so as to make it operative abinitio. By this order, the trial court has not preserved the status quo, but has brought into being new state of

affairs. Adinterim injunction shall operate from the date it is issued and not from date earlier thereto unless it happens to be a mandatory injunction

requiring to restore the position as it existed on the date of the suit and that is not the case here.

12. Perusal of the impugned order would fairly reveal that the then Munsiff has referred to some facts of the case and then without deciding

anything rushed to pass the order. He has not even cared to find out if in the facts and circumstances of the case, he should have exercised the

discretion to grant the interim injunction. He has not taken into reckoning, and considered existence of a prima facie case, sufferance of an

irreparable injury or balancing of the inconveniences inter se the parties. The prima facie case sine qua non for exercise of powers in combination

with either or the two other conditions has not been taken into consideration to find out if an injunction is warranted in this case. The impugned

order is not supported by reasons and does not appear to have been passed in exercise of discretion, informed of reasons, fair play and justice.

13. The exercise of discretion appears capricious and in ignorance of the relevant facts. Merely, because the petitioner's employer department has

issued certain circulars/administrative instructions, providing certain guidelines for posting of its employees in Leh/Kargil and in contravention of

these circulars and administrative instructions, plaintiff has been posted at Kargil, cannot be per se a ground to issue an adinterim injunction. Merely,

because it is alleged that the plaintiff was previously posted at Leh in different stints can not do, without anything more, the action of the

petitioners mala fide or biased. Besides, when the order of transfer Annexure D itself shows that the order is in interest of service that should mean

in the interests of administration, the transfer order cannot be said to be bad on that count. The trial court should not have interfered with the

transfer order made for administrative reasons and in service interest/ public interest. It is not alleged that the transfer in question was made in

violation of any mandate of statutory rule. The redressal for an action taken under executive instructions by authorities is with the higher authorities

in the department and the plaintiff should have approached those authorities rather than rushed to institute the suit and seek the restrain on a transfer order. After all transfer is an incident of service and should not be interfered with lightly, unless the legal grounds exist therefore and such cases can be very rare.

In AIR 1991:SC 532, it has been held:

.....a Government servant holding a transferable post has no vested right to remain posted at one place or the other, he is liable to be transferred from one place to the other. Transfer orders issued by the competent authority do not violate any of his legal rights. Even, if a transfer order is passed in violation of Executive instructions or orders, the courts ordinarily should not interfere with the order. Instead effected party should approach the higher authorities in the department....

14. For the aforesaid reasons, the impugned order cannot be sustained. It is set aside. Notify the decision to the trial court and send back record.