

(1998) 09 J&K CK 0010

In the Jammu And Kashmir High Court

Case No : Service Writ Petition (SWP) No. 512/1995

Yoginder Anand

APPELLANT

Vs

State of J&K and Another

RESPONDENT

Date of Decision : 02-09-1998

Acts Referred:

Constitution of India, 1950 — Article 226

Citation : (2000) KashLJ 284 : (2000) 2 SCT 998

Hon'ble Judges : O.P.Sharma, J

Bench : Single Bench

Advocate : Shaishta Hakim, K.S.Johal, Advocates appearing for the Parties

Judgement

The petitioner has challenged the promotion of private respondents as Senior Superintendent of police on the ground that they were all junior to

him and did not possess any better merit so as to justify his supersession. The only reason for this arbitrary action, according to the petitioner, is

that he had earlier challenged his transfer from Jammu to Anantnag (Kashmir) by order dated 1.5.1993 which was stayed by this Court on

12.8.1993 in SWP No. 894/1993 and contempt proceedings had to be initiated for compliance of the stay order. This, it is alleged, offended the

official respondents who were biased against him and acted accordingly in denying him the promotion.

The allegation of bias is founded on the plea that he filed SWP No. 894/1993 challenging his transfer from Jammu to Anantnag in which following

order was passed on 12.8.1993 :

The respondents while passing the order of transfer and the order of suspension have over looked the earlier Court orders against which no

appeal was filed rather the order was complied. Once that judgement has not been changed and the petitioner has not been examined afresh for

declaring him fit, no punitive action will lie prima facie against him keeping in view the peculiar circumstances of the case. In my opinion the

petitioner has succeeded in convincing the court that the order of transfer and the subsequent order of suspension are not bona fide grounds.

Therefore, the interim direction is warranted in the matter. Therefore, till then the operation of the order of suspension and the order of transfer

impugned in the Writ petition will remain in abeyance subject to objections from the other side.

This according to the petitioner, influenced the Selection Committee which ignored his excellent service record while promoting his juniors. The

first question is, has the petitioner pleaded bias and if so against which member of the Selection Committee? It is settled law that allegation of mala

fides or bias has to be specifically pleaded and supported by material before the other side is called upon to rebut the same. It is also settled that

charge of mala fide can be made only against an individual and not an office. Admittedly, none of the members of the Selection Committee have

been impleaded by name, besides the Director General. So the allegation of mala fides cannot be investigated on the mere ipsi dixit of the petitioner

who has failed to identify the officers who were biased against him. Moreover, bias has to be pleaded and proved by the petitioner as observed by

their lordships of the Apex Court in the following decisions :

In *E. P. Rayappa Vs. State of Tamil Nadu*, (AIR 1974 SC 555), it was held that:

We must also overlook that the burden of establishing mala fides is very heavy on the person who alleges it. The allegations of mala fides are often

more easily made than proved and the very seriousness of such allegations demands proof of a high order of credibility.

This proposition was reiterated in *"Sgivajirao Nilangerkar Patil Vs. Dr. Mahesh Madhav Gosavi"* (AIR 1987 SC 294), holding that: "It was

somewhat unfortunate that allegations of mala fides which could have no foundation in fact were made and several cases which had come up

before this Court and other Courts and it had been found that these were made merely with a view to cause prejudice or in the hope that whether

they have basis in fact or not some of which might at least stick.

No doubt inference of mala fides can be drawn by taking into account the attendant circumstances but such inference must be based on factual

matrix as laid down in ""M. Shankearanarayana Vs. State of Karnataka"" (AIR 1993 SC 763), holding that:

It may be permissible in an appropriate case to draw a reasonable inference of mala fide from the facts pleaded and established. But such

inference must be based on factual matrix and such factual matrix cannot remain in the realm of institution, surmise or conjecture.

Applying the ratio of these decisions, no bias can be inferred in the case and this ground of challenge is rejected.

5. It was next argued that Selection Committee had to record reasons for ignoring the seniority of the Petitioner. In support of this Mr. Johal relied

on the decision of this Court in Lal Chand's case (Supra), holding that:

14. The language of Rule 25 (2) in the present case is quite different. The words 'shall be made on the ground of merit and ability' clearly

postulate that the order of the appointing authority must show ex facie that the considerations mentioned in the rule were present in the mind of the

appointing authority at the time of making promotions and the word 'ground' implies that these considerations should be stated in the order so that

anybody reading the order may know that action has been taken under R. 25 (2) of the Rules. In other words while we fully agree with the

principle that the question of promotion depends largely on the subjective satisfaction of the appointing authority and that the assessment of the

appointing authority regarding the work and the performance of the Government servant cannot be questioned, yet we cannot help feeling that the

statutory rules do require that the considerations which had weighed with the appointing authority must find place in the order of promotion and

then alone it would be a compliance with the provisions of Rule 25 (2).

6. This was subsequently clarified by a full Bench of a large strength in Lal Chand Vs. Director CD and NES and others (1971 KLJ 65). it was

held that:

5. Even if the appointing authority does not record reasons in the order, it will be a sufficient compliance with the provisions of Rule 25 (2) of the

Rules (Supra) if the contemporaneous or anterior record of promotion is passed by the appointing authority has applied its mind by proceeding on

the basis of such record which contains the grounds for promotion. We, therefore, clarify our Full Bench decision in Lal Chand Pargal's case

(Supra) accordingly.

7. So it is no longer necessary to state reasons for supersession in the order of promotion. Moreover, lately the concept of Departmental

Promotion Committee has been introduced in the service law, the object of which is to substitute individual assessment of the officers by entrusting

the job of selection of inservice candidates for promotion to the collective wisdom of the members of the Committee. It is the Committee which

assesses the merit and suitability of the officer, on the basis of his service record and performance reports. Thus the promotions at the higher level

particularly at Gazetted level are made on the recommendation of Departmental Promotion Committee. So the Judgement in Lal Chand's case is

now to be viewed in the context of this new development and not on the basis of assumption that the appointing authority is competent to make

promotions of its own. Since the Committee, in this case was chaired by the Chief Secretary of the State and they found that petitioner was not

suitable to the post, it is not possible to take a different view as this court is not exercising appellate jurisdiction. Since the charge of bias and mala

fides has failed so the judicial review is permissible only to see whether the Committee has followed the rules of procedure about which there is no

challenge. Further recording reasons for supersession, the Apex Court in State of Rajasthan Vs. Srimam Verma and Another ((1996) 6 SCC 493)

has held that:

12. The High Court has pointed out that such selections are likely to be challenged in a court of law and if no reasons are recorded or atleast the

record indicates the reasons for superseding a senior and selecting his junior, the Court would be in a position to consider the grievance effectively

and satisfactorily. This argument brings to our mind the decision in (AIR 1967 SC 1606) but that was case where the order questioned before the

Court was a quasijudicial order. It is equally true that even in administrative matters, this Court has been insisting upon the duty to act fairly which

may sometimes require an opportunity of hearing. But having regard to the nature of function of selection and taking into consideration the fact that

the only right of the Government servant is a right to be considered and not a

right to promotion we do not think possible to infer the requirement of recording reasons in all situations.

So even for this reason, it is no longer necessary to record reasons though on the facts, respondents have given sufficient reasons for ignoring the petitioner's claim for promotion.

8. Moreover, the post of Senior Superintendent of Police being the selection post, the question is whether a person who consistently represented

against his transfer to Valley on the ground that he was unfit to serve at high altitude and snow bound areas, could assail the order of suppression.

It is admitted that he had earlier filed Writ Petition No. 850/1990 in this Court had directed the respondents to consider him for posting at a

warmer place. It appears that this order was not implemented and the petitioner had to file Civil Original Application No. 153/1991 in which the

following order was passed on 561992:

Report of Medical Board has been received from which it appears that the petitioner is unfit to serve in High altitude and snow bound areas and

according to said board Kashmir Division also falls in the said category. In view of the findings of the Board objections filed by the Director

General police seem to be baseless and even mischievous. He is bound to comply with the order of the Court immediately and that shall be done

within three weeks from today, otherwise he shall be produced before the Court on the next date to be fixed in 1st week of July 1992.

9. So the post of Senior Superintendent of Police being a selection post, if this handicap of the petitioner had weighed within the selection

Committee, their opinion could not be said to be arbitrary or mala fide because the petitioner can not expect promotion as well as posting of his

choice. Although, this is not the defence pleaded on behalf of the State but this handicap cannot be ignored by the appointing authority because

promotion is not a matter of right though he had a right to be considered. So there is no merit in this petition and the same is dismissed without any

order as to costs.