
(2016) 2 JKJ 577

Jammu & Kashmir High Court

Case No: SWP No. 2204 of 2015, MP Nos. 01 of 2015, 02 of 2015 and 03 of 2015

S. Swarn Singh

APPELLANT

Vs

State of J&K

RESPONDENT

Date of Decision: Oct. 16, 2015

Acts Referred:

- Constitution of Jammu and Kashmir, 1956 - Section 103

Citation: (2016) 2 JKJ 577

Hon'ble Judges: Mr. Janak Raj Kotwal, J.

Bench: Single Bench

Advocate: Mr. D.K. Khajuria, with Mr. Amit Gupta and Mr. R.S. Jamwal, Advocates, for the Appellants/Petitioners; Mr. B.S. Salathia, Sr. Advocate with Mr. Anil Khajuria, Advocate, for the Respondent No. 5; Mr. Ravinder Gupta, AAG, for the Respondents No. 1, 4 and 6

Final Decision: Allowed

Judgement

Mr. Janak Raj Kotwal, J. - Petitioner claims to have served as ARTO, District Ramban for about three years. Vide Government Order No.

103/AF-TR of 2014 dated 18.10.2014, petitioner was transferred from Ramban and posted as ARTO, Board of Inspection (BOI), Jammu. Vide

Government Order No. 56-TR of 2015 dated 23.07.2015, petitioner has been transferred from the post of ARTO BOI and posted as I/C

ARTO, Flying Squad, Jammu and by the same order private respondent has been posted at his place.

2. Petitioner assailed his transfer from ARTO, BOI, Jammu in SWP No. 2159/2015 on the grounds that transfer was pre-mature and therefore,

violative of the Transfer Policy issued by the Government vide Government Order No. 861-GAD of 2010 dated 28.07.2010, that he has been

transferred to a non-existent post and that he has been transferred not in the interest of administration but at the behest of the private respondent,

who has managed his posting at his place on his transfer from the post of ARTO, Ramban where he had been posted vide an order dated

12.05.2015.

3. A co-ordinate Bench of this Court disposed of SWP No. 2159/2015 vide order dated 24.07.2015 issuing following direction:

In view of case set up, this petition is disposed of with a direction to respondents to give fresh look to impugned transfer Order No. 56-TR of

2015 dated 23.07.2015 in so far as it pertains to the petitioner, in light of averments made in petition, annexures appended thereto, and having

regard to the transfer policy/statute occupying the field. Let such decision be taken within a period of two weeks from the date copy of this order is

served upon the respondents by the petitioner. Till then impugned Order No. 56-TR of 2015 dated 23.07.2015 in so far as it pertains to the

petitioner shall not be acted upon.

4. Pursuant to the direction issued in SWP No. 2159/2015, respondent No. 1 issued Government Order No. 59-TR of 2015 dated 03.08.2015.

Respondent No. 1 rejected contentions of the petitioner holding them as devoid of merit, kept intact his transfer and issued further direction that

the petitioner shall report to his new place of posting without any further loss of time failing which action for dereliction of official orders shall be

taken. Not only that respondent No. 1 issued a direction to the Transport Commissioner to ensure service of the order on the petitioner and report

about the compliance within a week and direction to the Regional Transport Officer Jammu to relieve the petitioner immediately and direct him to

report new place of posting, that is, Flying Squad, Jammu. Paragraphs of order No. 59-TR of 2015 dated 03.08.2015, which are relevant for the

purpose of this petition are reproduced as under:

Whereas, pursuant to the directions passed by the Hon'ble High Court, the department has given fresh look to the Government Order dated

23.07.2015 in the light of the contents of the writ petition and observed that the transfer order so far as it relates to the petitioner has been made in

the interest of administration and on the basis of administrative exigency in terms of the law, rules, policies in vogue as there are serious allegations

raised against the petitioner in various complaints received from Hon'ble Chief Minister, I/C Transport, Chief Secretary, J&K and the

Administrative Department (Transport). Accordingly the Administrative Department has ordered an inquiry into the allegations raised in the above

said complaints. Normally, on the basis of such charges of grave nature, the petitioner should have not been assigned any job and should have

been attached till completion of the inquiry already ordered in the matter. However, despite complaints and serious allegation, the petitioner has

been directed to discharge the functioning and head the Flying Squad, Jammu, which is mandated with a very important task to ensure road safety

as enshrined in the guidelines of the Committee set up by the Hon'ble Apex Court.

Whereas, in the petition, the petitioner has contended that the transfer of the petitioner has been effected in violation of transfer policy issued by the

Government. The averments made by the petitioner in this regard have been examined and found not in accordance with the law/ rules/policies

governing the subject matter. On the contrary, the transfer of the petitioner, as confirmed with the official records, has been made with the prior

approval of the Government which is Hon'ble Minister for Transport. Thus there is not violation of transfer policy in vogue pertaining to pre-mature

transfer.

(underlining by me)

5. Petitioner by the medium of this writ petition assails Government Order No. 59-TR of 2015 dated 03.08.2015 (supra). He seeks quashing of

this order and a direction to the respondents to allow the petitioner to continue as ARTO, BOI, Jammu.

6. Petitioner has assailed order dated 03.08.2015 mainly on the grounds that the petitioner has been transferred to a non-existent post only to

punish him and that the transfer has been made for giving undue benefit to private respondent and the order, therefore, is mala fide. It is contended

that oblique motive in passing the impugned order is evident inasmuch as RTO has been directed to relieve the petitioner immediately and a

direction has been issued that petitioner shall join at his new place of posting without any loss of time, failing which action for dereliction of duty

shall follow. It is contended that a false complaint was got filed against him by the private respondent from one Anil Vaid which on enquiry by the

Regional Transport Officer was found baseless and without any evidence. Petitioner has produced copy of the report of the RTO dated

17.06.2015. It is contended that there was no other complaint against the petitioner. Petitioner has also contended that there is no sanctioned post

of ARTO in the Flying Squad inasmuch as two officers, namely, Mamta Rajput and Konika, who are working as ARTOs in the Flying Squad are

drawing their salary from Ramban and Poonch.

7. Official respondents on one hand and the private respondent on the other have filed objections opposing the writ petition.

8. Stand of the official respondents precisely is that transfer of the petitioner has been ordered in view of administrative exigency and in the interest

of good and responsive administration. It is contended that transfer and posting of a Government Servant is made in view of the administrative

exigency and not in the interest of a Government Servant and the impugned order has been passed in the interest of administration by the

Competent Authority. The specific allegation of the petitioner that the transfer has been made with mala fide intention of posting the private

respondent in his place has not been specifically denied though it is contended that petitioner has levelled vague and bald allegation of mala fide.

Official respondents have raised preliminary objection about the maintainability of the petition on the ground that order dated 03.08.2015 has been

complied with by the petitioner by joining his new place of posting on 05.08.2015 and the private respondent has also joined in place of the petitioner.

9. Stand of the private respondent is in tune with that of the official respondents. He denies the allegation of his hand in complaint against the

petitioner by one Anil Vaid and contends that transfer of the petitioner has been ordered in the interest of administration and in view of the exigency

of service and not as punishment for complaints against him. Justifying his posting as ARTO, BOI, Jammu, the place held by the petitioner, the

private respondent has stated that his daughter is suffering from thalassemia; she is registered with Thalassemia Day Care Centre at SMGS

Hospital, Jammu and is dependent on blood transfusion, which requires his constant presence with his daughter at Jammu. It is contended that

petitioner has been posted as ARTO, BOI, Jammu, the position which was held by the petitioner pursuant to the directions issued by this Court in

SWP No. 1670/20.13 and SWP No. 1434/2015 filed by the petitioner.

10. Mr. D. K. Khajuria, learned counsel for the petitioner, submitted that the premature transfer of the petitioner is punitive and stigmatic in nature

as he is said to have been transferred because of a number of complaints received against him. It was urged by Mr. Khajuria that a punitive

transfer of a Government servant without any inquiry and hearing him violates the principles of natural justice and is liable to be set aside. Mr.

Khajuria further argued that transfer is mala fide as it has been manipulated by the private respondent for his premature transfer from Ramban just

within two months of his transfer to that place. Mr. Khajuria pointed out that the private respondent after his transfer from Udhampur to Ramban

vide transfer order dated 12.05.2015 in order to secure his adjustment in place of the petitioner manipulated a complaint against him by one Mr.

Anil Vaid, which was the only complaint against him and was found false by the Regional Transport Officer, Jammu on enquiry. In support, Mr.

Khajuria relied upon *Somesh Tiwari v. Union of India and ors.*, (2009) 2 SCC 592.

11. Per contra, Mr. B.S. Salathia, learned Senior Advocate, appearing for the private respondent submitted that transfer of the petitioner neither

can be said to be punitive nor stigmatic for the reason that as per the transfer order dated 23.07.2015, petitioner was transferred in a routine

transfer along with number of other ARTOs without a mention of any complaint or inquiry against him. Mr. Salathia submitted that in the impugned

order dated 03.08.2015 only a reference has been made to the pendency of some complaints against the petitioner but it has been made clear that

he has been directed to discharge the functions and head the Flying Squad which is mandated with a very important task to ensure road safety. Mr.

Salathia relied upon Union of India v. Sri Janardhan Debanath and Ors. AIR 2004 SC 1632.

12. Assail to the transfer on the ground that the same is premature and violative of the Transfer Policy does not survive and cannot be entertained

in view of the Full Bench Judgment of this Court dated 31.08.2015 in SWP No. 1476/2014 and connected matters. Learned Full Bench of this

Court while analysing the provisions of the Transfer Policy issued by the Government vide Government Order No. 861-GAD of 2010, dated

28.07.2010 has held that the same will not confer any enforceable right in the light of Rule 27 of the Jammu and Kashmir Civil Services

(Classifications, Control and Appeal) Rules, 1956. Rule 27 which is a statutory provision, provides that a member of service or class of a service

may be required to serve in any part of the State on any post borne on the cadre of such service or class and does not provide for any maximum

or minimum tenure at a posting or place. A Government servant, therefore, cannot assail his transfer on the basis of the aforementioned Transfer

Policy as the Policy is not enforceable. No Government servant has a right to continue at a particular post or place of posting for a definite period.

13. Nonetheless, there is ample authority and it is now settled as a principle of law that administrative decision of transferring a Government servant

from one post/place of posting to another post or place of posting can be questioned before the Courts on three grounds namely, that order of

transfer is passed in violation of any statutory rule or on mala fide reasons or by an incompetent authority. There is ample authority also that a

transfer order, which is punitive in nature, issued without the inquiry or giving Government servant opportunity of being heard violates principles of

natural justice and can be questioned on that ground.

14. The allegation that the transfer of the petitioner is mala fide for having been ordered to accommodate the private respondent against him is

without any substance. It is not disputed that the daughter of the private respondent is suffering from thalassemia and is a registered case of

thalassemia with SMGS Hospital, Jammu. She requires constant blood transfusion. It being so, private respondent cannot be faulted for

approaching the Competent Authority or even this Court to arrange for his posting at Jammu to look after his daughter. There is, however, no

material to support the allegation that the private respondent manipulated his posting as ARTO, BOI, Jammu by dislodging the petitioner. In SWP

No. 1670/2013, the private respondent had sought a direction for his placement/adjustment at any place either at Jammu or at Udhampur/Samba

and a learned co-ordinate Bench of this Court had while disposing of that petition asked the respondents to consider the petitioner's claim for

adjustment either in Jammu or nearer to Jammu. On the strength of order passed in SWP No. 1670/2013, petitioner at a later point of time had

assailed his transfer from Udhampur to Ramban in SWP No. 1434/2015 and a co-ordinate Bench of this Court had stayed that transfer. It thus

clearly emerges that private respondent's endeavour had always been to secure a posting at or around Jammu but not a particular post. Allegation

of mala fide, therefore, is without any basis.

15. The contention that transfer of the petitioner is punitive in nature has substance. The impugned order issued by respondent No. 1 in its

substance speaks that transfer of the petitioner has been ordered ""in the interest of administration and on the basis of administrative exigency in

terms of law, rules, policies in vogue as there are serious allegations raised against the petitioner in various complaints received from Hon'ble Chief

Minister, I/C Transport, Chief Secretary, J&K and the Administrative Department (Transport)"". On plain reading of the impugned order, it would

admit of no doubt that the premature transfer of the petitioner is not just a routine transfer in the administrative interest or exigency but has been

actuated by receipt of various complaints against him and is therefore, punitive in nature. Not only that, as per this order the Administrative

Department has initiated inquiry against the petitioner and such are the allegations in the complaints that the petitioner should not have been

assigned any job and should have been attached till completion of the inquiry against him but even then he has been directed to discharge the

functioning and head the Flying Squad, Jammu which is mandated with a very important task to ensure road safety as enshrined in the guidelines of

the Committee set upon by the Hon'ble Apex Court.

16. The reason of the transfer as given in the impugned order notwithstanding, the clear but mismatching stand of the official respondents in their

reply to this writ petition is that transfer of the petitioner has been ordered in the interest of administration and as an administrative exigency and is

not punitive in nature. No reference to any complaint, much less to number of complaints, against the petitioner has been made in the reply nor is it

the respondents' case that inquiry in the complaints was held and petitioner was given opportunity of being heard in the complaints against him.

Contention of the petitioner that the only complaint filed against him by one Anil Vaid was found baseless on inquiry has not been denied.

Respondent No. 1 has thus ordered punitive transfer of the petitioner without affording him opportunity of being heard.

17. A punitive order of transfer of a Government servant said to have been issued on the basis of complaints against him attracts stigma. Such

transfer if ordered without affording him opportunity of being heard is wholly illegal and is liable to be set aside. In Somesh Tiwari's case (supra)

the Supreme Court has held that it is one thing to say that the employer is entitled to pass an order of transfer in administrative exigencies but it is

another thing to say that the order of transfer is passed by way of or in lieu of punishment. 'When an order of transfer is passed in lieu of

punishment, the same is liable to be set aside being wholly illegal.'

18. Legal position is no different in Janardhan Debanath's case cited by Mr. B.S. Salathia, learned Senior Advocate appearing for the private

respondent. In that case, respondents therein, who were serving in Postal Services Department, were transferred from Agartala Division to

Meghalaya Division. In the writ petitions filed by them the stand taken by Union of India was that transfer was done interest and on account of

exigencies of administration and it was pointed out that they not only misbehaved with the Director (Postal Services), a senior lady officer, she was

confined and dragged from one room to another and this was done with a view to force her to withdraw the charge-sheet against the Deputy Post

Master. Their lordships of the Supreme Court held in para 15 of the reporting: -

15. The allegations made against the respondents are of serious nature, and the conduct attributed is certainly unbecoming. Whether there was any

misbehavior is a question which can be gone into in a departmental proceeding. For the purposes of effecting a transfer, the question of holding an

enquiry to find out whether there was misbehavior or conduct unbecoming of an employee is unnecessary and what is needed is the prima facie

satisfaction of the authority concerned on the contemporary reports about the occurrence complained of and if the requirement, as submitted by

learned counsel for the respondents, of holding an elaborate enquiry is to be insisted upon the very purpose of transferring an employee in public

interest or exigencies of administration to enforce decorum and ensure probity would get frustrated.

19. In the case on hand, as pointed out above, transfer of the petitioner admittedly has been done as there were serious allegations in various

complaints against him. No reference, however, to any such complaint has been made in the reply of the respondents nor is there any material to

show that nature of allegations called for immediate transfer of the petitioner in the public interest and on account of exigency of service. The

punitive transfer of the petitioner, which from its nature is stigmatic, therefore, is not justified.

20. Respondents have questioned the maintainability of this writ petition on the ground that the impugned transfer has been implemented inasmuch

as the petitioner has concealed the fact that pursuant to his transfer he joined as ARTO Flying Squad on 15.08.2015, that is, on the day of filing of

the writ petition and even the private respondent has also joined in place of the petitioner. It is contended also that the petitioner having complied

with the order is estopped from assailing the order. In this context, it is noticed that the impugned order contains a strict direction to the petitioner

to report to his new place of posting without any loss of time and a warning that in case of failure action for dereliction of official order shall follow.

Not only that, the order also contained a direction to the RTO, Jammu to relieve the petitioner immediately with a direction to report at his new

place of posting as also a direction to the Transport Commissioner to report compliance of the order within one week. All these directions suggest

anxiety of respondent No. 1 to see that order is implemented and in such circumstances quick compliance by the petitioner cannot be taken as his

acquiescence to the order. That apart, illegality of the order would not get cured by compelling the petitioner to comply with the order and doors

of Judicial Review cannot be closed on that score.

21. For all what has said and discussed above, this writ petition has merit and is allowed. The transfer of the petitioner is set aside and his place of

posting as ARTO BOI, Jammu is restored.

22. I am conscious that the private respondent was posted at Jammu for a good reason but goodness should have been extended up to the place

of posting only and need not be extended to the post to be given to him. The Competent Authority should, therefore, do well by giving suitable

posting to him having regard to his domestic problem related to health of his daughter.

23. Disposed of.