

## **HIGH COURT OF JAMMU AND KASHMIR AT JAMMU**

Case: SWP No. 18/2009 & CMP No. 20/2009 & CMP No. 526/2009

Date of order : 01.05.2009

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Manzoor Hussain Gulshan Vs. State and others.

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Coram:

***Hon'ble Mr. Justice Virender Singh, Judge.***

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Appearing counsel:

For petitioner(s) : Mr. K. S. Johal, Advocate.

For respondent(s) : None for respondent Nos. 1 to 4 and 6 & 7.

Mr. K. M. Bhatti, Advocate, for respondent No.5.

Mr. D. C. Raina, Sr. Advocate, with Mr. F. A.

Natnoo, Advocate, for respondent No.8.

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i) Whether approved for reporting  
in Press/Journal/Media Yes/No

ii) Whether to be reported in  
Digest/Journal Yes/No

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Vide this order I intend to dispose of the main writ petition at the stage of admission itself as learned counsel for both the sides have consented for the same.

In brief, the case set up by the petitioner is that vide order dated 16.10.1987 (Annexure-A) he was appointed as Teacher in the month of November, 1987 and was transferred as Warden in 'Gujjar and Bakerwal Hostel' in the year 1987 itself. Since then he is continuously working as Warden and presently posted in 'Gujjar and Bakerwal Hostel' Rajouri. In between also he was transferred in different Hostels in the State. He had met with an accident when he was posted as Warden at Doda and this resulted into his 60% permanent disability. The grievance projected herein is against the

order dated 31.03.2008 (Annexure-H) passed by respondent No.1 vide which he has now been repatriated to his parent department and in his place, respondent No.8 has been picked up.

While issuing notice to the respondents, implementation of the impugned order was stayed by this Court. It was, however, subject to objections from the other side.

Respondent No.1, 2 & 8 have already filed their respective objections to the main petition. Respondent No.8 has also filed an application bearing CMP No. 526/2009 for vacation/ modification of the interim order. Mr. Raina, learned Sr. Advocate submits that the application for vacation of the stay order may be treated as reply to the CMP No. 20/2009 filed by the petitioner for the interim relief. Allowed. However, the remaining respondents have not tendered their reply till date.

Heard learned counsel for both the sides at length and perused the record minutely.

Mr. Johal submits that continuance as Warden in 'Gujjar and Bakerwal Hostel' for long 21 years gives the petitioner a substantive right of continuation for the same post. He submits that in fact the petitioner was appointed on this post by transfer and, therefore, it cannot be said to be a case of transfer/ deputation from parent department, as such, the impugned order of his reversion is legally not sustainable. While giving the flashback of the earlier writ petitions, Mr. Johal submits that in September, 1991, the Government came up with an order for constitution of a Divisional Level Selection Committee for the purpose of making adjustment against the posts of Wardens/ Assistant Wardens in 'Gujjar and Bakerwal Hostels'. Since the said order was affecting the service

career of the petitioner, he filed writ petition bearing SWP No. 1142/1991, which, however, came to be dismissed on 11.08.1998. Thereafter also the petitioner filed two writ petitions on different occasions bearing SWP No. 1127/2004, which was dismissed as withdrawn with a permission to file fresh one and SWP No. 1743/2005, which was again dismissed as withdrawn with the same liberty as during the pendency of the said petition, order of transfer (impugned herein) was passed. In the aforesaid writ petitions, the petitioner had challenged the policy prescribing the procedure for filling up the posts of Wardens in Gujjar and Bakerwal Hostels'.

Mr. Johal then submits that the petitioner is a Handicap person with disability of more than 60% as he had suffered a serious accident during the aforesaid period. Therefore, he is entitled to be adjusted/ appointed on the basis of his reservation granted under the provisions of 'Jammu & Kashmir (Persons with Disabilities Equal opportunities, Protection of Rights and Full Participation) Act 1998' (hereinafter for short to be referred as 'Disability Act'). He, in this regard, has drawn the attention of this Court to provisions of Sections 21, 22 & 25 of the Act, requiring 3% vacancies to be reserved for classification for persons with disabilities. He submits that in the aforesaid two writ petitions (SWP No. 1127/2004 and SWP No. 1743/2005) also the petitioner had also taken the same plea on the basis of Disability Act and is agitating it once again through the instant petition.

Mr. Johal lastly submits that after spending 21 years as Warden in different 'Gujjar and Bakerwal Hostels', it would not be possible for the petitioner to change the track and teach the students,

that too when he is left with only few years of service and his permanent disability of 60% is standing in his way.

Repudiating the submissions advanced by Mr. Johal, Mr. Raina submits that the writ petitioner is seeking to enforce the right, which is legally not available to him as he wants to stick to a particular post despite being transferred by his employer as per the policy framed in this regard. He contends that for the last 21 years, the writ petitioner is holding a post of Warden on the strength of interim orders passed by this Court on different occasions in different writ petition(s) filed by him, whereas it is a simple case of sending the writ petitioner on deputation/ transfer as Warden in 'Gujjar and Bakerwal Hostel Doda' being a permanent member of service in School Education Department. He contends that transfer is the exigency of service and the writ petitioner cannot project any grievance against the order when it does not smack of any mala fides. Therefore, he possibly cannot show any grievance against the impugned order and the instant petition merits dismissal on this score alone.

Mr. Raina then submits that the writ petitioner otherwise has not been able to lay any foundation to challenge the Government Orders of 2003 & 2006 on the basis of the provisions of 'Disability Act', and, therefore, he cannot claim any reservation now at this stage on the ground of any disability suffered by him after many years of his transfer. Even otherwise, the tendency to stall the transfer by projecting a case on medical grounds deserves to be curbed and the Hon'ble Supreme Court of India has taken a serious note of it. At the same time, after joining at his new place of posting, he can move a representation for his adjustment projecting his case on medical grounds, but not at this stage when he has no basis for it.

Mr. Raina on the basis of aforesaid submissions contends that the petitioner has no case at all in his favour.

Mr. Bhatti representing respondent No.5 submits that when the posts were initially created in the year 1977, the mode of appointment of Wardens was by way of transfer/ deputation and there were no service rules governing such appointment. Mr. Bhatti's concern is that every Hostel of such type should have Warden at the earliest and submits that, in fact, at three hostels, no Warden has been appointed by the State for a reasonably good time and it calls for some directions to the State.

In my view, the controversy involved in the instant writ petition revolves around the principal question relating to the service status of the petitioner. The claim of the petitioner is that he was appointed as Warden in 'Gujjar and Bakerwal Hostel Doda, by mode of transfer. It is not in dispute that there were no service rules governing such appointment. It is only in the year 2003, the State came up with the policy (Government Order No.1483- GAD of 2003 dated 19.11.2003), which envisaged a procedure for filling up the posts of Wardens in the 'Gujjar and Bakerwal Hostels' in the State. The said procedure is as under:-

"a. The Social Welfare Department shall obtain a panel of three officers (three for each vacancy) from the Education Department eligible for appointment as Wardens of Gujjars and Bakerwal Hostel

The selection from the panel provided by the Education Department shall be made by the Committee consisting of the following officers:-

1. Principal Secretary to Government, Social Welfare Department.

2. Director School Education, Jammu/Kashmir.
  3. Director Social Welfare, Jammu/Kashmir.
  4. Secretary, Advisory Board for Gujjars and Bakerwals.
- b. The recommendations of the selection Committee shall be passed on by the Social Welfare Department to the General Administration Department for issuance of orders.
- c. The normal tenure of deputation shall be two years and may be extended upto a maximum of three years with the concurrence of the Social Welfare Department.”

The aforesaid policy was thereafter superseded by policy of 2006, which reads thus:-

“In supersession of Government Order No. 1483-GAD of 2003, dated 19.11.2003, it is hereby ordered that the Wardens/ Assistant Wardens in the Gujjars and Bakerwals Hostels of the State shall be Governed by the following procedure:-

- a. The General Administration Department shall obtain a panel of eligible Head Masters/Masters, who have outstanding service career from the Education Department for their posting as Wardens in Gujjars and Bakerwals Hostels of the State.
- b. The Selection of Wardens/Assistant Wardens from the panel provided by the Education Department shall be made by a Committee comprising the following officers:-
  1. Administrative Secretary, GAD Convenor

2. Administrative Secretary, Social Welfare Deptt.
  3. Administrative Secretary, Education Deptt.
- c. The GAD will issue the orders of deputation of wardens and Assistant wardens after obtaining approval of the HCM (Chairman of the J&K State Advisory Board for Development of Gujjars and Bakerwals).
- d. The normal tenure of deputation of Wardens/Assistant Wardens in Gujjars and Bakerwals Hostels shall be two years and in no case it will be allowed beyond three years.”

May be the petitioner, on the basis of the interim orders to his credit had remained posted as Warden for more than 20 years, that by itself would not change the complexion of the case or as a matter of fact his status. His transfer was a simple case of transfer out of parent department as is clear from the basic order (Annexure-A) dated 16.10.1987 issued by the Education Department, indicating that he was working as Teacher in High School Planger and was transferred and posted as Warden, Gujjar and Bakerwal Hostel Doda. Therefore, legally it is to be construed as deputation for the reason that his transfer was out of parent department (Education Department). Deputation, howsoever long it may be, it does not create indefeasible right in favour of the deputee holding the post on which he was deputed. In the absence of specific rules providing for appointment by transfer of an incumbent to the post he is holding, mere transfer cannot validly be said to be an appointment by transfer. It was, thus, a transfer/ posting of the petitioner from his parent department (Education Department) only. Therefore, his reversion to his parent department can not be allowed to be objected to for any justifiable

reason. Keeping in view the aforesaid aspect into consideration, I do not find any merit in the contentions of Mr. Johal raised on this aspect.

At the same time, Disability Act 1998, the reliance on which is being made by Mr. Johal to question the validity of reversion order of the petitioner cannot come to his rescue as the said Act nowhere stipulates that the person suffering from disability cannot be sent back to his parent department from the post he has been deputed.

The net result is that finding no merit in the petition, on hand, the same is dismissed alongwith connected CMP(s). Interim direction issued shall stand vacated.

Before parting with the order, I may observe here that if the petitioner at any subsequent stage moves a representation with regard to his adjustment in his parent department to any place suitable to him in view of his disability as projected by him, the concerned authority may accord consideration to his request with compassion.

**( Virender Singh )  
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**Judge**

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