

IN THE HIGH COURT OF HIMACHAL PRADESH, SHIMLA

CWP No. 8590 of 2014.

Judgement reserved on: 23.12.2014.

Date of decision: 31.12.2014.

Raj Kumar

..... Petitioner

Vs.

State of H.P. & ors.

..... Respondents.

Coram

The Hon'ble Mr. Justice Mansoor Ahmad Mir, Chief Justice.

The Hon'ble Mr. Justice Tarlok Singh Chauhan, Judge.

Whether approved for reporting? Yes

For the petitioner : Mr. Sanjeev Bhushan, Advocate.

For the respondents : Mr. Shrawan Dogra, Advocate General with Mr. Anup Rattan, Mr. Romesh Verma and Mr. M.A. Khan, Additional Advocate Generals.

Tarlok Singh Chauhan, Judge.

It is for the second time that the petitioner has been compelled to approach this court seeking quashment of his transfer, which has been effected on the basis of U.O. Note No. Secy./C.M-7004/2012-VIP-B-143360 dated 17.6.2014 received from the office of Hon'ble Chief Minister.

2. Initially the petitioner vide order dated 7.2.2014 was ordered to be transferred from Horticulture Extension Centre, Sundla, Development Block Salooni, District Chamba to Plant Protection Centre, Ratnari Development Block, Jubbal & Kotkhai, District Shimla against the vacancy. This order had been effected on the basis of

Whether the reporters of the local papers may be allowed to see the Judgment?

D.O. No. Secy/CM-07004/ 2012-VIP-B-114510 dated 10.01.2014. The petitioner approached this court by filing CWP No. 1261 of 2014 and the said transfer was cancelled on the basis of the decision of this court in **Amir Chand vs. State of Himachal Pradesh 2013 (2) Him. L.R. (DB) 648**, to which decision we shall advert to later.

3. Thereafter vide order dated 3rd August 2014 the petitioner was again transferred to the said station. This transfer has been assailed on the ground that the same is illegal, arbitrary and against the settled norms and the petitioner has been transferred to a distance of nearly 500 kilometers without taking into consideration that his children are studying in 9th and 6th class, respectively. These generalized grounds appear to have been taken because the office order dated 3.8.2014 on the face of it appears to be innocuous.

4. But then the cat is out of the bag when the respondents filed the reply wherein it has been averred that respondents had received numerous complaints against the petitioner from public representatives of nearby Panchayat(s), which compelled the authorities to effect the transfer. It is the further case of the respondents that right from the date of his appointment on 7.10.1988, the petitioner has remained in and around his home district i.e. Chamba. So far so good. The respondents then have placed on record letter dated 15th July 2014, a perusal whereof reveals that petitioner has again been transferred on the basis of U.O. note, as would be clear from the contents of letter, which is reproduced here in below:-

“Sir,

On the above cited subject, the U.O. note No. Secy./C.M-7004/2012-VIP-B-143360, dated 17.6.2014 received from the office of Hon'ble Chief Minister H.P. vide which Sh. Raj Kumar, Horticulture Extension Officer has been transferred from Horticulture Extension Centre Sundla Distt. Chamba to Plant Protection Centre Ratnari in the Dev. Block Jubbal & Kotkhai area and be made effective. In this regard it is requested that Sh. Raj Kumar HEO had already been transferred vide this Directorate office order of even number dated 7.2.2014 in compliance to the U.O. dated 10.1.2014 (copy enclosed). Sh. Raj Kumar, HEO has challenged the transfer order in the Hon'ble High Court of H.P. on 5.3.2014 and as per the order passed by the Hon'ble Court of H.P. this Directorate has cancelled the office order of even number dated 7.2.2014 therefore, keeping in view decision of Hon'ble Court of H.P. it is not possible to issue the transfer order on the basis of received U.O. Note dated 17.6.2014 and if the transfer is necessary this can be made on administrative ground, the service Bio-data of the official is as under:-

Name of the official/Designation	Sh. Raj Kumar, Horticulture Extension Officer.
Date of Birth/ Retirement	15.5.1964/ 31.5.2022
Date of Appointment	7.10.1988
Home District	Chamba
Place of present posting with date	Horticulture Extension Centre Sundla w.e.f. 23.6.2008.
Previous three place of posting	1. Salooni 2/1997 to 11/2001 2. Sundla 11/2001 to 3/2005 3. Zeera 3/2005 to 8/2007
Place where from transfer proposed to.	Horticulture Extension Centre Sundla Dev. Block Salooni Distt. Chamba to Plant protection Centre Jubbal Kotkhai Distt. Shimla against vacancy.
Stay from court, if	The above official was transferred vide this Directorate office order of even No. dt. 7.2.2014, but the official has filed a CWP 1261/2014 before the Hon'ble High Court of H.P. and as per decision passed on 5.3.2014 by Hon'ble Court the transfer order passed on 7.2.2014 had been cancelled accordingly.
Distance of transfer	550 K.M.
Tribal served or not.	Yes
Proposal of Head of department	If, the compliance is necessary on the approval received from the office of the Hon'ble Chief Minister of H.P. then the administrative approval may be accorded to transfer the official, because the behaviour of the said official is not good with the local public as is evident from the representations received from the four Gram Panchayat's (copy enclosed)."

5. It is trite that transfer is an incidence of service and as long as the authority acts keeping in view the administrative exigency and taking into consideration the public interest as the paramount consideration, it has unfettered powers to effect transfer subject of course to certain disciplines. Once it is admitted that the petitioner is State government employee and holds a transferable post then he is liable to be transferred from one place to the other within the District in case it is a District cadre post and throughout the State in case he holds a State cadre post. A government servant holding a transferable post has no vested right to remain posted at one place or the other and courts should not ordinarily interfere with the orders of transfer instead affected party should approach the higher authorities in the department. Who should be transferred where and in what manner is for the appropriate authority to decide. The courts and tribunals are not expected to interdict the working the working of the administrative system by transferring the officers to “proper place”. It is for the administration to take appropriate decision.

6. Even the administrative guidelines for regulating transfers or containing transfer policies at best may afford an opportunity to the officer or servant concerned to approach their higher authorities for redress but cannot have the consequence of depriving or denying the competent authority to transfer a particular officer/ servant to any place in public interest and as is found necessitated by exigencies of service as long as the official status is not affected adversely and there is no infraction of any career prospects such as seniority, scale of pay and secured emoluments.

Even if the order of transfer is made in transgression of administrative guidelines, the same cannot be interfered with as it does not confer any legally enforceable rights unless the same is shown to have been vitiated by malafides or made in violation of any statutory provision. The government is the best judge to decide how to distribute and utilize the services of its employees.

7. However, this power must be exercised honestly, bona fide and reasonably. It should be exercised in public interest. If the exercise of power is based on extraneous considerations without any factual background foundation or for achieving an alien purpose or an oblique motive it would amount to mala fide and colourable exercise of power. A transfer is mala fide when it is made not for professed purpose, such as in normal course or in public or administrative interest or in the exigencies of service but for other purpose, such as on the basis of complaints. It is the basic principle of rule of law and good administration, that even administrative action should be just and fair. An order of transfer is to satisfy the test of Articles 14 and 16 of the Constitution otherwise the same will be treated as arbitrary.

8. Judicial review of the order of transfer is permissible when the order is made on irrelevant consideration. Even when the order of transfer which otherwise appears to be innocuous on its face is passed on extraneous consideration then the court is competent to go into the matter to find out the real foundation of transfer. The court is competent to ascertain whether the order of transfer is passed bonafide or as a measure of punishment.

9. The transfer in the present case evidently has not been effected in administrative exigencies or in public interest but has been made on the basis of U.O. Note. It is the specific case of the respondents themselves that petitioner was transferred on the basis of complaints received from the public representatives. Therefore, the question that falls for our consideration is as to whether such transfer can withstand judicial scrutiny and is permissible in law.

10. This precise question came up for consideration before this court more than three and half decades back in **Ram Krishan vs. District Education Officer, ILR (Himachal Series) (1979) 8 HIM, 481**, wherein this court held as follows: -

“8. We hereby record our strong disapproval of such type of interference from outsiders in day today administration of the State. If such interference is to be allowed, it would only mean that the government servants should run after those who are taking part in public life and in politics for getting better terms of service and a better place for their postings, and should do everything to please them and not to please the department by their ability, honesty and integrity. It need not be emphasized that such interference of outsiders in day-to-day administration of the State is highly detrimental to the public interest as it would result in nepotism and corruption wherein only those who can wield influence and purse, can succeed. Therefore, we want by this judgment to bring it to the notice of all concerned that sooner this type of interference is discouraged and stopped, the better for the administration and the people of this State.”

11. In **A.K.Vasudeva vs. State of H.P. and others ILR (Himachal Series) (1981) 10 HIM 359**, this court while dealing with a case in which the transfer of a teacher had been made at the behest of a Member of the Legislative Assembly has held as follows:-

21. The practice of effecting transfers of teachers at the behest of every M.L.A. and other influential persons seems to be rampant in the department of Education in the State. The record is full of it. Indeed when the transfer proposals are prepared there is a column No. 8 which is to show "recommended / proposed by". I find that a transfer has been made even at the instance of the resident Youth Congress (I) Subathu of a teacher Alaxender from Kanda to Subathu. It appears that no transfer is made except at the instance of somebody. Why was Shri Chaman Lal reluctant to admit his role, and why did he depose that he had nothing to do with the posting and transfer of any teacher? I had expected him to come out openly and frankly. He is not only a member of the Legislative Assembly but at the moment owns a responsible position as Chairman of a public corporation."

12. Thereafter referring to the judgement in **Ram Krishan's** case (supra), this court went on to hold as follows:

"28. It is unfortunate indeed that despite the aforementioned pronouncement by this Court the malady of the politicians interfering in the administration of the Education Department is as rampant as before, if not worse. Apparently no one is bothered about any discipline in this department and the teachers and others are perhaps encouraged by this method to be beholden to the political persons instead of relying on the honesty and the integrity of the Director of Education and other officers for administering the department and ordering transfers."

13. In CWP No. 1105 of 2006, titled **Sushila Sharma vs. State of H.P and others**, this court has held as follows:-

"We, however, direct that a copy of this judgment be sent to the Chief Secretary to the Govt. of H.P., who shall ensure that a proper transfer policy is formulated to ensure that the transfers are made only on administrative grounds and not on any other grounds. In the policy to be framed, it shall be ensured that all the employees are treated fairly and equally and every employee during his tenure of service serves in tribal/ hard areas and also in remote /rural areas. When transfers are made, the administrative department shall ensure that the employees who have already served in tribal/ hard areas as well as remote/ rural areas are not again sent to these areas and there is a continuous process of change whereby all the employees have a chance to serve in tribal/hard areas as well as remote/ rural areas. In the policy so framed, It should also be ensured that the transfer orders are not cancelled without making reference to the administrative department to put forth its views. In the policy, measures shall be provided to ensure that employees (obviously influential) who have managed to remain posted in the urban areas/cities are posted to rural/remote areas and hard/tribal areas in the transfer season when the transfers are made. The transfer policy should also ensure that

people, who are posted in remote/rural areas, join their place of postings and do not manage to get their transfers cancelled on frivolous grounds as has happened in the present case. The policy be framed and filed in Court within two months from today." Consequent to these directions, a policy was framed, but has been observed more in breach."

14. In CWP No. 3530 of 2011 titled **Babita Thakur vs. State of H.P. and others**, a learned single Judge of this court held as follows:-

"9. It is true that it is for the employer to see where the Government servant is to be posted. However, it is equally true that there is no arbitrariness in the action. The transfer cannot be used as an instrument to accommodate/ adjust the persons without there being any administrative exigency. The underline principle for transfer is public interest or administrative exigency. In the instant case, neither there was any public interest nor any administrative exigency necessitating the transfer of the petitioner from government Primary School, Chadyara (Sadar) to Government Primary School, Khanyari (Chachoit1)."

15. In CWP No. 2844 of 2010 titled **Pratap Singh Chauhan vs. State of H.P. & others decided on 18.6.2011**, a learned single Judge of this court after considering various judgements of Hon'ble Supreme Court held as follows:-

"10. We are governed by the Constitution of India. As per the constitutional scheme there are three pillars of democracy; the Legislature; the Judiciary and the Executive. Each has to work in its own sphere. This is a system of checks and balances where each can check the other, but it must be clearly understood that none of the three organs can encroach upon the jurisdiction of the other. The jurisdiction vested in this Court under Article 226 of the Constitution of India is indeed very wide. Wider the jurisdiction, more care should be taken to exercise it with greater discretion, so that questions are not raised about the functioning of the Judiciary. The Apex Court has in no uncertain terms laid down a note of caution that Courts should not interfere in transfer matters except on very strong grounds. 11. Having held so, this Court is also not oblivious to the factual position which exists on the spot and the situation is that day in and day out this Court is flooded with writ petitions in which employees challenge the order of their transfer on various grounds. On more than one occasion this Court has found that there are notes sent by public representatives such as Members of the Legislative Assembly recommending the transfers. No doubt, public representatives have a right to make recommendations, but these can only be recommendations and cannot be taken to be the final word."

16. In Sant Ram Pant vs. State of H.P. and others 2009

(3) Shim. L.C. 206, a Division Bench of this court held as follows:-

“ 8. When transfers are made, an employee may be aggrieved by his transfer. An employee has a right to make a representation against such transfer. It is also the right of the employer, including the State, to look into the grievances of the employees and if the grievance made by the employee is found to be genuine, the State is well within its right to redress the grievance of the employee and cancel the order of transfer. However, the grounds for passing an order of cancellation within two weeks of the original order must be borne out from some material on the record. In the present case, despite two opportunities being given the State has not produced any representation made by the respondent No. 3 or any other communication addressed to the office of the Hon'ble Chief Minister on behalf of the respondent No. 3 which would justify the issuance of the note dated 1.1.2009.”

17. A treatise on this subject is a judgement of Division Bench of this court in **Amir Chand's** case (supra), wherein this court after taking into consideration the entire law as settled by the Hon'ble Supreme Court as also various High Courts including this court issued the following directions:-

“1. The State must amend its transfer policy and categorize all the stations in the State under different categories. At present, there are only two categories, i.e. tribal/ hard areas and other areas. We have increasingly found that people who are sent to the hard/ tribal areas find it very difficult to come back because whenever a person is posted there, he first manages to get orders staying his transfer by approaching the political bosses and sometimes even from the Courts. Why should the poor people of such areas suffer on this count. We are, therefore, of the view that the Government should categorize all the stations in the State in at least four or five categories, i.e. A, B, C, D and E also, if the State so requires. The most easy stations, i.e. urban areas like Shimla, Dharamshala, Mandi etc. may fall in category A and the lowest category will be of the most difficult stations in the remote corners of the State such as Pangti, Dodra Kwar, Kaza etc. At the same time, the home town or area adjoining to home town of the employee, regardless of its category, otherwise can be treated as category A or at least in a category higher than its actual category

in which the employee would normally fall. For example, if an employee belongs to Ghumarwin, which is categorized in category B, then if the employee is serving in and around Ghumarwin, he will be deemed to be in Category A.

2. After the stations have been categorized, a database must be maintained of all the employees in different departments as to in which category of station(s) a particular employee has served throughout his career. An effort should be made to ensure that every employee serves in every category of stations. Supposing the State decides to have four categories, i.e. A, B, C, D, then an employee should be posted from category A to any of the other three categories, but should not be again transferred to category A station. If after category A he is transferred to category D station, then his next posting must be in category B or C. In case such a policy is followed, there will be no scope for adjusting the favourites and all employees will be treated equally and there will be no heart burning between the employees.

3. We make it clear that in certain hard cases, keeping in view the problems of a particular employee, an exception can be made but whenever such exception is made, a reasoned order must be passed why policy is not being followed.

4. Coming to the issue of political patronage. On the basis of the judgements cited hereinabove, there can be no manner of doubt that the elected representative do have a right to complain about the working of an official, but once such a complaint is made, then it must be sent to the head of the administrative department, who should verify the complaint and if the complaint is found to be true, then alone can the employee be transferred.

5. We are, however, of the view that the elected representative cannot have a right to claim that a particular employee should be posted at a particular station. This choice has to be made by the administrative head, i.e. the Executive and not by the legislators. Where an employee is to be posted must be decided by the administration. It is for the officers to show their independence by ensuring that they do not order transfers merely on the asking of an MLA or Minister. They can always send back a proposal showing why the same cannot be accepted.

6. We, therefore, direct that whenever any transfer is ordered not by the departments, but on the recommendations of a Minister or MLA, then before ordering the transfer, views of the administrative department must be ascertained. Only after

ascertaining the views of the administrative department, the transfer may be ordered if approved by the administrative department.

7. No transfer should be ordered at the behest of party workers or others who have no connection either with the legislature or the executive. These persons have no right to recommend that an employee should be posted at a particular place. In case they want to complain about the functioning of the employees then the complaint must be made to the Minister In charge and/ or the Head of the Department. Only after the complaint is verified should action be taken. We, however, reiterate that no transfer should be made at the behest of party workers."

(underlining supplied by us)

18. Here it is pertinent to observe that the aforesaid decision of this court has been affirmed by the Hon'ble Supreme Court as noted in para-22 of the judgement in **Sanjay Kumar vs. State of H.P. & others Latest HLJ 2013 (HP) 1051.**

19. Yet again the matter regarding transfer on the basis of D.O. Notes was the subject matter of consideration in **Sanjay Kumar's** case (supra) wherein after a lucid analysis and taking note of various judgements of Hon'ble Supreme Court and this court, it was held as follows:-

"30. The transfer at the instance of a person, who has no role to play in the Government, will not only be extraneous consideration, but also against public policy. It shakes the confidence of the people and creates an impression in the mind of a common man that the centre of power is somewhere else and not the Government. In order to curb this tendency and inspire confidence in general public and more particularly in the employees, it is necessary that no one should get an impression that employee can be transferred for asking at the instance of a person, who has no concern with the Government. This, if goes unchecked, is bound to affect the morale of the employees and their independent working and will not be in the interest of general public. There is, however, one caveat. That, any person has a right to make a complaint against an employee regarding his conduct to his superior or Chief Minister and even request for his transfer. It is,

however, only for the competent authority to consider the request and to take appropriate action in accordance with law. Further, it is unfathomable that such large number of transfers could be made at the instance of a person who is not in the Government, nor a people's representative as such. Issuing transfer orders at the instance of an outsider, who incidentally happens to be a Party worker, cannot be a co-incidence, but a concerted effort of the duty holders, who were otherwise responsible to preserve rule of law. Such action not only shakes the conscience of the Court, but also, inevitably, impinges upon the validity of such orders as the same are the product of colourable exercise of power."

20. Notably, the State government challenged the aforesaid decision before the Hon'ble Supreme Court which was dismissed vide order dated 27.9.2013 in the following terms:

"Heard learned counsel for the petitioner. We do not see any cogent reason to interfere with the impugned judgement and order in these petitions. The special leave petitions are dismissed. However. We clarify that the State is entitled to make the transfer as per the transfer policy adopted by the State for the particular time and particular department."

21. Tested on the touchstone of aforesaid exposition of law, it can safely be concluded that the transfer of the petitioner cannot withstand judicial scrutiny as the basis and foundation of the transfer happens to be the various complaints made by the public representatives against the petitioner. The transfer has been made on the basis of the U.O. note issued by the office of Hon'ble Chief Minister and whereas, no proposal for transfer has been originated from the concerned administrative department. The impugned transfer order, therefore, is not sustainable being arbitrary and vitiated because the same has been issued under dictation.

22. The learned Advocate General would, however, contend that irrespective of the U.O. Note, the petitioner cannot have any grievance with regard to his transfer since there were numerous complaints against him and therefore, the employer has acted well within its rights to transfer such an employee.

23. We are afraid that this submission cannot be countenanced because it only leads to one inference that order in question would attract the principle of malice in law as it was not based on any factor germane for passing an order of transfer and based on irrelevant ground i.e. on the allegations made against the petitioner in the complaints. It is one thing to say that employer is entitled to pass an order of transfer in administrative exigency but it is another thing to say that 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. (Ref: **Somesh Tiwari vs. Union of India and others (2009) 2 SCC 592**).

24. There is yet another reason why the aforesaid submission of the respondents cannot be accepted. In terms of the judgement passed by this court in **Amir Chand's** case (supra), the complaints as alleged to have been received against the petitioner by the respondents from various representatives were required to be sent to the head of the administrative department, who in turn was required to verify the same and if after associating the petitioner, the complaints were found to be true then alone could the petitioner have been ordered to be transferred. Admittedly, this exercise has not

been undertaken by the administrative department i.e. the respondents herein. Therefore also the order of transfer cannot be sustained having been passed capriciously and arbitrarily.

25. If the petitioner has been indulging in any conduct not befitting his office and contrary to public interest, the respondents-authority should have conducted an inquiry and imposed appropriate penalty as would be permissible under the rules. But then the transfer at the behest of the members of the public without any inquiry is not only against the interest of the concerned government servant but is also against public interest. It tends to destroy the morale of government servant and the same is otherwise illegal. Such a transfer can not get the seal of approval from this court.

26. Lastly, the learned Advocate General has strenuously contended that petitioner right from the date of his entry in service has remained posted in and around Chamba, which is his home district and for this purpose he has placed on record the details of up to date posting of the petitioner, which are as under:-

1.	7.10.1988 (date of appointment) to 11/1992 at Horticulture Extension Centre Kowas, Dev. Block Pangi District Chamba.
2.	11/1992 to 1/1997 HEC Chaklu District Chamba
3.	2/1997 to 11/2001 HEC Salooni District Chamba
4.	11/2001 to 03/2005 HEC Sundla District Chamba.
5.	03/2005 to 8/2007 HEC Jeera District Chamba
6.	8/2007 to 6/2008 Dev. Block Noorpur District Kangra.
7.	6/2008 to till date HEC Sundla District Chamba.

27. Such submission that too at the instance of the State cannot be maintained because it is settled law that an employee has

no choice in the matters of posting and transfer, which powers are within the exclusive domain of the employer. Even if the petitioner has remained in and around his home district Chamba, it was only because the respondents desired so by posting him at such places. The petitioner of his own could not have joined at a station of his choice.

28. This case reflects a dismal state of affairs where despite repeated directions passed by this court from time to time over the last three and half decades, the respondents have shown scant regard to such directions and have not cared to follow the mandate of law in matters of transfer. This court has repeatedly held that any person has a right to make a complaint against an employee regarding his conduct to his superiors including the Hon'ble Chief Minister and even request for his transfer. It is, however, only for the competent authority i.e. administrative department to consider the request and take appropriate action in accordance with law. But when the administrative authorities do not perform their duties and resultantly fair play is denied by the administrative authorities, people turn up to the courts complaining of such blatant case of administrative excess compelling the courts to intervene in such matter. Once the State government has framed a transfer policy, then it is its duty to implement the same because the very purpose of framing a policy is to strike a balance between the rights of the employees and the State in matters relating to transfer so that the same is not misused.

29. For the reasons stated above, the writ petition is allowed. Accordingly, the impugned order of transfer dated 3.8.2014 is quashed and set-aside. However, the respondents are at liberty to transfer the petitioner in accordance with law. All pending application(s) , if any, also stands disposed of.

**(Mansoor Ahmad Mir),
Chief Justice.**

**December 31, 2014.
(Hem)**

**(Tarlok Singh Chauhan),
Judge.**