

VIMAL KUMAR
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**IN THE HIGH COURT OF PUNJAB AND HARYANA AT
CHANDIGARH**

Date of decision: 21.05.2019

CWP No.7038 of 2019 (O&M)

Deepak Sharma

...Petitioner

Vs.

State of Haryana & others

...Respondents

CORAM: HON'BLE MR. JUSTICE RAJIV NARAIN RAINA

Present: Mr. D.S.Patwalia, Senior Advocate, with
Mr. Harsh Mehla, Advocate, for the petitioner.

Mr. Saurabh Girdhar, AAG, Haryana.

Mr. Amit Jhanji, Advocate,
for respondent No.3.

RAJIV NARAIN RAINA, J.

1. Feeling aggrieved by the order dated 08.03.2019 issued by the Special Secretary, Home to Government of Haryana, Jail Department, transferring the petitioner from District Jail, Faridabad to District Jail, Palwal vice respondent No.3, the petitioner approached this Court by filing the present petition under Article 226 of the Constitution.

2. The petition dated 12.03.2019 was filed on the next day i.e. 13.03.2019, which was listed for motion hearing on 14.03.2019. While issuing notice of motion, an order was passed by this Court staying the operation of the impugned order dated 08.03.2019 qua the petitioner. It was argued that petitioner had been transferred four times within a short span of two years and the present transfer of the petitioner from Faridabad to Palwal

is against the transfer policy and instructions issued by the Election Commission while clamping the election code of conduct on 11.03.2019 during General Elections.

3. Upon notice, respondent No.3 has entered appearance to contest the petition stating that he had dutifully complied with the transfer order and assumed the charge of Superintendent of Prison, District Prison, Faridabad on 11.03.2019 (Afternoon). The charge report dated 11.03.2019 is at Annex R-3/1 on pp.47 of the paper-book.

4. After assuming charge as Superintendent of Prison, District Prison, Faridabad, respondent No.3 has had to leave and assume charge of the post of Superintendent of Prison, District Prison, Palwal on 19.03.2019 giving effect to the office order dated 18.03.2019 passed by the Director General (Prisons), Haryana. This was in deference to the interim stay order.

5. Laying challenge to the order dated 08.03.2019, it is contended by Mr. D.S.Patwalia, learned senior counsel that the impugned transfer order though passed on 08.03.2019 was endorsed in the Head Office on 11.03.2019, the date on which the code of conduct came into effect and, therefore, the transfer order is null and void in view of directives of the Election Commission of India.

6. Not only is the implementation of the impugned order a violation of the election code of conduct, but the repeated transfers, the last within 7 months or so is against the transfer policy and the normal duration of transfers from one transfer and posting to another. It is also argued that the transfer order does not record or invoke the principle of 'public interest' to justify the transfer order.

7. On the question; as to when a transfer order takes effect, he submits that it is only when it is served on the person affected. He relies on the judgment of the Supreme Court in Bipromasz Bipron Trading SA Vs. Bharat Electronics Limited (BEL), (2012) 6 SCC 384. Though the decision was rendered in the light of the provisions of the Arbitration & Conciliation Act, 1996, but the principle, he submits, on analogy would apply to office orders of transfers even in service law jurisprudence to urge in conclusion that until the order is communicated to the person affected by it, it will be open to the competent authority to consider the matter again till it is not served on the affected party. Till then the order is nothing more than provisional in character. In *Bipromasz Bipron Trading SA*, the Supreme Court thrashed out the legal proposition of when does an order adversely affecting the rights of parties take effect after referring to previous decisions in Bachhittar Singh Vs. State of Punjab & another, AIR 1963 SC 395; BSNL & others Vs. Subash Chandra Kanchan & another, (2006) 8 SCC 279 and much cited State of Punjab Vs. Amar Singh Harika, AIR 1966 SC 1313, wherein the Supreme Court held that communication of the order was the effective date and not before as such an order can always be changed.

8. In *Amar Singh Harika's* case, the Supreme Court held that mere passing of the dismissal order would not be effective unless it is published and communicated to the officer concerned. If the appointing authority passed an order of dismissal, but does not communicate it to the officer concerned, theoretically it is possible that unlike in the case of a judicial order pronounced in Court, the authority may change its mind and decide to modify its order.

9. Accordingly the Supreme Court reaffirmed in *Bipromasz Bipron Trading SA* that an order passed by a competent authority or by an appropriate authority and kept with itself, could be changed, modified, cancelled and thus denuding such an order of the characteristics of a final order. Such an un-communicated order can neither create any rights in favour of a party, nor take away the rights of any affected party, till it is communicated. There must be communication so as to confer an enforceable right. In the same line, he relies on Chhattisgarh State Electricity Board Vs. Central Electricity Regulatory Commission & others [Civil Appeal No.37598 of 2007 decided on 15.04.2010], which requires no further dilation.

10. What Mr. Patwalia wants to drive home is that the order dated 08.03.2019 had no force of law to affect the rights of the petitioner till it was communicated and on the date of communication, the Government was paralyzed in giving effect to the order because of coming into force of the election code of conduct. Therefore, the petitioner could not be shifted from District Jail, Faridabad to District Jail, Palwal.

11. This argument which draws sustenance from the act of the Commission would depend in its enforcement on the instructions contained in Chapter 19 of the Model Code and Government Officials issued by the Election Commission of India in its effort to hold free and fair elections and to ensure that there is no scope for public complaints. The policy of the Election Commission of India has been cited by both the petitioner and respondent No.3 each reading it in their own favour.

12. In this regard, Mr. Amit Jhanji representing respondent No.3, relies on Clause 19.2.1, which deals with 'Conditions of Transfer' falling in

the introductory part of the policy enumerated under Clause 19.1 and onward containing statement that the Election Commission has been following a consistent policy that government officials directly connected with election are not to be posted in home district or districts where they have served for a considerably long period. The purpose behind this policy is to neutralize the familiarity effect of local politician and to ensure impartiality of the government officials. He refers to Clause 19.2.2, which reads as follows:

“19.2.2 Applicability of the policy

- (i) These instructions shall cover not only officers appointed for specific election duties like District Election Officers, Deputy District Election Officers, Returning Officers/Assistant Returning Officers, Electoral Registration Officers/Assistant Electoral Registration Officers, officers appointed as nodal officers of any specific election works but also district officers like Additional District Magistrates, Sub Divisional Magistrates, Dy. Collector/Joint Collector, Tehsildar, Block Development Officers or any other officer of equal rank directly deployed for election works.
- (ii) These instructions shall also be applicable to the police department officers such as Range Inspector Generals, Deputy Inspector Generals, Commandants of State Armed Police, Senior Superintendent of Police, Superintendent of Police, Addl. Superintendent of Police, Sub-Divisional Head of Police, Station House Officers, Inspectors, Sub-Inspector, Reserve Inspectors/ Sergeant Majors or equivalent ranks, who are responsible for security arrangement or deployment of police forces in the district at election time.
- (iii) The Police Sub-Inspectors and above should not be posted in their home district.

- (iv) If a police sub-Inspector has completed or would be completing a tenure of 3 years out of four years on or before the cutoff date, in a police sub-division, then he should be transferred out to a police sub-division which does not fall in the same Assembly Constituency. If that is not possible due to small size of district, then he/she should be transferred out of the district.”

13. Since the full text of the ‘Model Code and Government Officials’ was not placed in the petition, Mr. Patwalia has supplemented it with the remaining provisions of the relevant Chapter to especially point out Clauses 19.3 and 19.4, which deal with ‘Clarification on Transfers of Sub-Inspectors of Police’ and ‘Ban on Transfers of Officials Connected with Election’ respectively. Those provisions are quoted below:

“19.3 Clarification on Transfers of Sub-Inspector of Police

19.3.1 There may be cases where it may be difficult to affect the transfer of Police Officers who are in-charge of Thana in compliance of the policy laid down in the abovementioned instruction of the Election Commission, in big Metro cities/smaller states having less number of districts. In such cases, the territorial consideration for such police officer may be sub-division as an exception. In rest of the other cases the territorial jurisdiction may be district, with prior approval of Election Commission.

19.3.2 A question has been raised whether this instruction is applicable for the Sub-Inspector of Police. It is clarified that, where the Sub-Inspector of Police is in-charge of Thana, he is covered by this instruction and hence is required to be transferred as per guideline laid down above.

19.4 Ban on Transfers of Officials Connected with Election

- 19.4.1** With announcement of election, the Election Commission directs that there shall be a total ban on the transfer of all officers/officials connected with the conduct of the election. These include but are not restricted to:
- (i) The Chief Electoral Officer and Additional/Joint/Deputy Chief Electoral Officers;
 - (ii) Divisional Election Commissioners;
 - (iii) The District Election Officers, Returning Officers, Assistant Returning Officers and other Revenue Officers connected with the conduct of elections;
 - (iv) Officers of the Police Department connected with the management of elections like Range IGs and DIGs, Senior Superintendents of Police and Superintendents of Police, sub-divisional level Police Officers like Deputy Superintendents of Police and other Police officers who are deputed to the Election Commission under Section 28A of the Representation of the People Act, 1951;
 - (v) The transfer orders issued in respect of the above categories of officers prior to the date of announcement but not implemented till the time when Model Code came into effect should not be given effect to without obtaining specific permission from the Election Commission.
 - (vi) In those cases where transfer of an officer is considered necessary on account of administrative exigencies, the State Government may, with full

justification, approach the Election Commission for prior clearance.

- (vii) No appointments or promotions in Government / Public Undertakings shall be made during this period, without prior clearance of the Election Commission.
- (viii) This ban shall be effective till the completion of the election process.”

14. Mr. Patwalia then submits that there is hardly any difference between Sub-Inspector of Police/Incharge of Thanas and Jail Superintendents. The latter officials are also part of policing. I am not impressed with this distinction tried to be drawn to bring the case at the door of the Sub-Inspector of Police/Incharge of Thanas. Sub-Inspectors managing *Thanas* are sensitively placed in an election scenario and therefore set apart, but the Superintendent of Jails run Jails within closed doors housing under-trials and convicts, who have no voting rights while in judicial custody or serving sentence and jail officials cannot by virtue of office affect the conduct of elections and its outcomes. They do not deal with the public like the policemen in-charge of police stations. The argument is rejected.

15. Now, to the next aspect of the contention of the petitioner which proceeds with reference to Clause 19.4.1, where the Election Commission directs that there shall be total ban on the transfer of all officers/officials connected with the conduct of the election and these directions come from the announcement of election. There is consequently no ban on the Government carrying out its usual business of transfers in jails administration, which is not connected with the conduct and outcome of elections. Even assuming that a Jail Superintendent has power to grant parole and furlough it would not mean that he will grant furlough en masse

and let jailbirds out to exercise their franchise. I assume that such power is exercised frugal and not casually as it has to accord in terms of rules and the jail manual. There are checks and balances on the exercise of such power and for a wrong order a Jail Superintendent can be taken to task by the Department.

16. On the other hand, Mr. Jhanji cites case law close on the point while referring to the Division Bench judgment of this Court in Harbans Singh Jalal Vs. Union of India, 1997 (3) RCR (Civil) 355 dwelling on the observations in Paras 10 & 19. In Para 10, the question has been posed for answer:

“Whether the Election Commission has any authority to direct the Government to follow model code of conduct, adopted by various political parties?”

The question is answered in Para 19, which reads:

“Election Commission has categorically stated that they have not interfered with the day to day decisions of the State Government. They only wanted officers connected with election to be retained at their respective places. They also wanted to ensure the conduct of free and fair election without interference by officers as well. If permanent executives of the State took into their heads that some of the actions which the political executive wanted to implement, as violative of directions given by the Election Commission, the Election Commission cannot be faulted. No direction of the Election Commission having the effect of interfering with the day to day decisions of the Government, has been brought to our notice either. In such a situation, we are not in a position to find any illegality in the action resorted to by the Election Commission.”

17. It is not the intention of the Election Commission to interfere with day-to-day decisions of the State Government. It is also nobody's case that either the petitioner or respondent No.3 are connected with the conduct of elections or have been deputed for election purposes.

18. Next, Mr. Jhanji relies on the decision of the Madras High Court in S. Rajagopal Vs. State of Tamil Nadu & another, 2011 (19) SCT 369, which is a case involving transfer of civil servant made prior to issuance of election notification and before model code of conduct came into force. If the order is not tainted with mala fide intention or colourable exercise of power, the Madras High Court held that no interference is called for. This is common plea in such matters and nothing new is stated in the judgment.

19. Indisputably, the order of transfer in the instant case was made on 08.03.2019, when the model code of conduct had not come into force. The next two days i.e. 09.03.2019 and 10.03.2019 were holidays (being Saturday and Sunday) and, therefore, the endorsement came on Monday i.e. 11.03.2019. From a reading of Para 35 of the Madras judgment, I find another aspect adverted to. The Election Commission expects all officials engaged in the conduct of elections to discharge their duties in an impartial manner without any fear or favour. They are deemed to be on deputation to the Commission and shall be subject to its control, supervision and discipline. The conduct of all Government officials who have been entrusted with election related responsibilities and duties would remain under constant scrutiny of the Commission and strict action shall be taken against those officials who are found wanting on any account. The general directions of the Commission are that no election related official or police officer of the rank of Sub Inspector and above shall be allowed to continue in his home district during the elections.

20. The petitioner and respondent No.3 are far from Police Officers referred to in the model code of conduct and cannot be equated with them.

The impugned order has caused no injustice to the petitioner when the two Jails are also not too far from each other though that fact would not make much of a difference in the outcome of the case. In Union of India Vs. S.L.Abbas, AIR 1993 SC 404, the Supreme Court held that unless it is shown that transfer order is imbued with malice, the question of quashing it does not arise. The Supreme Court further held in Para 7 as follows:

“7. Who should be transferred where, is a matter for the appropriate authority to decide. Unless the order of transfer is vitiated by mala fides or is made in violation of any statutory provisions, the Court cannot interfere with it...”

21. In State Bank of India Vs. Anjan Sanyal, AIR 2001 SC 1748, the Supreme Court observed:

“4. The order of transfer of an employee is a part of the service conditions and such order of transfer is not required to be interfered with lightly by a court of law in exercise of its discretionary jurisdiction unless the court finds that either the order is mala fide or that the service rules prohibit such transfer or that the authorities, who issued the order, had not the competence to pass the order...”

22. Mr. Patwalia does not dispute that no mala fides have been alleged against any Officer in passing the impugned order.

23. Mere departure from transfer policy is not a sufficient ground to vitiate the order. These are guidelines. In case the words in ‘public interest’ are not incanted in the order that would not mean that such order has not been passed in ‘public interest’ and is vulnerable. This is because there is a presumption of regularity in the conduct of business of the Government and there is no difficulty I feel in reading ‘public interest’ into the impugned order and orders must be so read in substance. The usual phrases used in transfer orders are in ‘public interest’, on ‘administrative grounds’ and ‘administrative exigencies’. Whether you find these phrases or not in an

order will not detract from a transfer order. Though I am in agreement with Mr. Patwalia that an order of transfer may take effect from the date of its communication, but on the date of communication the shadow of the election code of conduct does not remove the base of the order as there is no prohibition in the election code. I would also think that this argument is inherently transitory in nature and would not hold good at all when the election results are announced and Government formed and the election code of conduct is put to sleep mode till the next elections.

24. There is another aspect I would like to make mention. When the ex parte interim order was passed on 14.03.2019, the Court was not apprised by the petitioner disclosing that respondent No.3 had already joined as Superintendent Jail, Faridabad on Monday 11.03.2019. The ad interim stay order was made qua the petitioner, but there was no direct stay on the joining of respondent No.3 at his place of posting. There was no direction for maintaining the status quo ante. Thus, continuance of the stay order is not found justified. I would have liked to non suit the petitioner only on this suppression of fact when respondent No.3 has already joined his posting in the District Jail, Faridabad on 11.03.2019. Had this input been given to the Bench on the first date of hearing and still the order was passed, then it would have been an altogether different thing. Mr. Patwalia has not been able to get out of this fact and is unable to say anything on the submissions made by the counsel who argued the matter on 14.03.2019.

25. Mr. Patwalia has also joined issue of non-filing of written statement by the State represented in Court by Mr. Saurav Girdhar, AAG, Haryana. He says that first the stand of the State should be made known before final orders are passed. This argument has been considered. I may

have called for the reply, but at the same time find no necessity since the materials on record are sufficient to adjudicate the matter. The full text of the Model Code and Government Officials has been produced by the petitioner during the course of hearing and that is all that one would have wanted to see to form an opinion on the character of the impugned transfer order.

26. I may add that Mr. Jhanji has produced two charts showing the transfer and postings of the petitioner and respondent No.3 from the year 2014 to 2019. On 05.02.2014, the petitioner was transferred from Karnal to Faridabad. From Faridabad he went to Palwal on 02.05.2017. On 15.12.2017 he was transferred to Narnaul from Palwal. On 13.07.2018, he was again transferred to Faridabad and by the impugned order dated 08.03.2019, the petitioner has been transferred from Faridabad to Palwal. The petitioner has spent 3 years and two months in Faridabad from 2014 to 2017 and then again for about 8 months from 13.07.2018 till the passing of the impugned transfer order. Even assuming that respondent No.3 has similar pattern in transfer and posting, this would not fair in my mind either the petitioner or respondent No.3 so long as the transfer order is not legally bad and transfer is a condition of service. No employee has a right to insist on a place of posting.

27. In view of the above and having regard to the submissions made by the counsel, I do not find any sufficient cause or cogent ground to uphold the transfer order.

28. The petition is dismissed.

29. With the dismissal of the writ petition, ad interim stay granted vide order dated 14.03.2019 stands automatically vacated. CM No.4772 of 2019 is disposed of accordingly.

21.05.2019
Vimal

[RAJIV NARAIN RAINA]
JUDGE

<i>Whether speaking/reasoned:</i>	<i>Yes</i>
<i>Whether Reportable:</i>	<i>Yes</i>