

(2018) 03 J&K CK 0053

In the Jammu And Kashmir High Court

Case No : SWP No. 1919 OF 2017?MP No.01 OF 2017

GULSHAN KUMAR @APPELLANT @HSH STATE AND OTHERS

Date of Decision : 22-03-2018

Acts Referred:

Jammu and Kashmir Civil Services Decentralization and Recruitment Rules, 2010, —
Rule 23

Jammu and Kashmir Civil Services Decentralization and Recruitment Act, 2010 —
Section 2©, 4

Citation : (2018) 03 J&K CK 0053

Hon'ble Judges : TASHI RABSTAN

Bench : Single Bench

Final Decision : Dismissed

Judgement

1. The challenge in this petition is to Order No. 26-ADSJ of 2017 dated 31.07.2017 passed by respondent No.3 to the extent petitioner has been

transferred from Mulberry Circle Solki to the office of Manager Seed, Batote; with a further direction to the respondents to allow him to continue at

his present place of posting, i.e., Mulberry Circle, Solki, District Rajouri or to post him in any other place near his place of residence.

2. The case of the petitioner is that he came to be appointed as a Daily Wager in the respondent No. 1-department on 16.12.1983 and after rendering

service for a period of more than 11 years on daily wage basis, he came to be regularized as Helper. Petitioner continued to hold the post of Helper in

the respondent department till the year 2013 when he was promoted as Seed Examiner in October, 2013. Vide order No.40-ADSJ of 2014 datedÂ

03.03.2014, petitioner came to be re-designated as Tassar Demonstrator, a post in the same pay scale as that of Seed Examiner.

3. It is contended that petitioner was operated upon for his gallbladder in February 2016 and while he was still recovering in the post operation period,

petitioner met with road accident in February 2017 which has brought about permanent disability to the petitioner inasmuch as four of his ribs got

broken in the aforesaid accident and his left shoulder got completely dislocated and has been reunited by insertion of two rods. It is also contended that

the aforesaid disability has brought about stiffness in the chest and left arm of the petitioner and his movement has been restricted. Further, as a result

of aforesaid accident, the petitioner has developed breathing problem due to chest injury and feels suffocated every now and then. Further, petitioner

has also developed numbness in his left foot and can neither stand for long hours nor can sit in one position for long. It is also contended that first ever

posting of the petitioner as Tassar Demonstrator was made in the Mulberry Circle Solki, District Rajouri and the petitioner continued to work against

the same post till the passing of the order impugned being order No. 26-ADSJ of 2017 dated 31.07.2017 whereby the petitioner has been transferred

and posted in the office of Manager Seed, Sericulture Development Department, Batote in District Doda.

4. The petitioner has challenged the impugned transfer order primarily on following grounds :-

a) That the impugned Order No. 26-ADSJ of 2017 dated 31.07.2017 whereby the petitioner has been transferred from Mulberry Circle Solki to the

office of Manager Seed, Sericulture Development Department, Batote is absolute illegal and arbitrary and is, therefore, violative of the rights

guaranteed to the petitioner under Articles 14 and 16 of the Constitution.

b) That the petitioner has suffered severe physical disability as a result of a vehicular accident, which occurred in February, 2017 and in which four

ribs of the petitioner were broken and his shoulder was dislocated which had to be reunited by insertion of two rods. Petitioner also has developed

breathing problem and has numbness of the left foot as a result of the aforesaid accident and in these circumstances the transfer of the petitioner to

the hilly area of Batote in District Doda is absolutely uncalled for. The respondents are very well aware of the aforesaid medical condition of the

petitioner.

c) That further, petitioner has been transferred from Mulberry Circle Solki to the office of Manager Seed in Batote. The entire operations in the Seed

Sector result in generation of dust and, consequently, the petitioner who feels

suffocated and has developed breathing problem as a result of the aforesaid vehicular accident would not get a healthy and congenial working atmosphere in the office of Manager Seed, Batote and his posting in the said office would, on the contrary, put the life of the petitioner to jeopardy. There are number of other Tassar Demonstrators working in the Mulberry Circle Rajouri, which includes both seniors and juniors of the petitioner and anyone of them could have been picked up for posting in the office of Manager Seed Batote, however, the respondents have picked up the petitioner while completely overlooking the medical condition of the petitioner. Such action on the part of the respondents is also violative of right to life guaranteed under Article 21 of the Constitution of India. d) That the post of the Tassar Demonstrator held by the petitioner is a district cadre post and, as such, in view of Rule 23 of the J&K Civil Services (Decentralization and Recruitment) Rules, 2010 a person holding a district cadre post cannot be transferred outside of the district and there is complete bar for effecting inter districts transfers in respect of district cadre post.Â However, in the present case, the petitioner who is also working against the district cadre post has been transferred from District Rajouri to District Doda, which is absolutely illegal and in violation of Rule 23 of the aforesaid Rules of 2010. The order impugned, as such, cannot be permitted to sustain and deserves to be quashed. Even in respect of divisional cadre post, in case of inter-district transfers, it is the respondent No. 2 who is the authority competent to such transfers and the respondent No. 3 has no competence of power to issue such an order.Â

5. Respondents have filed objections contending therein that petitioner, who was previously working Seed Examiner was redesignated as Tassar Demonstrator by the Divisional Level Promotion Committee of the Sericulture Development Department on 03.03.2014. The petitioner before being re-designated was belonging to Divisional Cadre and after re-designation continued to be in Divisional Cadre because of the fact that the post which the petitioner was holding was a Divisional Cadre post and it was the Divisional Level Promotion Committee of the Department which had re-designated him as Tassar Demonstrator from Seed Examiner. It is further contended that a common Seniority List of Inspectors, Sub Inspectors, Head Seed Examiner, Seed Examiner, SeniorÂ Supervisors,Â Supervisor,Â

Tassar Examiner, Tassar Technician, Tassar Demonstrator is

being maintained in the Department in which petitioner is figuring at S.No.81. It is further contended that all the employees, who are figuring in the

seniority list belong to the Divisional Cadre of Jammu Province and they can be transferred anywhere within Jammu Division. It is further contended

that in J&K Sericulture Development Department Tassar activities in Jammu Division are undertaken only in Batote area and its higher reaches

because of the appropriate climatic conditions for Tassar Cocoon Rearing and Tassar breeding. All the Tassar Officers and official work in MSB

Establishment is concentrated in Batote and the adjoining areas and is supervised by one Officer designated as Tassar Project Officer, who performs

his duties at Batote. The whole Tassar Wing of the Department of Jammu Division comes under Manager Seed, Batote, who has his headquarters at

Batote. Respondents contends that it is clear that Manager Seed, Batote is Divisional Level Office and pertains to Silkworm Seed/Tassar Seed Wing

Production of the Department. As such, all technical posts under the establishment of the Manager Seeds falls in Divisional Cadre of Jammu

Province. The grievance of the petitioner is that he belongs to District Cadre post is misconceived and cannot be sustained. In so far as health

condition of the petitioner is concerned, in this regard, respondents have contended that Gallbladder operations are very common and routine

operations and do not leave any lasting negative health repercussions. The petitioner will have better medical facilities available in Batote City than are

available in Rajouri. The Batote Town is a health resort with salubrious climate and would have very positive impact on the health of the petitioner.

It is also contended that all other persons who are dealing with Tassar Development/Seed Development in Rajouri or elsewhere shall also be re-

deployed at appropriate places for the optimum utilization of their specialized skills. The transfer of the petitioner has been affected keeping in view

the requirements of the department. There has been no ulterior motive in his transfer from Rajouri to Batote. The transfer of the petitioner is part of

the manpower rationalization process initiated in the department for better and improved utilization of the services of the employees of the department.

The petitioner is not the only person, who has been transferred and further transfers will be affected in due course of time. The transfer in the

Government service is an incidence of the employment and employees can be transferred anywhere at the discretion of the Government. The

petitioner's transfer has been affected in the interest of the administration and for serving the public interest better.Â Â Â

6. Heard learned counsel appearing for the parties and considered the pleadings.

7. Petitioner questions order impugned on the grounds that the same has been issued against the statutory rules framed by the Government of Jammu

and Kashmir and order impugned has been issued by incompetent person as respondent No.3 who has passed the order does not have the power to

issue the transfer order of petitioner and he has been transferred without taking into consideration his health conditions.Â Â

8. I have carefully bestowed my attention to the writ record so as to ascertain as to whether the petitioner has been transferred against the statutory

rules or by incompetent person(s).Â

9. It is argued on behalf of the petitioner that petitioner working as Senior Assistant in the respondents department is district cadre employee and, as

such, can be posted only against a district cadre post. It is contended that in terms of the impugned transfer order, petitioner has been transferred

against the divisional cadre post, though they belong to district cadre. Thus, learned counsel for the petitioner contends that petitioner has been

transferred from District Rajouri to District Ramban by the Additional Director, Jammu who had no authority to effect an inter district transfer. It was

also urged that the petitioner was holding a district cadre post and was enjoying a pay scale lower than that of Senior Assistant and, therefore, in terms

of J&K Civil Services (Decentralization and Recruitment) Rules, 2010, he was not liable to be transferred outside the district. The argument advanced

on behalf of petitioners are refuted by learned counsel for the respondents who maintains thatÂ impugned transfer order has been passed by the

competent authority in the interest of administration and public interestÂ and in absence ofÂ allegations of malafide, bias or prejudice, petitioners

cannot assail the same. He further contends that petitioners have been transferred by the respondent No.3, who is competent to transfer in terms of

Govt. Order dated 28.07.2010. Learned counsel further contends that both the petitioners are Senior Assistants belonging to Jammu Divisional Cadre.

To substantiate his arguments, he has placed on record a copy of seniority list of

Jammu Division in which petitioner figures at S.No.81.

10. It is profitable to reproduce Rule 23 of the Jammu and Kashmir Civil Services Decentralization and Recruitment Rules, 2010 as under :-

23. Intra and Inter-cadre transfers.

A member of the State, Divisional or District Cadre shall be transferable only within his own cadre and shall in no case be transferable from one

Divisional cadre to another Divisional Cadre or District Cadre or from one District Cadre to another District Cadre or Divisional Cadre post;

Provided that for posts in Leh and Kargil Districts, notwithstanding any other provision contained in these rules, members of any of the State,

Divisional or District Cadres may be transferred for such tenure as the Government may deem appropriate from time to time. In all such cases the

lien and promotion prospects of such members shall be protected in their parent cadre.â??

11. As per aforesaid Rule, it is provided that a member of the State, Divisional or District Cadre can be transferred only within his own cadre and shall

in no case be transferrable from one divisional cadre to another divisional cadre or from district cadre to another district cadre.Â

12. Divisional cadre post is defined in Section 2(c) of the Jammu and Kashmir Civil Services Decentralization and Recruitment Act, 2010, which reads

as under :-

2(c) â??Divisional Cadreâ?? means the cadre of a department in a Division comprising the following posts:-

(i) All non-gazetted posts the basic pay of which exceeds the basic pay for the post of Senior Assistant but does not exceed the basic pay for the post

of Sectional Officers and does not include the posts falling under the State Cadre;

(ii) Such gazetted posts or services as the Government may from time to time notify in this behalf.

13. However, Section 4 of the aforesaid Act provides for Constitution of the District, Divisional and State Cadre.

(1) From the commencement of these rules, there shall be constituted District, Divisional and state Cadres of the services in each department of the

Government. In case a department has more than one office at the District, Divisional or State level, each such District, Divisional or State level office

shall constitute a separate District, Divisional or State Cadre, as the case may be:

Provided that gazetted posts borne on various services and departments, as on the date of coming into force of these rules, shall continue to be the

State Cadre posts as heretofore.

(2) All the posts borne on the establishment of a District level office of a department whether executive, ministerial, technical or manipulative which carry a pay scale of, or equivalent to, the post of Senior Assistant but are not included in a Divisional or State cadre shall be the District cadre posts.

(3) All the posts borne on the establishment of:-

(i) A Divisional level office of a department which carry a pay scale not exceeding the pay scale for the post of Section Officer or its equivalent but are not included in a District or State Cadre; and

(ii) A District level office carrying a pay scale which exceeds the pay scale of the post of senior assistant or its equivalent but does not exceed the pay scale for the post of section Officer or its equivalent shall be the Divisional Cadre posts.

(4) All the posts borne on the establishment of the headquarter office of a department, having jurisdiction over the whole State and all other posts in a District or Divisional Cadre exceeding the pay scale of the post of section officer shall be the State Cadre posts.â??

14. However, Section 4 of the aforesaid Act provides that while the District, Divisional and State Cadres of the services shall be organised on

Department basis, the State Government may by Notification exclude a post or a category of posts ordinarily falling within District or Divisional Cadre

and include it in the Divisional or State Cadre. Admittedly, the post held by the petitioner is included in the Divisional Cadre. Moreso, as per seniority

list, it is crystal clear that the same has been issued by the Divisional Head in which petitioner figures at S.No.81.Â

15. The plea of the petitioners with regard to competency of respondent No.3 for issuance of impugned transfer order is concerned, in this regard, it is

contended that respondent No.3 has issued the impugned order of transfer not only in respect of petitioners but also in respect of other employees of

the Department in Jammu Division.Â Otherwise also, in terms of Clause (D) (II) Delegation of Powers for making Transfers/postings as per Govt.

order No.861-GAD of 2010 dated 28.07.2010, it has been provided that the authority to whom the powers have been delegated for transfer of

Divisional Cadre nongazetted employees within the Division is the Divisional Head of the Department. The contention of the petitioner that respondent

No.3 has not adhered to Government order dated 28.07.2010 while effecting transfers, whereas in the present case, transfer of the petitioner has been

made by the respondent No.3 who the Divisional Head of the Jammu Division of the employees belongs to the Divisional Cadre. Thus no question

arises for nonimplementation of the policy. Transfer of the petitioner is governed by the Govt. Order supra governing transfer policy and which has

been duly issued after the approval by the Cabinet and respondent No.3 is competent to issue the transfer orders of the petitioner.Â

16. The Jammu and Kashmir Civil Service Decentralization and Recruitment Act, 2010 providing for Constitution of District, Divisional and State

Cadres does not prohibit streamlining of such cadres and power vests with the Government to include a member of the District or Divisional cadre in

Divisional cadre or State Cadre. The transfer in the instant case is within the same cadre, though from one wing to another. The post of Senior

Assistant held by the petitioners is a Divisional Cadre post and they could be transferred to any particular wing/office within Jammu Division.Â The

impugned order has not been assailed on the grounds that the same was actuated by any mala fide intention on the part of the competent authority or

that his transfer was premature.Â

17. It is a settled position of law that an order of transfer of a government servant is no doubt justifiable, but such transfer order can be interfered with

in writ jurisdiction in rarest and exceptional cases and such transfer order can be interfered with, if it is issued by an authority, not competent to do so,

or if there is violation of any statutory rule, or there is gross discrimination between the petitioner vis-Ã-vis similarly situated officers/employees, or if

the transfer is actuated by mala fide.

18. That being the situation and in view of the above discussion, order impugned, on being examined, does not appear to be suffering from any

colourable exercise of power, or is made on the ground of violation of any statutory rules/regulations or transfer policy or is based on malafide, nor do

I find that the order on the face of it appears to be stigmatic or in the nature of a punitive order. In absence of any of above, no prejudice can be cited

by the petitioners and as such, he has failed to make out a case for interference

in the impugned order. Consequently, I do not find any merit in the writ petition. The same is, accordingly, dismissed along with connected MP(s). However, with regard to the plea of the petitioner as alleged in the writ petition he was operated upon for his gallbladder in February 2016 and while he was still recovering in the post operation period, petitioner met with road accident in February 2017 which has brought about permanent disability to the petitioner inasmuch as four of his ribs got broken in the aforesaid accident and his left shoulder got completely dislocated and has been reunited by insertion of two rods and because of aforesaid disability, the petitioner has developed breathing problem due to chest injury and feels suffocated every now and then, further, petitioner has also developed numbness in his left foot and can neither stand for long hours nor can sit in one position for long, he may either be retained at his present place of posting or be posted near to his residence. To extend support to the grounds urged in the petition, prescription slips and medical certificates have been annexed with the petition. If that be so, respondents are at liberty to consider the same on its merits after providing opportunity of hearing to the petitioner and after going through the medical record as may be produced by him.