

(2020) 08 J&K CK 0040

In the Jammu And Kashmir High Court

Case No : Civil Miscellaneous No. 2990, 2991, 2992 Of 2020, Writ Petition (C)
No. 1194 Of 2020

Gulshan Younis

APPELLANT

Vs

Union Territory Of J&K And Others

RESPONDENT

Date of Decision : 21-08-2020

Acts Referred:

Jammu And Kashmir Civil Servants (Removal Of Doubts And Declaration Of Rights)
Act, 1956 — Section 3(1)
Constitution Of India, 1950 — Section 77, 162, 226

Citation : (2020) 08 J&K CK 0040

Hon'ble Judges : Ali Mohammad Magrey, J; Sanjay Dhar, J

Bench : Division Bench

Advocate : Mohammad Iqbal Dar

Final Decision : Disposed Off

Judgement

Ali Mohammad Magrey, J

Cm Nos. 2990/2020, 2991/2020;

1. These Application Have Been Filed By The Applicant, Seeking Extension Of Time For Affixing The Stamp Papers And The Requisite Court Fee As Well As Placing On Record The Certified Copy Impugned Judgment With The Main Petition.
2. On The Set Of Facts And The Grounds Urged, Coupled With Submission Made, The Applications Are Allowed And The Applicant Is Permitted To Make Good The Deficiency As And When Registry Starts Working In The Regular Form. Both The Cms Are Accordingly Disposed Of.
3. In This Petition, Filed Under Article 226 Of The Constitution Of India, The Petitioner Has Craved The Indulgence Of This Court In Quashing The Order Impugned Dated 6th Of July, 2020, Passed By The Central Administrative Tribunal, Jammu (Hereinafter Referred To As The 'Cat') In Oa No. 61/127/2020, Titled Dr Gulshan Younis Vs Union Territory Of J&K & Ors, Whereby The Request

Of The Petitioner For Interim Relief Has Been Rejected.

4. The Petitioner Has Questioned The Order Impugned, Amongst Other Grounds, On The Ground That The Order Impugned Is Against The Facts And Circumstances Of The Case And Is Also Contrary To Law And Rules Governing The Subject. It Is Further Submitted That The Cat Has Not Considered The Matter In Its Right Perspective Inasmuch As The Action Of The Chief Medical Officer Was Based On Malafides As Also Was Misuse Of Official Position, But This Point Has Not At All Been Taken Into Consideration By The Cat While Refusing Grant Of Interim Relief. It Is Pleaded That The Order Impugned Has Also Caused Miscarriage Of Justice On The Ground That The Shifting Of The Petitioner From Her Original Place Of Posting Where She Was Still A Fresher Was Not Ordered In The Interest Of Administration.

5. Heard The Learned Counsel For The Petitioner, Perused The Documents On Record And Considered The Matter.

6. It Has, Time And Again, Been Held By Various Courts, Including The Hon'ble Supreme Court Of The Country That Transfer Is An Exigency Of Service And It Is The Prerogative Of The Employer To See As To At What Place The Services Of An Employee Can Be Best Utilized In The Larger Public Interest. An Employee, Holding A Transferable Post, Has No Right To Insist That He Should Be Allowed To Serve At A Particular Place For A Particular Period.

7. A Full Bench Of This Court, While Deciding A Reference Made In A Bunch Of Writ Petitions, The Lead Case Being 'Swp No. 1476/14' Titled 'Syed Hilal Ahmad Vs. State & Ors.', Decided On 31st Of August, 2015, Has Settled The Issue With Respect To Enforcement Of The Executive Instructions/Government Orders. It Is Well Settled Legal Position That Government Instructions Are Not Having Statutory Force. It Is Also Settled In Law That Executive Instructions/Government Orders Are Subject To Statutory Rules. Executive Instructions Cannot Supplement The Rules. The Issue Is No More Res Integra And Has Been Settled By The Supreme Court In A Catena Of Judgments. The Full Bench Of This Court, While Reiterating The Observations Of The Supreme Court, Has Also Held That The Executive Instructions/Government Orders Are Subject To Statutory Rules. The Relevant Paras (11, 12 And 18) Of The Judgment Are Reproduced Below, Word For Word And Letter For Letter:

"11. It Is Well Settled Legal Position That Government Orders Are Only Administrative Instructions, Having No Statutory Force. The 1956 Rules Having Been Issued In Exercise Of Powers Conferred Under Sub-Section (1) Of Section 3 Of The Jammu And Kashmir Civil Servants (Removal Of Doubts And Declaration Of Rights) Ordinance, 1956, The Same Is The Statutory Rule Governing The Field. Thus, The Contention Of The Learned Counsel Appearing For The Petitioners That, Minimum Two Years' Service Is Mentioned In The Transfer Policy Through Government Order No. 861-Gad Of 2010 Dated 28.07.2010, Is Bound To Be Adhered To, Has No Force. As Already Stated, Rule 27 Being Statutory

Rule, Empowering The Government To Post A Government Servant At Any Time In Any Place Or In Any Post Borne On The Cadre, The Said Transfer Policy, Particularly The Term Mentioned Therein, Can Be Adhered To As Far As Possible And The Same Is Only An Executive Instruction Based On Which No Right Could Be Claimed And No Right Having Been Vested, The Government Servant Has No Right To Seek Enforcement. Even For The Sake Of Argument, The Policy Cannot Have Any Binding Force Because The Policy, If Construed As Binding, Goes Contrary To Rule 27.

12. It Is Well Settled In Law That Executive Instructions/ Government Orders Are Subject To Statutory Rules And The Legislature, Who Framed The Rule, Cannot Delegate Its Power To The Authorized Officer Or Executive And The Executive Can Issue Government Orders Only Within The Bounds Of The Rules. The Legislature Has Not Amended Rule 27 Fixing Any Minimum Or Maximum Tenure To A Government Servant To Serve In A Particular Station. In The Decision Reported In Air 1961 Sc 4, (Vasanlal Magan Bhai Sanjanwala V. State Of Bombay), Hon'ble The Supreme Court Has Held That The Legislature Cannot Delegate Its Essential Functions Which Have Been Entrusted To It By The Constitution. In The Decision Reported In Air 1962 Sc 97 (Mohammed Hussain Gulam Mohammed V. State Of Bombay) It Was Held That The Authorized Officer Cannot Issue Order Which Is Contrary To The Statute. If The Intention Of The Executive Is To Fix Minimum Or Maximum Tenure To A Government Servant To Serve In A Particular Station, It Can Only Recommend The Legislature To Amend The Rule. In The Decision Reported In Air 1986 Sc 1323 (Trivedi And Sons, D.K V. State Of Gujarat), The Hon'ble Supreme Court Held That "The Rule Making Authority Cannot Change The Policy Of The Act/Regulation". In This Case, As On Today, Rule 27 Is Not Amended. Moreover No Policy Decision Can Be Taken In Terms Of Article 77 Or Article 162 Of The Constitution Of India Which Would Run Contrary To The Constitutional Or Statutory Schemes As Held By Hon'ble The Supreme Court In (2007) 5 Scc 317 (Post Master General, Kolkata V. Tutu Das Dutta) And (2007) 2 Scc 491 (Punjab Water Supply & Sewerage Board V. Ranjodh Singh And Ors).

18. In The Decision Of The Hon'ble Supreme Court Reported In Air 2014 Sc 263 (Supra) It Is Held That The State Governments Are Affecting Transfers And Postings At The Whims And Fancies Of The Executive Head For Political And Other Considerations And Not In Public Interest. Hence Minimum Tenure Of Service Is Good For The Administration And Efficiency. Insofar As The State Of J&K Is Concerned, As Stated Supra, A Minimum Tenure Of Two Years And Maximum Tenure Of Three Years Is Already Fixed In Government Order Dated 28.07.2010 And The Said Order Is A Guideline And Not Having Any Statutory Force. In The Said Order Itself It Is Stated That Premature Transfers, Wherever Unavoidable In The Interest Of Administration, May Be Ordered On Certain Contingencies. Hence Strict Implementation Of Minimum 2 Years And Maximum 3 Years Tenure Is Not Intended In The Government Order. In Such Circumstances, The Said Government Order Will Not Confer Any Right Of Enforcement Through Court Of

Law In The Light Of Rule 27 Stated Supra".

8. However, At This Stage, Mr M.I. Dar, Learned Counsel For The Petitioner Submits That The Petitioner Shall Feel Satisfied If The Writ Petition Is Disposed With Liberty To The Petitioner To Make A Representation Before Director, Health Services Kashmir, As Regards Her Transfer To Some Nearest Place Of Posting In View Of The Difficulty Faced By Her, Who Shall Consider The Same In Accordance With The Rules Governing The Field.

9. In View Of The Above, The Instant Writ Petition Alongwith Connected Cm Shall Stand Disposed Of With Liberty To The Petitioner To Make A Representation Before Director, Health Services Kashmir, Espousing Her Grievance As Agitated Herein This Petition, Who Shall Consider The Same In Accordance With The Rules Governing The Subject And Pass Appropriate Orders Thereon Expeditiously.

10. Writ Petition Alongwith Connected Cm(S) Disposed Of As Above.