
(2019) 03 J&K CK 0033

In the Jammu And Kashmir High Court

Case No : Service Writ Petition (SWP) No. 495 Of 2019, IA 01 Of 2019

Imtiyaz Ali Khan & Anr

APPELLANT

Vs

State Of Jammu & Kashmir & Ors

RESPONDENT

Date of Decision : 12-03-2019

Acts Referred:

Jammu And Kashmir Civil Servants (Removal Of Doubts And Declaration Of Rights)
Ordinance, 1956, — Section 3(1)
Jammu And Kashmir Civil Services (Classification, Control & Appeal) Rules, 1956 —
Rule 27
Constitution Of India, 1950 — Article 77, 162

Citation : (2019) 03 J&K CK 0033

Hon'ble Judges : Ali Mohammad Magrey, J

Bench : Single Bench

Advocate : S. Rizvi

Final Decision : Dismissed

Judgement

1. By medium of this petition, the petitioner has assailed the validity of Order bearing No. FSI/Ser/17/2019 dated 27th of February, 2019, issued by the respondent No.1, whereby and whereunder the action taken vide Forest Order No. 10 of 2019 dated 9th of January, 2019, placing the petitioners at the disposal of Principal, KFT School, Chitternar, Bandipora for utilizing their services as Instructors in the KFT School Chitternar, Bandipora, has been confirmed.

2. The background facts leading to the filing of the instant petition are that the petitioners, substantively holding the posts of Forester in the Social Forestry Department, were, vide Forest Order No. 10 of 2019 dated 9th of January, 2019, issued by the Chief Conservator of Forests (Central), placed as the disposal of the Principal KFT School, Chitternar, Bandipora, for utilizing their services as Instructors in the KFT School, Chitternar, Bandipora with immediate effect. Feeling aggrieved of the said order, the petitioners, in an earlier round of litigation, approached this Court by medium of SWP No. 63/2019. The said writ petition, in terms of order dated 17th of January, 2019, was, on the basis of the

submission of the learned counsel for the petitioners, was disposed of by directing the petitioners to file a representation to the respondent No.1 with a further stipulation that on receipt of the said representation, the respondent No.1 shall consider and decide the same and till such time, the status quo vis-à-vis it existed that day was directed to be maintained. In pursuance of the directions of this Court, the respondent No.1 has issued order No. FSI/Ser/17/2019 dated 27th of February, 2019, whereby the action of the Chief Conservator of Forests (Central) in placing the petitioners at the disposal of the Principal, KFT School, Chitternar, Bandipora, has been confirmed. This order has been, now, challenged by the petitioners in the instant petition.

3. Learned counsel for the petitioners submits that the petitioners have been subjected to hostile discrimination as despite availability of senior officers than the petitioners in their division, only the petitioners have been singled out and placed at the disposal of the Principal, KFT School, Chitternar, Bandipora causing prejudice to the rights and interests of the petitioners. The learned counsel further submits that the order impugned has been issued in violation of the rules and the law as the Principal Chief Conservator is an incompetent officer to order transfer/ placement of the petitioners. It is further contended that the order impugned amounts to punishment and is based on vengeance as it does not mention the posts on which the petitioners have to join. The learned counsel has further proceeded to state that three consecutive orders came to be issued by the respondents with regard to the transfer/ posting of the petitioners only to harass and humiliate the petitioners, coupled with the motive to accommodate some of their blue-eyed employees.

4. Heard the learned counsel for the petitioners, perused the documents placed on record and considered the matter.

5. At the outset, what requires to be stated is that in pursuance of the directions passed by this Court in the earlier writ petition filed by the petitioners directing the respondent No.1 to consider the representation of the petitioners, the respondent No.1 has accorded consideration to the representation of the order which has resulted in issuance of the order dated 27th of February, 2019, that is impugned herein this petition. In terms of well settled position of law, as has been, time and again, reiterated by various Courts, including the Hon'ble Supreme Court of the country, 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/she should be allowed to serve at a particular place, of his/ her liking, for a particular period.

6. Furthermore, 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 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".

7. In view of the above factual discourse, this writ petition, being devoid of any merit, shall stand dismissed in limine alongwith the connected IA, being Interim Application No. 01/2019. However, mere dismissal of the writ petition shall not form an impediment for the petitioners to pursue the remedy as may be available to them for seeking implementation of the order passed by this Court on 17th of January, 2019 in SWP No. 63/2019, filed by the petitioner earlier in point of time.