
(2019) 07 J&K CK 0047

In the Jammu And Kashmir High Court

Case No : Writ Petition (WP) No. 2548 Of 2019, CM No. 4959 Of 2019, Caveat No. 1351 Of 2019

Muzaffar Ahmad Malik

APPELLANT

Vs

State Of Jammu & Kashmir & Ors

RESPONDENT

Date of Decision : 31-07-2019

Acts Referred:

Constitution Of Jammu And Kashmir, 1956 — Section 103
Jammu And Kashmir Civil Servants (Removal Of Doubts And. Declaration Of Rights) Act, 1956 — Section 3(1)
Constitution Of India, 1950 — Article 77, 162

Citation : (2019) 07 J&K CK 0047

Hon'ble Judges : Ali Mohammad Magrey, J

Bench : Single Bench

Advocate : Malik Fahdul Haq

Final Decision : Dismissed

Judgement

Ali Mohammad Magrey, J

1. By medium of this petition, filed under Article 226 of the Constitution of India read with Section 103 of the State Constitution, the petitioner has assailed the validity of Government Order No. 80-Rev (Gaz) of 2019 dated 11 th of July, 2019, issued by the Commissioner/ Secretary to Government, Revenue Department/ respondent No.1, in terms whereof the petitioner has been transferred from as Tehsildar, Dooru, Anantnag and posted as Tehsildar, Keran, Kupwara. A 'Writ of Mandamus' is also sought by the petitioner for directing the respondents to allow the petitioner to continue discharging his duties as Tehsildar, Dooru, Anantnag.

2. The petitioner claims that he was appointed as Naib Tehsildar in the year 1991 in the respondent Department and posted at the office of the Deputy Commissioner, Anantnag. Thereafter, as per the petitioner, he was promoted to the post of Tehsildar in the year 2010 and, subsequently, confirmed by the PSC

in 2011. It is contended that, presently, the petitioner is discharging his duties as Tehsildar, Dooru, Anantnag to the best of his ability, however, while working as such, the respondent No.1 has issued the impugned Government Order No.80-Rev(Gaz) of 2019 dated 11th of July, 2019, whereby the petitioner has been transferred as Tehsildar, Doru, Anantnag and posted as Tehsildar, Keran, Kupwara.

3. Mr Fahdul Haq, the learned counsel for the petitioner, submits that the order impugned has been issued by the respondent No.1 on malafide considerations only to harass and humiliate the petitioner. The learned counsel has further proceeded to state that since the petitioner is scheduled to retire from service upon reaching the age of superannuation in near future, therefore, the respondents ought not have passed the impugned order.

4. Mr Shah, the learned Senior Additional Advocate General, who is on Caveat and represents the respondents, while contending that the impugned order has been issued by the competent Officer, submits that transfer is an exigency of service and that the petitioner, who is holding a transferable post, cannot claim continuation at a particular place of his liking.

5. Heard the learned counsel for the parties, perused the pleadings on record and considered the matter. Caveat stands discharged.

6. At the outset, what requires to be stated, herein this case, is that transfer is an exigency of service. Law on the subject is well settled to the extent that the Courts, ordinarily, should not interfere with an administrative transfer order which is made for administrative reasons, unless and until the same is made in violation of any mandatory statutory rule or on the ground of malafide. A Government servant, holding a transferable post, has no vested right to remain posted at one place or the other and that he/she is liable to be transferred from one place to the other. Even, if a transfer order is passed in violation of executive instructions or orders, the Courts, ordinarily, do not interfere with the order, instead, the affected party should approach the higher authorities in the department. If the Courts continue to interfere with the day-to-day transfer orders issued by the Government and its subordinate authorities, there will be complete chaos in the administration which would not be conducive to public interest. The scope of judicial review in matters of transfer of a Government Servant to an equivalent post without adverse consequence on the service or career prospects is very limited being confined only to the grounds of malafides or violation of any specific rule. In the present case, the respondent No.1 has issued the order of transfer of the petitioner purely in the interest of administration, which power is vested in the respondent No.1 in terms of the rules governing the field and the Court cannot, in any manner whatsoever, stop the respondent No.1 from exercising those powers. This view is fortified by a judicial dictum laid down by a Full Bench of this Court, while deciding a reference made in a bunch of writ petitions, lead case being 'SWP No. 1476/14' titled 'Syed Hilal Ahmad vs. State & Ors.' decided on 31st of August, 2015. The Bench, while reiterating the observations of Hon'ble 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, verbatim et literatim:

"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. As regards the contention of the learned counsel for the petitioner that the transfer order of the petitioner has been issued on malafide considerations, the same is also not only misconceived, but also misdirected as well. This is so because the petitioner has not been able to place any cogent evidence on record which would show that the impugned order is the result of any malafide on the part of the respondents. It is well settled that mere general statements will not be sufficient for the purposes of indication of malafide intentions. There must be cogent evidence available on record to come to the conclusion as to whether, in fact, there was existing a bias or a malafide move which results in the miscarriage of justice. The expression 'malafide' has a definite significance in the legal phraseology and the same cannot possibly emanate out of fanciful imaginations or even apprehensions, but there must be existing definite evidence of bias or malice to declare an act to be a malafide one. Only allegations of personal vendetta without any definite evidence, therefore, cannot be said to be a sufficient assertion worth acceptance in a Court of law. There must be a positive evidence available on record in order to decry an administrative action on the ground of malafides and arbitrariness. The ill will or spite must be well pronounced and without which it would be not only unfair, but also patently not in conformity with the known principles of law. In the case on hand, on a scrutiny of the pleadings placed on record by the petitioner, unfortunately, there is no evidence apart from bare allegation of any spite or ill will, more so by reason of the fact that the same involves factual element, in the absence of which no credence can be attributed thereto.

8. For all what has been said and done above, I am of the considered view that there is no merit in the petition of the petitioner. Accordingly, the same fails and shall stand dismissed in limine, alongwith the connected CM. However, with regard to the plea of the petitioner that he is due to retire upon reaching the age of superannuation in near future, the petitioner shall be at liberty to approach the competent authority in his Department for seeking continuation at the present place of posting, which shall be considered on merits and in accordance with the rules governing the field.