
(2012) 03 KL CK 0286
In the High Court Of Kerala
Case No : W.A. No. 1466 of 2006

N. Ramachandran and Others

APPELLANT

Vs

S. Madhu and Others

RESPONDENT

Date of Decision : 16-03-2012

Acts Referred:

Kerala Excise and Prohibition Subordinate Service Special Rules, 1974 — Rule 10, 11
Kerala State and Subordinate Services Rules, 1958 — Rule 27(a)

Citation : (2012) 2 KLJ 624

Hon'ble Judges : T.R. Ramachandran Nair, J;P.R. Ramachandra Menon, J;Manjula Chellur, J

Bench : Full Bench

Advocate : P. Ravindran, Chincy Gopakumar and B. Gopakumar, for the Appellant; T.P. Kelu Nambier (Sr.), P.V. Mohanan, Biju P.N., Rosamma Joseph and Girija Gopal (GP), for the Respondent

Final Decision : Dismissed

Judgement

T.R. Ramachandran Nair, J.—The question referred for decision of the Full Bench is the following: Whether an employee who has secured a district-wise appointment when transferred on request to another district before completing five years will have to surrender his entire five years of service, so as to claim seniority in the transferred unit even if the transfer is after one year of his appointment?

W.A. No. 1466/2006 is filed against the judgment in W.P.(C) No. 11178/2005, W.A. No. 802/2007 is filed against the order in R.P. No. 731/2006 filed against the same judgment and W.P.(C) No. 26361/2006 is filed, challenging the order Ext.P4 by which revised seniority list of Excise Guards for the period from 1.1.1989 to 30.6.2000 was published in implementation of the judgment in W.P. (C) No. 11178/2005. 2. W.P.(C) No. 11178/2005 was disposed of along with the connected writ petitions, viz. 16863/2003,29059/2004, 11178/2005, 11242/2005, 12802/2005 and 16332/2005 by a common judgment. W.A. No.

1505/2006 filed against the judgment in W.P.(C) No. 29059/2004 was dismissed by a Division Bench consisting of K.A. Abdul Gafoor and Justice K.P. Balachandran, JJ. on 19.9.2006, confirming the judgment of the learned Single Judge (K. Balakrishnan Nair, J.) (as he then was). When W.A. No. 1466/2006 came up for hearing before another Division Bench, consisting of Chief Justice S.R. Bannurmath and Kurian Joseph, J. (as he then was), the matter was referred to the Full Bench doubting the correctness of the judgment in W.A. No. 1505/2006.

3. We heard learned Senior Counsel Shri P. Ravindran and learned Counsel Shri B. Gopakumar, appearing for the appellants/petitioners, Shri P. V. Mohanan, learned counsel appearing for the contesting respondents and Smt. Girija Gopal, learned Senior Government Pleader appearing for the official respondents.

4. The dispute, shortly stated, is one concerning the principles for fixing the seniority. As far as the petitioners in W.P.(C) No 11178/2005 are concerned, they were appointed as Excise Guards in the Excise Division, Palakkad. The contesting respondents 5 to 15 therein, who are appellants in W.A. Nos. 1466/2006 and 802/2007, were appointed in the Excise Divisions Ernakulam, Kannur and Kasaragod. They were appointed through the Public Service Commission and were transferred to Palakkad Division as per various orders produced as Exts.P3 to P5, before completing less than One year of service in the respective Excise Divisions. The present dispute arose when the final seniority list of Excise Guards of Palakkad Division was published as per Ext.P13. The petitioners were included in the provisional seniority list of Excise Guards in Palakkad Division, Ext.P7, and respondents 5 to 15 were not included therein, but were included in the seniority lists published in their respective district of appointment. But later, respondents 5 to 15 were put unblock as seniors to the petitioners in Ext.P13. The learned Single Judge allowed the writ petitions accepting the contentions of the writ petitioners that the transferees will get seniority in the new unit only after completion of five years from the date of their initial appointment, as they were eligible for transfer only in terms of Exts.P1 and P2 Government Orders which have put a restriction on inter district transfer before completion of five years. The said view has been upheld by the Division Bench in W.A. No. 1505/2006.

5. Shri P. Ravindran, learned Senior Counsel contended that as far as the appointment of Excise Guards are concerned, they were appointed in particular divisions and the appointment is not district-wise. The Government Orders like Exts.P1 and P2 providing for inter district transfer and the restrictions therein will not, therefore, apply to them. As far as the appointment and transfer of Excise Guards are concerned, they are governed by Rules 10 and 11 of the Kerala Excise and Prohibition Subordinate Service Special Rules. 1974 and as empowered by Rule 11, the competent authority transferred the appellants as per Exts.P3 to P5 orders. Therefore, as far as such transferees are concerned their seniority will have to be reckoned in terms of the first proviso to Rule 27(a) of Kerala State and Subordinate Service Rules (for short KS & SSR) and therefore

they will get seniority from the date of their joining in the transferee division. It is pointed out that in the Government Orders Exts.P1 and P2, no consequences have been provided, if the inter-unit transfer is effected before completion of five years. Elaborating his contentions, learned Senior Counsel also submitted that the executive orders which go against the provisions of the statutory rules, cannot have effect in deciding the issue. It is also submitted that as far as inter division transfer of Excise Guards are concerned, the orders Exts.P1 and P2 will not apply, meaning thereby that they will govern only persons who are not covered by the Special Rules. It is submitted that the court cannot supply words to a statute which principle is well settled. Reliance is also placed on the decision of the Apex Court in K.P. Sudhakaran and Another Vs. State of Kerala and Others, , interpreting Rule 27(a) and the proviso thereto of KS & SSR.

6. Learned Senior Government Pleader, Smt. Girija Gopal, who appeared for the official respondents, submitted that the scheme for inter district transfer is governed by various Government Orders issued from 1960 onwards. After the Public Service Commission started recruitment on district-wise basis, these Government Orders have been re-issued with modified terms to protect the Public Service Commission hands who are awaiting appointments. The Government have prescribed various stipulations from time to time as far as inter district transfer is concerned and the important one is that a transfer will be allowed only after completion of five years in the district of recruitment and the exception, if any, will require the approval of the Council of Ministers. Our attention was invited to various Government Orders in the matter. It is further submitted that as far as Excise Guards are concerned, their appointments are also district-wise, as the division, going by various circulars in the Excise Department, is the Revenue District itself. It is submitted that the Special Rules relied upon by the learned Senior Counsel for the appellants only provide for the specified authority for issuing the order of transfer (Rule 11) and therefore their transfers are also governed by the stipulations contained in Exts.P1 and P2 orders. It is pointed out that in various Government Orders the Government have stipulated that the adherence of five years rule should be there and the exceptions are minimum, which are also governed by the various Government Orders. It is pointed out that the appellants cannot get the benefit of relaxation and they were transferred after specifying a condition in the orders of transfer itself that for the purpose of appointment, seniority, etc. the Division in which they were appointed will be the unit.

7. These contentions were supported by the learned counsel appearing for the contesting respondents in the appeals, Shri P.V. Mohanan. It is argued that the proviso to Rule 27(a) is only the one prescribing a principle for fixing the seniority and it is not the provision under which inter district/inter-unit-wise transfers are being made. Various Government Orders in the matter from 1960 onwards provide for inter district transfer and from 1971 onwards the district has been made as the unit of appointment. In respect of Excise Guards also, the revenue district is the unit. Therefore, the Government Orders Exts.P1 and P2

will apply. The decentralisation was made in 1971 making recruitment district-wise in various categories of posts and the district is the unit for appointment, for promotion, discharge as well as seniority. The specific conditions under which the appellants were transferred, are clear from Exts.P3 and P4 transfer orders, whereby for the purpose of their appointment, discharge and seniority, the parent unit itself will have to be considered. It is pointed out that only when a transfer is made on a substantive basis along with the transfer of lien alone, they will get any such rights in the transferred unit. Therefore, as far as the appellants are concerned, their lien was retained in the parent unit. Our attention was invited to definition of "cadre" under Rule 12(4) of Part I of Kerala Service Rules (for short "K.S.R.") and the definition of "member of service" in the KS & SSR and the provisions relating transfer and termination of lien. It is therefore submitted that the reliance placed on the decision of the Apex Court in K.P. Sudhakaran and Another Vs. State of Kerala and Others, cannot help the appellants. It is also submitted that the Special Rules herein, viz. Kerala Excise and Prohibition Subordinate Service Special Rules, 1974 itself was adopted only in 1974, whereas the inter-district/inter-departmental transfers were governed by various Government Orders issued from 1960 onwards. It is thus submitted that there is no conflict between the provisions of the executive orders and that of the Special Rules and the proviso to Rule 27(a) of KS & SSR. Learned counsel also submitted that the transfer made herein is by invoking the general power of transfer and it is not one made under Rule 11 of the Special Rules.

8. The condition under which the appellants were transferred, as evident from Exts.P4 and P5, reads as follows:

For the purpose of appointment, re-appointment to the service whether as full member or not discharge from service and seniority among members of the service that the excise divisions in which they were originally appointed shall be the unit of those Excise Guards as per Rule 10 of the Special Rules.

It was ordered for administrative convenience and in public interest. The impact of the same will have to be considered, to analyse the contentions of the appellants.

9. A survey of the various Government Orders will throw light on the various aspects including the insistence for adhering to the conditions for inter-district and interdepartmental transfers. The first among the Government Orders to be considered is G.O.(Ms) 4/61/PD dated 2.1.1961. The same was issued in consultation with the Public Service Commission. It provides that "mutual or inter-departmental transfers of Government servants from one unit to another within the same Department, or from one Department to another within the same Subordinate service may be ordered by the Appointing Authority concerned" on request, subject to certain conditions. The important conditions were the following:

(i) A person transferred to a new unit will take rank below the junior most in the

category in the new Unit or Department. He will not be allowed to count his previous service towards seniority, but it will be counted towards increment, leave, pension, gratuity, etc.;

(ii) A permanent person need to be required to relinquish the permanency. He can retain his permanent lien in the old post until he is confirmed in the new unit or department; and

(iii) Persons transferred from one department to another or from one unit to another in the same department due to proved administrative reasons will retain all their rights in the old unit or department, as the case may be.

10. As per a memorandum dated 9.1.1960, the district-wise recruitees who have been recruited on the basis of their option to a district, cannot be transferred to other district except on administrative grounds. By Memorandum No. 52251/S(B)4/61.PD dated 24.10.1961 It was clarified that "the restrictions in the said memorandum of 1960 are still in force and the concession granted in G.O.(MS) No. 4/1961", will be subject to the restrictions. The subsequent Government Orders will show that the insistence on the observance of the conditions was scrupulously being maintained. The next important Government Order is G.O. (Ms)154/71/PD dated 27.5.1971. The same was issued in the light of decentralisation of the functions of recruitment to the District Recruitment Boards, in respect of recruitment to the Lower Ministerial Cadres at district level. Importantly, it was provided that recruitment at district level through such Recruitment Boards will be subject to various conditions including the following:

(i) No transfers will be allowed from one District to another within a period of five years from the date of commencement of continuous service;

(ii) Such inter-district transfers will be allowed only after five years and subject to the conditions laid down in G.O.(Ms) No. 4/PD dated 2.1.1961.

Subsequent additions have been made for appointment to various posts by issuing separate orders.

11. We will now refer to the Government Orders providing for relaxation of the conditions in certain specific circumstances. In G.O.(Ms) No. 331/76/PD dated 27.9.1976, relaxation was made in respect of relatives/dependents of serving soldiers and relatives, dependents of defence personnel killed in action, with regard to the stipulations in G.O. (Ms) No. 154/71/PD dated 27.5.1971. This relaxation was made after consultation with the Public Service Commission. It was ordered thus:

Government are pleased to order in relaxation of the five year rule referred to in para 3(i) and 3(ii) of G.O.(Ms) No. 154/71/PD. dated 27.5.1971 that requests for inter-district transfer of Government servants who are dependents relatives of serving soldiers/soldiers killed in action or died while on duty in the field/forward areas, would be sanctioned in deserving cases, and that the conditions in G.O. (Ms) No. 4/PD. dated 2.1.1961 regarding seniority will not be insisted on in the

case of the transferees so that they may be allowed to retain their original seniority in the new District.

The Government by G.O.(Ms) 340/76/PD. dated 29.9.1976 granted the relaxation in favour of lower ministerial cadres at district level of persons who have entered into inter caste marriage and this order was also issued in consultation with the Public Service Commission. It was stipulated that the five year rule stipulated in G.O.(Ms) No. 154/71/PD dated 27.5.1971 will not apply to persons who have entered into inter-caste marriage.

12. By G.O.(Ms) 442/80/GAD dated 26.9.1980 it was made clear that the condition of five year service laid down in the Government Order dated 27.5.1971 will not be applicable to the candidates who are advised for appointment in the headquarters vacancies, so that a candidate could get transfer to the district of his choice without insisting on the period of limit of five years. It was also ordered that transfers within the districts comprised in the erstwhile Malabar and Travancore-Cochin areas will be allowed within five years subject to other conditions specified. By G.O.(P) 3/82/GAD dated 2.1.1982 a proviso was inserted to Rule 27(a) of KS & SSR to protect the seniority of persons advised for appointment in headquarters vacancies. In G.O.(Ms) 50/85/GAD dated 25.1.1985 the Government ordered that "dependents of Ex-servicemen who were permanently disabled due to disease or accidents while in active service and discharged on pension on that account will also be eligible for the concession of inter-district transfers contemplated as per G.O.(Ms)No. 331/76/PD dated 27.9.1976."

13. In Circular No. 92546/SDI/83/GAD dated 20.5.1985 the Government relaxed the five year rule for inter-district/inter-departmental transfers, in respect of the members of Last Grade Service, by making it clear that "the orders are not applicable to them and that they will be governed by the provisions in Rule 17(d) of the said rules for inter-district transfer, mutual transfer, etc." Therefore, that is a case where one of the services itself was excluded from the purview of the Government Order insisting for five year rule.

14. The next important circular with regard to the grant of concession is one issued as per Circular No. 476/Adv.C3/88/P&ARD dated 22.2.1988 which granted a further concession to relatives/dependents of serving soldiers and relatives/dependents of defence personnel killed in action. It was made clear that the applications of those seeking inter-district transfer need not be placed before the Council of Ministers for relaxation of the five year rule. The dependency of the applicant with the soldier will have to be verified by the District Collector in such cases.

15. By G.O.(Ms)12/96/P&ARD dated 16.3.1996 the relaxation of five year rule was made in the case of transfers to Idukki, Wayanad and Kasaragod districts. It was specified by the said order that the "Government servants (including Teachers) recruited in other districts will be permitted to be transferred to the

Districts of Idukki, Wayanad and Kasaragod without insisting on completion of five years service in the original districts of recruitment. This concession will be available only for getting transfer into these districts, but not for getting transfer out of these districts and will be granted only once in the career of a Government servant." As per G.O.(P) No. 30/98/P&ARD dated 15.9.1998 it was further ordered that "inter-district transfers without insisting on completion of five years service in the original districts of appointments will be permitted among the Districts of Idukki, Wayanad and Kasaragod. In G.O.(P) 37/96/P&ARD dated 7.11.1996, certain doubts were raised regarding the question whether the five years spent by a person in the same district in different departments in the same category of posts could be reckoned for the purpose of inter-district transfer and whether the stipulation regarding loss of seniority will be applicable where the seniority is maintained on a state-wise basis. In paragraph 3, it was clarified as follows:

3. Government have examined the matter in detail and are pleased to clarify as follows:

(i) A district-wise recruit shall complete five years service in the district of recruitment as well as in the department where he is working so as to become eligible to get an inter-district transfer to another district.

(ii) Inter-district transfer of district-wise recruits will result in loss of seniority even in cases where state-wise seniority list is maintained for promotion.

16. The comprehensive Government Order issued with regard to inter-district transfers of employees by modifying certain conditions in the various Government Orders, is available in G.O.(P) No. 36/91/P&ARD dated 2.12.1991 (produced as Ext.P1 in writ petition No. 11178/2005 and relied on by the petitioners therein) which was issued in supersession of the existing orders. It is noted therein that the condition regarding completion of five years which was imposed from 1971 onwards, was relaxed and transfers from one district to another within the erstwhile Malabar and Travancore-Cochin areas were permitted and the five year ban exists at that point of time only in respect of transfers from a district in Malabar to Travancore-Cochin area and vice versa. For issuing the above order, the Government insisted to have modified guidelines, in the light of the fact that the interest of the rank holders in the PSC lists awaiting advice, will have to be safeguarded and to avoid any indiscriminate transfers ordered by the appointing authorities. It was noticed that under the District Recruitment Scheme, a candidate can choose any one district for the purpose of making an application and after weighing the interests of the candidates in PSC rank lists and those who have already secured appointment and seeking transfer to other districts than those opted by them, in paragraphs 4 to 6 of the said Government Order the entire scheme was specified with stringent conditions, as reproduced below:-

4. Government have weighted the interests of the candidates in PSC rank lists

and those who have already secured appointment seeking transfers to districts other than those opted by them. They are of the view that the sanctity of PSC lists have to be protected against distortion by indiscriminate transfers of those who have already secured appointments, to the detriment of those in PSC rank lists. They, therefore, order in supersession of the existing orders, that thereafter inter-district transfers will be allowed only on the following conditions:-

(i) Such transfers will be allowed only after completion of five years" service in the district of recruitment. The only exceptions to this rule will be the cases of transfer to the district of choice, of candidates advised from district rank lists to headquarters vacancies and that of near relatives/dependents of service soldiers/soldiers killed in action or died while on duty in field/forward areas. Periods of service spent on deputation in a different district will not be reckoned as service for this purpose.

(ii) Any inter-district transfer except the one, of candidates advised to headquarters vacancies to the district of his choice will entail loss of seniority. Service prior to the transfer will count towards increment, leave and pension benefits.

5. Relaxation of the five year rule in very exceptional cases that need sympathetic consideration will require the approval of the Council of Ministers. Cases should not be proposed for relaxation in a routine manner. There should be clear justifying grounds supported by the report of the District Collector of the district to which transfer is sought for. Proposal for relaxation in such cases shall be routed through Chief Secretary

6. Only 10% of the vacancies arising in the district in an year in a category in a department shall be filled up by inter-district transfer, including relaxation cases and cases of near relatives/dependents of soldiers.

An analysis of the various Government Orders issued from time to time will show that relaxations have been permitted only in exceptional cases, as noticed already, in the case of Army personnel, inter caste marriage people, etc. The above Government Order insists for approval of the Council of Ministers when relaxation is granted of the five year rule, in a specific case, and justifiable grounds had also to be shown and the application will have to be routed through the Chief Secretary.

17. The Government had instructed, by issuing various Government Orders from time to time that the five year rule should be strictly adhered to, e.g. in Circular No.123746/SD5/73/PD dated 26.5.1976 after noticing that certain inter-district transfers have been ordered before completing the prescribed period of five years, the Government directed as follows so as to strictly observe the five year rule:

All Heads of Departments and other Appointing Authorities are therefore requested to see that the five year rule prescribed in the G.O. first cited for the

inter-district/inter-departmental transfer of district-wise recruitment is strictly followed in future.

Again the position was reiterated rather emphatically by issuing Circular No. 112960/SDI/82/GAD dated 18.12.1982 and paragraph 2 therein reads thus:

2. It is observed that representations/proposals for relaxation of the five year rule for transfers are on the increase. The grounds put forward are almost identical-family problems, inability to maintain two establishments, illness of aged parents etc. If every such case is to be treated as "exception" and inter-district transfers allowed in relaxation of the rules, the rules themselves will become meaningless and redundant. Government therefore direct that such routine representations should not be entertained. Only cases which are supported by really exceptional and compelling circumstances should be considered for relaxation of rules e.g. inter-caste marriages. Harijan employees, near relatives of soldiers killed in action/serving soldiers, physically handicapped persons etc. All Heads of Departments and Offices and the Departments of the Secretariat are requested to bear these aspects in mind while forwarding proposals/considering requests, for such transfers.

Circular No. 9036/H2/90/Home dated 7.9.1991 directed the Heads of Departments to strictly adhere to the above instructions and to avoid any lapse on this aspect. It was ordered that the responsibility in this regard will be that of the Head of the Department. Another circular is Circular No. 23033/Adv.C3/91/P&ARD dated 19.12.1991 wherein it was directed that the instructions in G.O.(P) No. 36/91/P&ARD dated 2.12.1991 should be strictly adhered to and "violation if any shall be viewed seriously and action taken against the officer ordering the transfer."

18. In fact, in the general order containing the guidelines for transfer of Government employees issued as per G.P.(P) No. 15/89/P&ARD dated 22.5.1989, condition No. 2(a) incorporates the condition regarding five years service for inter-district transfer and we extract the same as under:

2(a) Subject to the condition regarding 5 years service for inter-district transfer applicable to D.R.B. recruits, employees who have not completed 3 years of duty/service in a station/district, shall not ordinarily be transferred.

The same is also therefore material. The said condition has been retained in all the subsequent orders, revising the guidelines issued as per G.O.(P) No. 13/2000 dated 27.4.2000 and G.P(P) No. 12/04/P&ARD dated 10.9.2004, etc.

19. A review of the principles under which these orders are issued, will show that the prime concern with regard to the restrictions for indiscriminate inter-district transfers was to safeguard the interest of the candidates included in the rank lists of the P.S.C. The availability of regular employees in various districts was the other consideration. Exceptions have been specified in the cases of near relatives/dependents of serving soldiers/soldiers killed in action or died while on duty in

field/forward areas. Candidates selected against headquarters vacancies, were also given the concession, apart from inter-caste married people. Even though initially certain posts only were included for district recruitment, from time to time other posts were added. The order Ext.P1 herein reiterates these principles when the various circulars were consolidated. It is apposite herein to extract from it the basis for issuance of the revised order, which are clear from paragraphs 1 to 3. The same are extracted below:

1. While introducing the system of district-wise recruitment to common category/ lower category posts in various departments in 1971, Government had stipulated that a person recruited from a district-wise rank list will not be transferred to another district before completion of five years in the district of recruitment and that on transfer to the district of his choice, after five years, he will take rank as the junior most in the new district. In course of time this condition was relaxed and transfers from one district to another within the erstwhile Malabar and Travancore-Cochin areas were permitted. The five year ban now exists only in respect of transfers from a district in Malabar to Travancore-Cochin area and vice versa.

2. Government have been receiving many complaints of indiscriminate transfers ordered by many appointing authorities to the detriment of those in PSC rank lists. It has, therefore become necessary to review the existing system with a view to safeguarding the interest of rank holders in PSC lists awaiting PSC advice.

3. Under the District Recruitment Scheme a candidate can choose any one district for the purpose of making an application. A candidate choosing a particular district should therefore, make his option carefully and he should be prepared to work in the district. Normally, any candidate will choose the district, most convenient to him.

It will show that the Government have been receiving many complaints of indiscriminate transfers ordered by many appointing authorities to the detriment of those candidates included in the PSC rank lists. As far as the candidates are concerned, even while applying for the post, they had to choose the district in the application. Therefore, when such persons who have opted a particular district are seeking transfers, the restrictions were thought of, as otherwise it will ruin the sanctity of the list published by the P.S.C. Such indiscriminate transfers while helping the persons who have secured appointment, will cause detriment to those included in the rank list. Such was the concern and anxiety expressed by the Government while issuing the orders and circulars. Relaxations were also made only in very exceptional cases for which approval of the Council of Ministers will have to be obtained.

20. In fact, the attempts to make indiscriminate transfers, were adversely commended upon by this Court in various judgments. We will now refer to the judgment of a learned Single Judge of this Court (V. Sivaraman Nair, J.) in K.S. Mini Vs. Deputy Director of Education, Ernakulam and Others, . The learned

Judge was of the view that inter-district transfers by issuing special orders in total violation of the guidelines, cannot be accepted. The transfer involved therein relates to Government school teachers who are also governed by the very same Government Orders and circulars. After referring to various aspects, the principles were laid down thus in paragraphs 6, 8 and 9:

6. ...Obviously, the Government was issuing orders to all who went to it without any reference to the number of vacancies available and without any regard to the principles of general application evolved by itself to channelise the exercise of power relating to inter-district transfer of teachers. The Government is of course the ultimate repository of control of the teaching staff of the Government Schools and therefore, the Government is entitled to oversee the implementation of directions relating to inter-district transfers also. But when once instructions were issued specifying the guidelines which should govern such transfers, it is essential that the Government confines itself to the duty of overseeing implementation of such directions instead of meddling with each individual case of transfer....

9. In the present case, it is evident that the three petitioners have tried to over-reach the ordinary instrumentality in an under standable anxiety to get priority in their favour. They should ordinarily have applied to the first respondent for inter district transfer. He is expected to order such transfers on the basis of the rank among the registered applicants determined with reference to orders of uniform application. Obviously, each of the petitioners tried to get better of the other applicants and therefore went straight to the Government to obtain orders of transfer. The Government appears to have willingly obliged, of course without considering the relevant facts and without even pausing to consider for a moment the effect of the issue of such orders in favour of all persons who approached them.

21. A Division Bench of this Court in *Annamma Joseph v. State of Kerala*, 1989 (1) KLT 1, which was heavily relied upon by the learned Senior Government Pleader, expressed strong reservation with regard to the attempt to violate the five year rule. The Division Bench consisting of Malimath C.J. and Bhaskaran Nambiar, J. speaking through Malimath C.J. (as he then was), held as follows in paragraph 1:

The learned single Judge has declined to interfere on the ground that the appellant having applied for appointment as Lower Division Clerk in Palghat District and having secured appointment in that district is ineligible for seeking transfer for a period of five years. The learned single Judge took the view that the Government order Ext.P2 cannot be understood as having an over-riding effect over the relevant order which precludes transfer of those appointed on district-wise basis for a period of five years to another district. We are inclined to agree with this view of the learned single Judge. The rule that those who have been appointed on district-wise basis should not be permitted to be transferred to another district for a period of five years has a salutary object to serve for the

purpose of ensuring equity in the matter of appointment of persons hailing from different districts. Appointments are made on district-wise basis where selection is confined to those who apply for appointment in that particular district. It is a matter of common knowledge that there are better prospects for securing selection in certain districts, and for this reason persons belonging to another district claim that they belong to that district and secure appointment and after securing appointment they make every effort to get transfer to the district from which they hail. With a view to avoid, such unhealthy practice and exploitation the Government have imposed restrictions that for a period of five years such persons should not ordinarily be transferred. Ext.P2 order which grants certain facilities in the matter of transfer of those who undergo inter-caste marriages, provides that the employees will invariably be accommodated in the same station or near by station transferring out other personnel, if necessary, and only where for reasons to be recorded such arrangements are impracticable the concession will not be applicable. In other words, if there are other compelling reasons the facility provided in Ext. P2 need not be extended. If, as in this case, applications were called for and selection and appointments were made on district-wise basis with the further stipulation that they will not ordinarily be transferred for a period of five years, the transfer of such persons before the expiry of five years must be regarded as impracticable or impermissible as the non-transferability of such appointees for a period of five years is one of the conditions of appointment. We have therefore no hesitation in agreeing with the view taken by the learned single Judge that as in the case in question, the appointment of the appellant was made on a district-wise basis with the stipulation that the appointee should not normally be transferred for a period of five years the question of claiming the benefit of Ext. P2 as a matter of right does not arise. The learned single Judge was therefore justified in declining to interfere.

(emphasis supplied)

The Division Bench was of the view that transfer of persons before the expiry of five years, must be regarded as impermissible. We have already noticed the various orders issued by the Government insisting for adherence of the rules.

22. Thus, judged in the light of these principles it can be seen that it is impermissible to grant inter district transfer within a period of five years and only in exceptional cases it can be relaxed.

23. In the light of the scheme available under various Government Orders which have obtained judicial recognition, we will have to address the contentions raised by the learned Senior Counsel for the appellants/petitioners.

24. Learned Senior Counsel, as already noticed, relies upon the first proviso to Rule 27(a) which reads as follows:

Provided that the seniority of persons on mutual or inter-unit or inter-departmental transfer from one Unit to another within the same Department or from one Department to another, as the case may be, on requests from such

persons shall be determined with reference to the dates of their joining duty in the new Unit or Department. In the case of more than one person joining duty in the same grade in the same Unit or Department on the same date, seniority shall be determined:

(a) If the persons who join duty belong to different units or different departments, with reference to their age, the older being considered as senior; and

(b) If the persons who join duty belong to the same category of post in the same Department, in accordance with their seniority in the Unit or Department from which they were transferred.

The rule as above provides the method of fixing seniority of persons on mutual or inter-unit or inter-departmental transfer within the same department or from one department to another made on request, and it must be determined with reference to the dates of their joining duty in the new unit or department. Plainly, it can be seen that what is envisaged therein is the principle in fixing the seniority. The proviso does not concern itself with the mode and conditions for inter-unit/inter-district or inter-departmental transfer. The attempt made by the appellants is to show that the said rule does not insist for a five year rule so far as the grant of inter-unit/inter-district transfers are concerned and by relying upon the said rule, the contention raised is that read along with the Special Rules, they are entitled to count seniority from the date of joining duty in the new unit or department. Non-completion of five years in the parent unit is immaterial, it is contended.

25. We shall now refer to the relevant provisions of the Special Rules, viz. Kerala Excise and Prohibition Subordinate Service Rules, 1974. Rule 7 provides for the "appointing authority" for various categories and sub-rule (2) provides as follows:

7. Appointing authority.--(1) xxxx

(2) The appointing authority for categories (2), (3) and (4) shall be the Assistant Excise Commissioner in charge of the Divisions concerned.

Category 3 is Excise Guards. The appointing authority is the Assistant Excise Commissioner in charge of the division concerned. Rules 10 and 11 were heavily relied upon by the learned Senior Counsel for the appellants/petitioners which are also extracted below:

10. Unit of appointment, discharge and reappointment, Seniority and appointment as full member--For the purposes of appointment or reappointment to the service, whether as a full member or not, discharge from the service and seniority among the members of the service, the State shall be the unit in the case of Excise Inspectors and the Excise Divisions shall be units in the cases of Excise Preventive Officers, Excise Guards and Drivers. Proviso-omitted.

11. Postings and transfers.--(1) Postings and transfers of all persons appointed to

service from one unit to another within an Excise Zone shall be made by the Deputy Commissioner of Excise concerned.

(2) Postings and transfers from one Excise Zone to another Excise Zone and to and from the special unit shall be made by the Additional Secretary (Excise), Board of Revenue.

Rule 10 is important to consider the case of the appellants and heavy reliance is placed on the same by the learned counsel for the respondents also. The same provides for a "unit for the purpose of appointment, discharge and re-appointment and seniority and appointment as full member". As far as Excise Guards are concerned, "Excise Divisions" shall be the unit." Even though it is vehemently contended by the learned Senior Counsel for the appellants that Rule 11 is the one governing the postings and transfers under which the orders Exts.P3 to P5 were issued, evidently the same confers power on a specified officer to issue the orders of posting and transfer and the scope of the provision is not the one concerning the principles governing transfer itself. The argument therefore that the transfers made herein are under the mode prescribed as per Rule 11 and the same alone will govern the matter, cannot be accepted.

26. The reliance placed on the decision of the Apex Court in K.P. Sudhakaran and Another Vs. State of Kerala and Others, also cannot help the appellants. Rule 27(a) and (c) of KS & SSR came up for interpretation therein. The facts of the case will show that the post involved is LDC (Lower Division Clerk) in different districts. The unit of recruitment was the district therein. After recruitment some of the appointees were transferred to other districts on request. Later, the question of fixing the seniority arose. When the seniority list was published, the seniority of transferred LDCs were shown in the list with reference to the dates of their first appointment and not with reference to the dates of their joining in the district to which they were transferred on their own request. The Division Bench, while disposing of the matter, took the view that the Government Order dated 2.1.1961 and Rule 27 provides for fixing the seniority only from the date of their joining duty at the District to which, they were transferred on their own request, but it was held that as the seniority list was finalised in 1984, the position of the transferred LDCs should not be disturbed and it was further held that the provisions of the Government Order dated 2.1.1961 and the proviso to Rule 27(a) should be given effect only prospectively. The Apex Court did not agree with the above view. In para 14, the legal position was explained thus:

14. The transferred LDCs. (contesting private respondents) contended that the GO dated 27.5.1971 stated that it will not affect the existing procedure where State-wise promotions are involved. They point out that though the posts of LDCs. are District-wise, as the promotion of LDCs to UDCs is State-wise, the provisions of G.O. dated 2.1.1961 will not apply, in view of clause (iv) of G.O. dated 27.5.1971. It is unnecessary to examine whether clause (iv) of G.O. dated 27.5.1971 excludes the applicability of G.O. dated 2.1.1961, as neither the G.O. dated 27.5.1971 nor the G.O. dated 2.1.1961 governed the effect of "own

request" transfers, after Rule 27(a) of the Service Rules was amended by introducing a proviso providing for the consequences of "own request" transfers. Where Statutory Rules govern the field, prior executive instructions cease to apply.

Shri P. Ravindran, learned Senior Counsel for the appellants placed heavy reliance on the said paragraph to contend that after the proviso to Rule 27 was amended, the executive instructions will not apply.

27. A reading of the principles therein only show that the Apex Court held that the principle under Rule 27(a) proviso will apply in fixing the seniority of the transferred LDCs. Evidently, in the said case it can be seen that persons concerned were transferred after their appointment under the relevant orders. Therefore, their position in the seniority list after such transfer was the matter which arose for consideration and it was held that the proviso to Rule 27(a) will apply. We do not agree with the contention of the learned Senior Counsel for the appellants that whatever may be the mode of transfer, the dictum laid down therein should be understood as one laying down that the seniority will have to be fixed from the date of joining the new unit. Evidently it was a case of regular inter-district transfer, and no contest was there with regard to the transfers made and the principle for fixing seniority was thus laid down. The facts emerging herein are altogether different.

28. One of the points raised by the learned Senior Counsel for the appellants is that the appointment in the Excise Department is on division basis and therefore the orders/circulars regarding inter-district transfer will not apply. This is answered by the learned Senior Government Pleader and learned counsel appearing for the contesting respondents by pointing out that as far as Excise Department also is concerned, the recruitment is district-wise and a division is equivalent to a Revenue district. Learned Senior Government Pleader made available the Government Order showing the details of the divisions and contended that as far as the State is concerned, there are 14 divisions equalling the total number of 14 Revenue districts. Apart from that, the notification issued by the Public Service Commission which was published in the Gazette dated 20.12.1983, inviting applications for the post of Excise Guards, has also been placed for perusal. Therein, column No. 4 gives the number of vacancies district-wise and Notes (1) (2) and (3) are also important. We extract column No. 4 along with the Notes hereunder:

4. Number of vacancies

(District-wise):-

Note:-- (1) Separate ranked lists will be prepared for each District in pursuance of this Notification. The ranked list thus prepared and published by the Commission shall remain in force for a minimum period of one year, subject to the condition that the said list will continue to be in force till the publication of new list after the expiry of the minimum period of one year or till the expiry of

two years, whichever is earlier. Candidates will be advised for appointment against the aforesaid vacancies and also against the vacancies, if any, reported during the currency of the list.

(2) Applications should not be sent to more than one District in response to this notification. If applications are sent contrary to the above direction, and if a candidate happens to be selected his name will be removed from the ranked lists and disciplinary action will be taken against him. Candidates should submit applications for this post to the concerned District Officer of the Commission noting the name of the District against the relevant column of the application. The address of the District Officer to whom applications are to be sent is furnished in column (10) of the notification.

(3) The selection in pursuance of this notification will be made on a Revenue District basis, subject to the Special conditions laid down in G.O.(Ms) No. 154/71/PD dated 27.5.1971. A candidate advised for appointment in one Revenue District from the ranked list prepared is not eligible for transfer to another District unless he completes 5 years continuous service from the date of commencement of service in the former District. Even if, transfer is allowed after 5 years, it will be subject to the rules in G.O.MS. No. 4/PD dated 2.1.1961. Candidates already in Government Service, holding this post in any one District are prohibited from applying to higher posts when notified.

29. Therefore, it can be seen that the recruitment is district-wise and Note (1) shows that separate ranked lists will be prepared for each district. Note (2) provides for a caution to the candidates that applications should not be sent to more than one District and Note (3) is important for considering the contentions herein also. It is clearly specified therein that selections made are on a Revenue District basis. Note (3) shows that a candidate advised for appointment in one Revenue District from the ranked list prepared is not eligible for transfer to another District unless he completes 5 years continuous service from the date of commencement of service in the former District. Such transfer, even if allowed after five years, will be subject to the rules in G.O.(Ms) No. 4/PD dated 2.1.1961. Therefore, it is now beyond the point to contend that as far as Excise Department is concerned, a division is different from a district and the appointment is not district-wise and therefore the Government Orders like Ext.P1 and the earlier Government Orders prescribing the guidelines for inter-district transfer and the principles thereon will not apply to the Excise Department. In fact, the Division Bench in W.A. No. 1505/2006 in the judgment, noticed the fact that the appointment is district-wise as far as Excise Department is concerned, in paragraph 5. The relevant portion is extracted below:

Of course, in Excise department, division is the unit unlike other departments. But the divisions are for each district. Recruitment to the category of Excise Guard is on district basis as conducted by the Kerala Public Service Commission. Necessarily, the division for the purpose of excise department is confined to each revenue districts. Therefore, going by Ext.P1, one can be transferred from the

district in which he has been recruited to another district of his choice only after completion of five years. Before that he does not have any entitlement for such transfer with lien to the district of choice.

Thus, evidently for the purpose of applying Rule 10 of the Special Rules, the unit of appointment will be district itself. Hence, it can be safely concluded that as far as Excise Department also is concerned, inter-district transfer will be governed by the provisions of various orders including Ext.P1 Government Order of the year 1991 and thus all the conditions prescribed will apply.

30. The next aspect is whether the Government Order runs contrary to the proviso to Rule 27(a). Evidently, the proviso to Rule 27(a) concerns the principle for fixing the seniority alone and it does not govern the conditions for grant of inter-district/inter-unit transfer. Matters which are not covered by the rules can clearly be brought in by executive instructions, which legal position is well settled.

31. The Apex Court had occasion to reiterate the said principle in *N.K. Pankajakshan Nair Vs. P.V. Jayaraj and Others*, , when a similar argument was raised. The facts of the case show that before the statutory recruitment rules came into force, an administrative order was in force and it provided that in the category of DYSP in the local police, not more than one out of eight vacancies should be filled up by transfer from amongst Assistant Commandants of District Armed Reserve and Armed Police Battalion. The statutory rules provides the method of appointment from three different sources, viz. (a) by direct recruitment; or (b) by promotion from amongst Circle Inspectors; or (c) appointment from amongst Second Commandants, Adjutants and Assistant Commandant, M.S.P. and Special Armed Police Battalions and Assistant District Armed Reserve. The appellant before the Apex Court was an Assistant Commandant in the District Armed Service Force under category (c). The argument was based on the executive instructions earmarking not more than one out of eight vacancies to be filled up by transfer from Assistant Commandants, etc. and that it still governs the field, being not inconsistent with the rule. The Apex Court answered the question in paragraph 8 thus:

8. It is undisputed that the executive order issued in the year 1962, still continues to remain in force, being amended from time to time but the relevant Clause of that executive order contained in Clause (d) has not been touched. The statutory Rules which came into force on 14th of June, 1966, no doubt stipulates that it is in supersession of the Rules and orders on the subject. Necessarily therefore, if the statutory Rules provide any provision corresponding to Clause (d) of the executive instructions, then the said executive instruction must give way. But if the statutory Rules are silent on the same and there is no provision which can be held to be contrary to the executive instructions, then the executive instructions will continue to operate in the field for which there is no provision in the statutory Rules. The executive instructions must be held to be supplemental to the statutory Rules.

(emphasis supplied)

It was noted that the statutory rules are silent on clause (d) of the executive instructions and therefore there is nothing in the statutory rules which is contrary to the executive instructions and the executive instructions will continue to operate in the field for which there is no provision in the statutory rules. In paragraph 9 it was further held thus:

9. Having examined the provisions of the recruitment Rules of 1966 as well as the executive instructions of the year 1962, we are unable to find any provision in the statutory Rules which can be said to be repugnant to the earlier executive order. That apart, the said executive order continues to remain in force by various amendments, though the very Clause has not been amended. In this view of the matter, the executive order of 1962 must be held to be continuing in force and remains operative.....

32. Similar is the position herein also. When proviso was added to Rule 27(a), what is taken care of is only the principle regarding seniority. The same was added by G.O.(P) 11/76/PD dated 13.1.1976. It is not as if as far as inter-district transfer and its principles are concerned, the proviso will govern. We cannot agree with the submission that the introduction of the proviso nullifies all that is covered by the executive orders and circulars. There is no provision therein contrary to what is provided under the proviso to Rule 27(a). Therefore, it cannot be said that Ext.P1 order runs contrary to the plain terms of the proviso to Rule 27(a).

33. In fact, another vehement contention raised by the learned Senior Counsel for the appellants/petitioners is that as far as Excise Department is concerned, the Special Rules alone will govern and therefore the executive orders including Ext.P1 will govern persons who are not covered by the Special Rules. We have noted Rule 11 of the Special Rules already. It only specifies the authority who is empowered to issue posting and transfer orders. The orders of transfer, therefore will have to be issued under the general guidelines of transfer prescribed by the Government from time to time and the inter-district/inter-unit transfers will be governed by the principles and conditions provided in Ext.P1 and other relevant orders and circulars. It is not as if an inter-district transfer like the one herein, is issued under Rule 11. The said argument is therefore rejected.

34. In this context, learned Government Pleader relied upon the principles stated by the Apex Court in *Dhananjay Malik and Others Vs. State of Uttaranchal and Others*, to show that the Government can maintain administrative instructions when the rules are silent on any particular point. In paragraph 14, it is held as follows:

Government cannot amend or supersede statutory rules by administrative instructions, but if the rules are silent on any particular point Government can fill up the gaps and supplement the rules and issue instructions not inconsistent with the rules already framed.

Learned Government Pleader further relied upon the principles stated by a Division Bench of this Court in Regi Vs. State of Kerala, to contend for the position that the power for issuing various orders governing inter-district transfer can be traced to Rule 39 of the general rules of KS & SSR and therefore they are having statutory recognition. In fact, the Division Bench (consisting of K. Balakrishnan Nair (as he then was) and P.N. Ravindran, JJ.) in the said decision, has clearly held that the orders permitting inter-district transfers are issued under Rule 39. K. Balakrishnan Nair, J. (as he then was) speaking for the Bench in Regi's case (supra) in paragraph 5 held as follows:

5. The next contention raised is that the only method of appointment available for appointment to the District Armed Reserve is through transfer from the members of the Armed Police Battalion. But the orders permitting inter-district transfer are orders issued under R.39 of the General Rules of the K.S. & S.S.R. The said Rule confers power on the Government to issue appropriate orders, notwithstanding anything contained in the Special Rules or the General Rules. Inter-unit and inter-district transfers have been permitted since 1961 under the order of the Government G.O.(MS)No. 4/61/PD dated 02.01.1961. It appears, recently, the Government have imposed a restriction on the percentage of vacancies to which inter-district transfers can be ordered. That is, orders have been issued to safe-guard the interests of the candidates included in the PSC list, awaiting appointment. We are of the view that the Government have power to permit inter-district transfer and the general orders governing the same are valid, notwithstanding anything contained in the Special Rules. So, the contention of the petitioners that inter-district transfer is impermissible in the light of the provisions of the Special Rules, cannot be accepted.

The said discussion will show that the power conferred under Rule 39 is notwithstanding anything contained in the Special Rules or the general rules and therefore the Government have got power to permit inter-district transfer invoking the provisions of the Government Orders in the matter. In fact, the Bench was also of the view that these orders are issued to safeguard the interests of the candidates included in the PSC list, awaiting appointment. The same is also significant. Hence, for all these reasons, the Special Rules herein cannot advance the case of the appellants.

36. We are therefore of the view that the contention that the circulars and executive orders will go against Rule 27(a) and the proviso, cannot hold good. The transfer orders issued herein, as already noticed, are with a condition that for the purpose of appointment, re-appointment, seniority etc. the unit to which they were appointed originally, shall continue. This is significant. The appellants therefore retained their lien in the parent units. Therefore, it cannot be treated as a transfer inter-district or inter-unit in the exact terms. The argument that violation, if any, of the condition provided under Ext.P1, of the five year rule will not be material as no consequences are provided therein, also therefore cannot hold good. The principles governing the grant of inter-district transfer will show

that the general norm is that it can be granted only after completion of five years of service in the district opted by the appointee. Exceptional cases we have already noticed. The appellants/petitioners do not come within any of the exceptional cases. Even with regard to transfer in exceptional cases, the same also shall be done by the approval of the Council of Ministers, which is also not available here. Therefore, going by the dictum laid down in Annamma Joseph's case (1989 (1) KLT 1) such transfers can only be held to be impermissible. Learned Government Pleader submitted that when the petitioners are beneficiaries of such an illegal order, they cannot claim seniority over the appointees in the new unit which goes against the conditions provided in Ext.P1 and other Government Orders.

36. In our considered view, the absence of any consequences in the executive orders cannot be a guiding factor to find out whether the orders could be supported for giving seniority to the petitioners, even if the five year rule is violated. That five year rule is the important aspect as far as inter-district transfer is concerned, cannot admit of any doubt. Violations of the same cannot get any justification or legal foundation. As we have already discussed, all the Government Orders and general directions issued by the Government from time to time, wanted to have strict adherence to the five year rule. Therefore, the said contention also can only be rejected. Apart from that, the conditions in the Gazette notification under which the appellants/petitioners could submit applications for appointment, clearly provided under Note (3) that "inter-district transfer can be obtained only after putting five years service in the unit". The same also will go against the contentions of the appellants/petitioners as non-transferability is a condition for appointment.

37. The next aspect is whether the appellants/petitioners are retaining their lien in the unit to which they were appointed or in the unit to which they are transferred the moment the transfers were effected. In fact, the contention raised by the learned Senior Counsel, Shri P. Ravindran is that the transfer of the lien is automatic. Shri P.V. Mohanan, learned counsel appearing for the party respondents contended otherwise, by relying upon the decision of a Full Bench of this Court in Balakrishnan Nair v. Ram Mohan Nair, 1998 (1) KLT 766 - FB (consisting of Mrs. K.K. Usha, K.S. Radhakrishnan and S. Sankarasubban, JJ.). That was also a case where the effect of the various rules under Part I K.S.R. relating to acquisition of lien, suspension and cancellation were considered. The Full Bench, after considering various aspects including Rule 8 of KS & SSR, speaking through S. Sankarasubban, J., laid down the principle thus in para 26:

26. Thus, on the basis of the above decisions and the relevant Rules in the KSR and K.S.S.R., we are of the view that the lien of a member of a service to a post in the parent Department is not lost automatically when he joins another Department. The lien can be terminated only after hearing the concerned person. By mere completion of probation it cannot be said that a person has been substantively appointed to a permanent post. Unless a person is confirmed under

R. 24 of K.S.S.R., it cannot be said that the person has been substantively appointed to a permanent post. In the present case, we find that the appellants have not been confirmed in the Co-operative Department. Hence they have no lien in the Co-operative Department. Their lien in the Rural Development Department has not been terminated. In that view of the matter, sending them back to the parent Department is legal.

The same principles will apply herein. Therefore, merely because a person joins another unit or another department, the lien in the unit of appointment is not lost automatically. In fact, the relevant rules of Part I of K.S.R. which have been referred to by the learned counsel for the party respondents, throw light on this aspect. Under Rule 12(18), "lien" is defined as follows:

(18) Lien- Means the title of an Officer to hold substantively, either immediately or on termination of a period or periods of absence, a permanent post to which he has been appointed substantively.

Rules 16 to 19 are relevant for the purpose of this case, which are reproduced below:

16. Unless in any case it be otherwise provided in these rules, an officer on substantive appointment to any permanent post acquires a lien on that post and ceases to hold any lien previously acquired on any other post.

17. Unless his lien is suspended under Rule 18 or transferred under Rule 20 an officer holding substantively a permanent post retains a lien on that post--

(a) while performing the duties of that post;

(b) while on foreign service or holding a temporary post, or officiating in another post;

(c) during joining time on transfer to another post, unless he is transferred substantively to a post on lower pay, in which case his lien is transferred to the new post from the date on which he is relieved of his duties in the old post;

(d) while on leave;

(e) while under suspension; and

(f) while under training.

18. (a) The Government shall suspend the lien of an officer on a permanent post which he holds substantively if he is appointed in a substantive capacity -

(1) to a permanent post outside the cadre on which he is born, or

(2) provisionally to a post on which another officer would hold a lien had his lien not been suspended under this rule.

(b) The Government may, at their option, suspend the lien of an Officer on a permanent post which he holds substantively, if he is transferred to foreign

service or in circumstances not covered by clause (a) of this rule, is transferred, whether in a substantive or officiating capacity to a post in another cadre, and if in any of these cases, there is reason to believe that he will remain absent from the post on which he holds a lien for a period of not less than three years.

19. (a) An Officer's lien on a post may in no circumstances be terminated, even with his consent, if the result will be to leave him without a lien or a suspended lien upon a permanent post.

(b) In a case covered by sub-clause (2) of clause (a) of Rule 18, the suspended lien may not except on the written request of the Officer concerned, be terminated while the officer remains in Government service: provided that it shall be open to the Competent Authority to refuse consent for the confirmation or retention of an Officer in a permanent post outside the cadre on which he is borne unless he makes a written request that his lien on the permanent post in his parent office should be terminated.

38. Rule 17 deals with the circumstances wherein an officer holding substantively a permanent post retains his lien. It is provided that unless his lien is suspended under Rule 18 or transferred under Rule 20 an officer holding substantively a permanent post retains a lien on that post. Rule 18 confers power on the Government to suspend the lien and Rule 19(a) provides that "an Officer's lien on a post may in no circumstances be terminated, even with his consent, if the result will be to leave him without a lien or a suspended lien upon a permanent post" and finally, Rule 20 provides as follows:

20. Subject to the provisions of Rule 21 the Government may transfer to another permanent post in the same cadre the lien of an Officer who is not performing the duties of the post to which the lien relates, even if that lien has been suspended.

Therefore, there is no automatic transfer of lien as contended by the appellants herein. In this context, the condition provided in the various orders, Exts.P4 and P5 that they will retain their position in the parent unit for the purpose of appointment, discharge and reappointment, seniority, etc. is therefore important and thus they retained their lien in the parent division itself even after the transfer.

39. The learned Senior Counsel for the appellants, Shri P. Ravindran relied upon the principles stated by the Apex Court in *Shrimati Tarulata Shyam and Others Vs. Commissioner of Income Tax, West Bengal*, *D.D.A. and Others Vs. Joginder S. Monga and Others*, and *Union of India (UOI) and Another Vs. Central Electrical and Mechanical Engineering Service (CE and MES) Group "A" (Direct Recruits) Association, CPWD and Others*, in support of his pleas. The argument in a nutshell is that the Court cannot supply words to a statute and executive instructions cannot go against the statutory rules.

40. In *Shrimati Tarulata Shyam and Others Vs. Commissioner of Income Tax*,

West Bengal, , it was held that" even if there be a casus omissus, the defect can be remedied only by legislation and not by judicial interpretation." This principle is thus well settled. But as far as the present situation is concerned, as we have already noticed, this is a case wherein the executive orders like Ext.P1 and the proviso to Rule 27(a) operate in different fields, and therefore the situation is dissimilar. Therefore, it is not a case where the question of importing into the statute, words which are not there, arises and the said principle cannot have any application herein.

41. In D.D.A. and Others Vs. Joginder S. Monga and Others, the Apex Court referred to the principles laid down in two earlier decisions of the Court in Sant Ram Sharma Vs. State of Rajasthan and Another, and State of Madhya Pradesh and another Vs. G.S. Dall and Flour Mills and Others, , which are reproduced hereunder:--

35. In Sant Ram Sharma Vs. State of Rajasthan and Another, , this Court has categorically stated: (AIR p. 1914 para 7)

It is true that Government cannot amend or supersede statutory rules by administrative instructions, but if the rules are silent on any particular point, Government can fill up the gaps and supplement the rules and issue instructions not inconsistent with the rules already framed.

36. Yet again in State of Madhya Pradesh and another Vs. G.S. Dall and Flour Mills and Others, this Court observed as under (SCC p. 174. para 19)

Executive instructions can supplement a statute or cover areas to which the statute does not extend. But they cannot run contrary to statutory provisions or whittle down their effect.

In fact, we have already referred to the similar principles stated in N.K. Pankajakshan Nair Vs. P.V. Jayaraj and Others, . The principles stated in all these decisions will show that executive instructions will govern wherever statutory rules are silent. To the same effect is the dictum laid down in paragraph 10 of Union of India (UOI) and Another Vs. Central Electrical and Mechanical Engineering Service (CE and MES) Group "A" (Direct Recruits) Association, CPWD and Others, , that the power of the State Government to issue executive instructions, is confined to filling up of the gaps or covering the area which otherwise has not been covered by the existing rules. Learned Senior Counsel for the appellants/petitioners also relied upon various decisions in support of the plea that a literal interpretation is required. There cannot be any application of those principles herein, as we have already held that the orders herein operate in different fields not covered by the statutory rules and as held by the Division Bench of this Court in Regi Vs. State of Kerala, , Rule 39 of KS & SSR empowers the Government to issue such orders notwithstanding anything contained in the Special Rules or the general rules.

42. Therefore, going by the stipulations in various executive orders including

Ext.P1 any transfer, inter-unit or inter-district-wise, will have to be substantively with the lien after a period of five years. The instances of relaxation are minimum and even in the case of relaxation it will have to be done by the Council of Ministers. Rule 27(a) of KS & SSR prescribes the principle wherein seniority can be reckoned when appointments are made otherwise than on the advice by the Public Service Commission. The first proviso provides for fixation of seniority of persons on mutual or inter-unit or inter-departmental transfer from one unit to another, etc. The provisions of KSR and that of KS & SSR when considered together, will show that as far as determination of permanent cadre is concerned, it will have to be done by the Government in respect of each service, class, category and grade. (Rule 2(18) of KS & SSR). In fact, the definition of "cadre" in Rule 12(4) of Part I K.S.R. means "the strength of a service or part of the service sanctioned as a separate unit". A "member of service" means "a person who has been appointed to that service and who has not retired or resigned, been removed or dismissed, been substantively transferred or reduced to another service, or been discharged otherwise than for want of a vacancy". (Rule 2(9) of KS & SSR). The words "substantively transferred" are quite important. We have already discussed Rules 16 to 20 of Part I K.S.R. providing for termination, transfer of lien, etc. Therefore, only if a person is substantively transferred with lien alone, he can be considered to have been transferred to the other unit. Unless and until the lien is transferred for various purposes including seniority, the transferees will have to be treated as borne in the parent unit itself. They can get seniority in the transferred unit only if the lien gets transferred in terms of the rules and eligibility for inter-district transfer can be acquired only after five years service in the district of appointment, based on which they can get seniority in the transferred units. Therefore, clearly it is a case where the persons like the appellants will not get seniority based on the present orders of transfer on completion of five years in the unit of appointment without a substantive transfer with lien, which alone could have enabled them for assignment of seniority under the proviso to Rule 27(a) of KS & SSR. The general power of transfer conferred under Rule 32 of KS & SSR will also show that a "member of a service" or class of a service may be required to serve in a post borne on the cadre of such service or class. The provisions of Rule 8 of KS & SSR are also important here and it will show that for all purposes of getting the service benefits to a person the parent cadre is important. Rule 8 enables a "member of service" who is absent from duty in such service to return back to that service if he is not otherwise ineligible, as held by the Full Bench in Balakrishnan Nair's case (supra). Therefore, when the appellants were transferred without transfer of lien, their rights are retained in the parent unit itself which includes seniority. Rule 10 of the Special Rules herein, as already mentioned, states that for the purpose of appointment, discharge and reappointment, seniority and appointment as a full member, the Excise division shall be the unit. Herein, the Excise division is equivalent to a revenue district. In that view of the matter, the appellants cannot get seniority as claimed by them based on Exts.P3 to P5 in the new division. Since the appellants were not

transferred with their lien, it cannot be treated as an inter-unit transfer in strict sense and at any point of time they were liable to be transferred to the parent division.

43. The learned Single Judge (K. Balakrishnan Nair, J. as he then was), in the common judgment, was of the explicit view that "Exts.P1 and P2 deal with inter-unit/district transfer, which is not covered by the statutory Rules. Rule 27(a) deals with the reckoning of seniority of an incumbent on his regular appointment to that unit, otherwise than on the advice of the Public Service Commission. The first proviso thereof deals with regular inter-unit/district transfer. In this case, the inter-unit transfer ordered before completion of 5 years" service is illegal. So, the decision of the Apex Court relied on by the party respondents has no application to the facts of the case."

44. The Division Bench of this Court, while dismissing Writ Appeal No. 1505/2006 arising from the same common judgment, speaking through K.A. Abdul Gafoor, J. succinctly put the relevant principles in para 6 as hereunder:

True, as per proviso to Rule 27(a), a person transferred from the one district to another district, on request, is entitled to reckon seniority from the date of joining in the transferee district. That can only when such transfer is ordered as per Ext.P1 with transfer of lien for the purpose of seniority. But Exts.P4 and P5 transfer containing the specific conditions as extracted supra does not give them the benefit to reckon seniority in the transferee district. These transfers were not ordered as per Ext.P1. It cannot also be considered as the inter unit transfer in terms of the proviso to Rule 27(a) because of the specific condition in Exts.P4 and P5 transfer orders to the effect that, for the purpose of seniority they could be regarded as incumbents in the respective district of initial recruitment. Therefore it cannot be termed as a transfer for the purpose of (sic)ckoning seniority as contemplated in the proviso to Rule 27(a) or that to be ordered in terms of Ext.P1. Rule 27(a) does not govern inter district/unit transferees, as such, as contended by the appellants. It governs only the seniority of the incumbent so transferred.

We respectfully endorse the said view.

45. We may add here, further that, they had no grievance about the crucial conditions in Exts.P4 and P5 at any point of time. They continued after such transfer by retaining their lien in the parent divisions. Eight of them were included in the provisional seniority list Ext.P8 in Kannur District itself being their district of recruitment. Thereafter, appellant No. 5 filed a representation to the first respondent claiming seniority in Excise Division, Palakkad and pursuant to the direction issued by this Court in O.P. No. 34292/2001 to consider the representation, the Joint Excise Commissioner, heard the matter and issued Ext.P10 proceedings to include his name in the seniority list of Excise Guards in Palakkad Division with effect from the date on which he joined at Palakkad Division and gave seniority from that date. He had completed only less than 3

months in Kannur Division, at the time of transfer. Again, by Ext.P11 direction was issued to the Assistant Excise Commissioner to obtain option from those Excise Guards who were transferred either to continue in Kannur or to remain in the District to which they were transferred, within three days. Finally, by Ext.P12 directions were issued to include the remaining of them in the final seniority list in the transferred district. Thus, options were called for after a long number of years and this exercise is unknown to the scheme of inter-district transfer. They were never given any relaxation by a decision of the Council of Ministers also. Therefore, the exercise done is clearly one in perpetuation of an illegality. If that be so, they cannot get seniority before five years which is the rule as far as regular inter-district transfers are concerned. If the transfer is effected before five years, and without getting an order of relaxation from the five year rule the seniority claimed in the transferred unit/district based on the order of transfer, cannot be granted. In that view of the matter and on the facts as explained above, it can be seen that the appellants cannot get any right at all. Therefore, we respectfully agree with the view taken by the Division Bench in W.A. No. 1505/2006 and reaffirm the same. The reference is answered accordingly.

For all these reasons, the Writ Appeals and the Writ Petition are dismissed. No costs.