

(2019) 12 J&K CK 0019

In the Jammu And Kashmir High Court

Case No : Service Writ Petition (SWP) No. 2763 Of 2018, CM No. 1073, 6589 Of 2019, Contempt Petition (CPSW) No.) No 689 Of 2016

Shalinder Kumar Singh

APPELLANT

Vs

Union Of India & Ors

RESPONDENT

Date of Decision : 04-12-2019

Acts Referred:

Armed Forces Tribunal Act, 2007 — Section 34

Citation : (2019) 12 J&K CK 0019

Hon'ble Judges : Ali Mohammad Magrey, J

Bench : Single Bench

Advocate : Manzoor Ahmad Ganai, T.M. Shamsi, Satinder Singh

Final Decision : Disposed Of

Judgement

Ali Mohammad Magrey, J

1. Petitioner claims to be working as Stock Keeper (Technical), having the rank of Naib Subedar and has served at Khumbathang, Leh (Ladakh) in terms of the order of posting dated 06.09.2018, issued by the Respondent No. 6 and in terms of order passed on 19.10.2018, the petitioner, as claimed, has been relieved without any reason and in terms of another order bearing PO No. 1328/2018 dated 26.11.2018, issued by OIC Records, BEG Records Kirkee, the petitioner was posted to 105-Engr Regt. C/O 99 APO. It is further stated that the place of posting of the petitioner in terms of order impugned is situated in North-East and in terms of communication dated 29.11.2018, as stated, the petitioner was asked to report to new unit by 10.12.2018. Feeling aggrieved of the order of transfer dated 26.11.2018 and the communication dated 29.11.2018, asking the petitioner to report to new unit by 10.12.2018, the petitioner challenged the same by virtue of the instant writ petition on the grounds detailed out in the writ petition. The grounds being relevant are taken note of:

"a) That the petitioner having the rank of Naib Subedar has been subjected to

frequent transfers. To be precise he has been transferred as many as 5 times within a span of less than 9 months, as is apparent from Annexures A to F, the latest being order as contained in Annexure-F.

b) That the transfer of the petitioner more than 5 times cannot be justified by any stretch of reason or logic instead arbitrariness is writ large on the face of the impugned transfer order as also other orders to which petitioner has been subjected to. Therefore, the order impugned being as a result of frequent transfer orders passed against the petitioner, becomes arbitrary and cannot stand the test of law.

c) That the power exercised by the respondents in the present matter is totally arbitrary, illegal and unconstitutional. There is no power vested with the respondents which empowers the respondents to transfer the petitioner more than 5 times within a span of less than 9 months. The entire impugned transfer order a result of colourable exercise of powers on the part of respondents and, therefore, needs to be quashed.

d) That the petitioner is sought to be transferred from Srinagar (BB Cantt) to Leh (Ladakh) and now is being tossed to North-East by virtue of impugned order with no reason or logic with no regard to the welfare of the petitioner in this matter.

e) That the frequent transfers of employees have always been depreciated by the Hon'ble Courts including the Hon'ble Apex Court and the law is settled that the Court do not countenance frequent transfers of the employees. Instead the Courts have invariably held that frequent transfers should not be undertaken by the authorities and the present case is a classic example of abuse of powers on the part of respondents which has resulted in the frequent transfer orders including the impugned transfer order passed against the petitioner.

f) That the impugned order smacks of malafides as it has been passed within a period of less than few months after the order of transfer of the petitioner to Ladakh. A bare perusal of various Annexures annexed to this petition would show that the respondents indulge in malafide exercise of powers by transferring the petitioner from BB Cantt Srinagar to Jammu and then from Jammu to Leh and now to North-East. Sequence of orders of transfers passed by respondents against the petitioner smacks of malafides and arbitrariness is writ large on the face of entire transfer orders including impugned transfer order. On this count also the impugned order, needs to be quashed by this Hon'ble Court.

g) That the way the powers have been exercised resulting in the passing of the impugned order, clearly shows that the impugned order is an outcome of malafides and, therefore, indulgence of this Hon'ble Court is sought for its quashment.

h) With the permission of the Hon'ble Court further and additional legal grounds will be urged at the time of hearing/admission of this petition.

2. On notice, the respondents filed objections supported by the affidavit of

Satyendra R. Rajput S/o Ramachal Singh R/o BB Cantt, Srinagar, officiating as Major, Garrison Engineer 864 Engineering Works Section, questioning the maintainability of the writ petition for the reliefs claimed, on the reason that the petitioner being an army personnel possessing the rank of Junior Commissioned Officer (JCO), holding a transferable post, has no vested right to remain posted in a particular office on a particular post at one place in Srinagar. It is also submitted that the petition of the petitioner deserves to be dismissed as the Court lacks jurisdiction as per section 34 of Armed Forces Tribunal Act, whereby all the matters relating to the service are to be transferred which are pending before the High Court or on the onset are to be dismissed. The respondents have also dealt with parawise issues raised by the petitioner in the parawise reply of the objections.

3. Needless to mention that on consideration of the matter, the Court on the motion hearing in terms of order dated 04.12.2018, while recording the submissions of the learned counsel for the parties and on further examination of the pleadings supported by the documents and the law, issued notice and directed the respondents that the present position of the petitioner as it existed on 04.12.2108, shall not be disturbed. The order being relevant is taken note of;

"In this petition, the petitioner has called in question the validity of order dated 26th of November, 2018 as also order dated 29th of November, 2018, whereby the petitioner has been transferred from his present place of posting, inter alia on various grounds with particular reference of the fact that during the last one year, the petitioner has been transferred five times.

Notice.

Mr Satinder Singh, the learned Central Government Counsel (CGC), while waiving notice on behalf of the respondents, submits that the petitioner has also filed a civil suit for the same cause of action. He shall file his response by Monday, the 10th of December, 2018.

List on Monday, the 10th of December, 2018.

In the meantime, subject to objections from the other side and till next date of hearing before the Bench, the present position of the petitioner, as it exists today, shall not be disturbed."

4. Pending decision in the writ petition, the petitioner alleging violation of the order qua not allowing him to perform the duties and disbursement of salary, filed contempt petition bearing CPSW No. 689/2018, which is also under consideration of the Court.

5. When this matter was considered for disposal on 03.12.2019, the petitioner present in the Court in person submitted that he is continuing with the respondents in terms of order passed by this Court on 04.12.2018 and in order to substantiate his claim, the petitioner has placed on record the salary statements, substantiating that he has been paid the salary from December 2018

till May, 2019. He further submitted that the respondents have been asked to release salary in favour of the petitioner pending decision in the writ petition. The appearing counsel in the writ petition Mr Satinder Singh, while submitting the arguments on behalf of the respondents submitted that the petitioner has been relieved from the unit and his name has been struck off, therefore, there will be no question to release the salary in favour of the petitioner from the unit. In that view of the matter, the learned counsel appearing for the respondents was asked to ascertain as to from which unit the petitioner has been paid the salary till May, 2019 and why the salary was withheld from May, 2019, till date even on the direction of the Court.

6. Today, Mr Satinder Singh, learned appearing counsel for the respondents alongwith Mr Tarun Kalra OIC Legal Cell as also Respondent No. 5- Lt. Col Varun Tandon, Garrison Engineer, 864-Engineer Works Section, B.B. Cantt. Srinagar, C/O 56 APO, have produced copy of communication bearing No. 1071/Discp/21/E1G dated 04.12.2019 addressed to Legal Cell HQ 15 Corps PIN-908515, C/O 56 APO by Respondent No. 5, mentioning the procedure followed in the case of release of pay and allowances of all Army persons i.e. Officer, Junior Commission Officer and other Rank. Perusal of the communication reveals that the pay and allowance in case of Army persons i.e. Officer, Junior Commission Officer and other Rank, are disbursed by independent civil authority i.e. Controller of Defence Account/Pay Account Office (Other Rank) and not by the respective units where they are posted. It further transpires from the communication that when dispatch unit issues Movement Order, individual is struck off strength from the dispatch unit and taken on strength to the New unit and as soon as individual is taken on the strength on the new unit, individual has to join the unit in stipulated time and if he fails to do so, a casualty in this regard is published by way of unit Part II order which becomes the part of the unit record for the deficient soldier and accordingly the same is paralelly reflected/processed to the concerned records, as in case of the individual belongs to Bombay Engineer Group Record Kirkee, Maharashtra. The same was processed by Garrison Engineer 864 Engineer Works Section (dispatch unit) and 105 Engineer Regiment (receiving unit) to the Bombay Engineer Group Records, Kirkee. The communication further reveals that the record office accordingly prepares a consolidated data and after updating it periodically, processes it to the Controller Defence Account based on the documentation received after ascertaining the correctness, and directs Pay Accounts Officer (Other Rank) to release/withhold the pay and allowance of the concerned Army Personnel. Communication is taken on record.

7. Heard learned counsel for the parties, considered the matter and perused the record.

8. The arguments advanced by both the parties with full vehemence shall result in either allowing the writ petition or its dismissal, but the Court has reached a stage where the petitioner is till date regularly under the orders of this Court passed on 04.12.2018, claiming to be attending the office of Respondent No. 6

but the respondents on the other hand, are stating that the petitioner stands relieved from the office on 03.12.2018.

9. The Court has not to take a view which may at the end result in adding miseries upon the petitioner, but has to ensure that such justice is delivered which is practical in thought ensuring that the party which is approaching the Court and is struggling for continuation and release of benefits under the orders passed by this Court, shall also get the same.

10. In the above background, the Court without going to the merits of the case and with the agreement of the parties, has decided to approve the line of settlement so as to enable the petitioner to avail the benefits attached to his post qua services he has rendered or may render in future with the respondents. The petitioner has been paid the salary from December 2018 till May 2019 and is claiming release of further salary from May, 2019 till date.

11. In the above background, this writ petition is disposed of in the following terms:

i. The petitioner shall be treated to be in the employment of the respondents and performed duties till date, therefore, entitled for the unpaid salary alongwith allowances;

ii. The salary shall be released in favour of the petitioner by the competent Disbursing & Disbursing Officer in the manner on adherence to the procedure;

iii. The petitioner shall join the place of posting i.e. 105-Engr Regd. Pin-914106 C/O 99 APO, in terms of impugned order bearing PO No. 1328/2018 dated 26.11.2018 within a period 15 days from today;

iv. The petitioner shall ensure handing over of the charge to the incumbent in position at Srinagar office within two days from tomorrow; and

v. In the event the petitioner fails to join at the new place of posting i.e. 105-Engr Regd. Pin-914106 C/O 99 APO within

15 days, then on the 16th day i.e. 20th of December, 2019, the respondents shall initiate action against him under rules.

12. With the aforesaid directions, this writ petition alongwith all connected CM(s) shall stand disposed of accordingly.

13. With the disposal of the main petition, the contempt petition shall also stand settled.

14. Copy of this order be kept in the file of CPSW No. 689/2018.

15. Copy of this order be provided to learned counsel for the parties under the seal and signature of Bench secretary of this Court.