

**HIGH COURT OF JAMMU AND KASHMIR AT
JAMMU**

LPASW No.132/2009, CMP No.180/2009.

Date of decision: 22.10.2010

Rani Kour v. State and others.

Coram:

**Hon'ble Mr. Justice Dr. Aftab H. Saikia- Chief Justice
Hon'ble Mr. Justice Sunil Hali- Judge.**

Appearing counsel:

For the appellant(s) :Mr. S.K.Shukla, Advocate.

**For the respondent(s) :Mr. R.S.Jamwal, Dy.AG for R- 1 to 3.
Mr. P.N.Raina, Advocate for R- 4 to 6.**

- i/ **Whether to be reported in : Yes.**
Press, Journal/Media.
- ii/ **Whether to be reported in : Yes.**
Digest/Journal.
-

Per Sunil Hali-J.

The appellant came to be appointed as Junior Staff Nurse on 28th August, 1987 and was posted in Government Medical College, Srinagar. While the appellant was serving in the Government Medical College, Srinagar, she and her husband faced threat to their lives from the militants in view of the disturbed law and order situation in the valley during the year 2000. On the threat perception from the militants, the appellant along with her husband sought their transfer from Sringar to Jammu. Acceding to her request by respondent no.1, she came to be transferred against an available vacancy in Govt. Medical College Hospital, Jammu vide Govt. Order No.685-HME of 2000 dated 11.10.2000. This arrangement continued when post held by her along with other posts came to be transferred to Govt. Dental College, Jammu permanently vide Govt. Order No. 103-HME of 2006

dated 23.02.2006. Resultant effect of order was that she came to be appointed against a newly created department, which was independent of the service on which she was borne.

The dispute with regard to her enlistment in the seniority list issued by respondents became subject matter of challenge in writ petition being SWP No.513/2007. The grievance set out in the said writ petition was that she had to rank above private respondents in view of the fact that she was appointed prior to them. The case set out by her in the writ petition was that her transfer in Govt. Dental College, Jammu was not at her asking but was on account of creation of new department on which the post(s) held by the appellant and other members of the Govt. Medical College, Jammu came to be permanently transferred. The writ Court did not agree with the contentions raised by the appellant by stating that her transfer from Srinagar to Jammu was at her own request, as such, she would rank below the junior most in the category in the new department. It is under these circumstances, the present appeal has been filed by the appellant.

We have heard learned counsel for the parties and perused the record.

The following questions are required to be determined by us in this appeal:-

- (a) Whether temporary transfer of the appellant from Sringar to Jammu at her own request would entitle her to claim seniority in the transferee department as maintained by her parent department;

- (b) Whether her transfer to Govt. Dental College, Jammu can be construed to have been done at her own request when admittedly she had not sought her adjustment in the said College; and
- (c) Whether temporary transfer of the appellant can be construed as deputation from one department to other and consequently her absorption in the new department would automatically cease her lien in the parent department.

With regard to first question, i.e. "Whether temporary transfer of the appellant from Srinagar to Jammu at her own request would entitle her to claim seniority as maintained in her parent department". In this regard, it be seen that the facts are not in dispute. The appellant was working in Govt. Medical College Hospital, Srinagar which was her parent department. On the threat perception of militants, she along with her husband opted for their transfer to Jammu which was acceded to by respondent no.1. She was adjusted against an available post of Junior Staff Nurse in Govt. Medical College, Jammu. It is not in dispute that she was not borne on the strength of Govt. Medical College, Jammu but was temporarily posted to the said College and her lien in the parent department was retained. Her absorption in Government Medical College, Jammu would not entitle her to claim seniority as maintained in her parent department. She has to rank at the bottom of the seniority list in the department. The first question is, accordingly, answered.

With regard to 2nd question, i.e., "Whether her transfer to Govt. Dental College, Jammu can be construed to have been done at her request when admittedly she had not sought her adjustment in the

said College". In this regard, it be seen that the appellant was working as Junior Staff Nurse against an available post borne on the strength of Govt. Medical College, Jammu. In pursuance to Govt. order dated 11.10.2000, she continued to work on the said post and vide order dated 15.03.2005, she came to be transferred and posted in Govt. Dental College, Jammu. After assuming assignment in the Govt. Dental College, Jammu, Indira Gandhi Govt. Dental College Hospital, Jammu came to be established as a full fledged Govt. Dental College for Jammu Province and was named as "Indira Gandhi Govt. Dental College Hospital, Jammu" on 24.10.2005. With the establishment of aforesaid Dental College Hospital, Jammu, under Secretary to Government, Health and Medical Education Department vide his letter dated 20.12.2005 took up the matter with the Principal, Government Medical College, Jammu and after due deliberations, the Government vide its Govt. Order No.103-HME of 2006 dated 23.02.2006, accorded sanction for the transfer of several posts along with incumbents holding the posts from Govt. Medical College Hospital, Jammu to Govt. Dental College Hospital, Jammu with immediate effect. Strength of Junior Staff Nurse was shown as 8, out of which 6 for plan and 2 for non-plan budget and all the incumbents who were holding the posts will acquire their lien in the Govt. Dental College, Jammu. The following things emerge from the aforesaid facts:-

- (a) That the appellant, prior to transfer of the post to Govt. Dental College, Jammu was already posted in the said College vide order dated 15.03.2005;

- (b) That transfer of the said post in the newly created department, contemplates creation of new lien in the Govt. Dental College, Jammu;
- (c) That order of transfer of post from Govt. Medical College, Jammu to Govt. Dental College, Jammu was on the asking of the Government and not at the request of the appellant and private respondents.

The question that calls for consideration is as to whether absorption of the appellant in the newly created department can be construed to be on her own request keeping in view the fact that she was initially transferred temporarily to Govt. Medical College, Jammu and since the post stands transferred to Govt. Dental College, Jammu, it is to be construed that this will be a transfer on her own request. On the first blush, one can say that since the appellant was working against the post which was borne on the strength of Govt. Medical College, Jammu and consequently transferring of the post to Govt. Dental College, Jammu would mean that her continuation on the said post on her own request would indicate that her absorption was on her own request. Deeper scrutiny would indicate that the appellant was admittedly transferred to Jammu on her own request and she could not claim any right for the purpose of reckoning her seniority as exists in her parent department, in Government Medical College, Jammu. There is nothing on record to suggest that her transfer to Govt. Dental College, Jammu was at her own request. We say so because she was transferred to the Govt. Dental College, Jammu on 15.03.2005,

much before the posts, were transferred from Govt. Medical College, Jammu to Govt. Dental College, Jammu. We, accordingly, hold that there was no option given by her to be adjusted in the Govt. Dental College, Jammu. The question no. 2 is, accordingly, answered.

With regard to third question, i.e., "Whether temporary transfer of the appellant can be construed as deputation from one department to another and consequently her absorption in the new department would automatically cease her lien in the parent department". In this regard, it be seen that there are two situations which emerge from the aforementioned facts. The appellant was transferred outside her service even though at her own request. Rule 27 of the Civil Services (Classification, Control and Appeal) Rules, 1956 deals posting and transfers wherein it is provided a member of a service or class of a service may be required to serve in any part of the State in any post borne on the cadre of such service or class. The appellant was transferred outside the service as such it could not be construed to be transfer within her own service. The other mode of transfer permissible under rule is by deputation which contemplates that the Government servants can be transferred in public interests outside their parent organization on a temporary basis. The transfer of appellant to Government Dental College Hospital, Jammu can be construed to be on deputation from his parent organization on a temporary basis. The deputation defines as under:-

"Deputation:- The term "Deputations" will cover appointments made by transfer of "In-service" Government Servants in public servants outside their parent Organisation on a temporary basis. The

deputation may be from one Government Department to another of the State Government or from a Government Department (of the State) to any Corporation, Company, Autonomous Body, Public Sector Undertaking wholly owned and controlled either by the State Government or by the Central Government, or any other State Government in the country. It shall include transfers made in public interests to Municipalities, Local Bodies, Statutory bodies, and all other Non-Government Organizations, Bodies, and Institutions within or outside the State.”

After having said so, the question that requires to be determined is as to whether her appointment substantively in the new department would automatically have the effect of termination of her lien from her parent department. This is an area where controversy has to be determined looking to the stand of the parties.

Mr. Shukla, learned counsel for the appellant contends that appellant was absorbed in the Govt. Dental College, Jammu as a consequence of which tentative seniority list of Junior Staff Nurse as on 01.04.2006 was issued by the respondent-Principal Dental College, Jammu showing her at S.No.1 whereas private respondents at S.Nos. 2, 3 and 4 respectively. The communication dated 08.09.2006 seeking her option for being absorbed was issued only after she was already absorbed in the new department. The option, if any, was required to be sought from the appellant prior to her absorption or the date when the posts were transferred from Govt. Medical College, Jammu to Govt. Dental College, Jammu. The option could not have been exercised after the event. He further contends that the appellant was admittedly on deputation in the Government Medical College, Jammu

for a period of more than five years without any objection being raised by her parent department, her absorption in the Govt. Dental College, Jammu would automatically cease her lien in the parent department. The question of absorption in the Government Dental College, Jammu was not at all an issue with the respondents and they all along accepted her absorption in the Government Dental College, Jammu. It is in the light of this the appellant was at S.No.1 in the tentative seniority list and consequently at S.No.4 in the final seniority list (impugned herein) which set at rest the controversy regarding her absorption.

On the other hand, the stand of the respondents is that the appellant was transferred in Govt. Medical College, Jammu on her own request and consequently on creation of new department, the said post came to be transferred to Govt. Dental College, Jammu, would not create any right in her to claim seniority over and above the private respondents as her status did not change that of borrowed employee on the creation of new department. What is emphasized is that since the post where she was working came to be transferred to Govt. Dental College, Jammu, would not give her right to claim her seniority over and above the private respondents. She admittedly was not borne on the strength of Govt. Medical College, Jammu.

Further stand of the respondents is that the appellant was never absorbed in Govt. Medical College, Jammu. The fact is that the post against which she was working stood transferred to Govt. Dental College, Jammu, her absorption in the department would depend upon the option which was sought from her by the department. In essence, it is stated that her absorption in the department will be construed to be at

her own request as her lien in the parent department continued to exist. The post which she was holding, was borne on the strength of Government Dental College, Jammu as such, her lien continues in the parent department. Only those persons who are borne on the strength of the Government Medical College, Jammu would acquire their lien in the Government Dental College, Jammu.

While examining the rival contention of the appellant, it be seen that as to whether the appellant has been absorbed in the newly created department or not. Much stress has been laid on this issue by the learned counsel for the respondents. In order to appreciate this controversy, certain facts are required to be noticed:-

- (a) That the appellant was posted in Govt. Dental College, Jammu on 15.03.2005. The communication dated 20.12.2005 also makes mention about the persons who were working in Govt. Dental College, Jammu in which name of the appellant is also included. The decision to create new department and consequently transfer of posts from Govt. Medical College, Jammu permanently to Govt. Dental College, Jammu, was taken in February, 2006.
- (b) That vide communication dated 08.09.2006 option was sought from the appellant to be absorbed in the newly created department. This option was given to her when she was admittedly working in the newly created service and not at the time when new service

was created. It is not the case of the respondents that all the Junior Staff Nurses working in Government Medical College, Jammu were transferred along with their posts to the newly created department. The appellant could be still retained in the Govt. Medical College, Jammu.

- (c) That issuance of tentative seniority list shows the appellant at S.No.1 and consequently issuance of final impugned seniority list clearly indicates that the appellant all along was accepted as member of the newly created service. It may be noted that the impugned seniority list showing the appellant at S.No.4 has been issued even though no option was admittedly given by the appellant.

The issue of her absorption on these facts cannot be contested by the respondents.

After having said so, the question that arises for consideration is as to whether the appellant has acquired the lien in the newly created department. It be noted that in pursuance to the need of the Government Dental College, Jammu, the services of the persons who were working in various department of the Government Medical College, Jammu were sought for the purpose of making newly created department functional. Order dated 23.02.2006 clearly reveals that the persons who were holding the posts in the Government Medical College, Jammu would stand transferred to Government Dental College, Jammu. As

a result of this transfer, they will acquire their lien in the newly created department i.e. Government Dental College, Jammu. Order nowhere mentions that the persons borne on the strength of the Government Medical College, Jammu alone would be absorbed in the newly created department. As such, it cannot be said that the appellant who admittedly was holding the post on the said date, had not acquired the right to be absorbed in the said department.

The issue regarding her status in the borrowed department as indicated hereinabove was that of deputationist. Vide order dated 23.02.2006 she was transferred along with other members working in the Government Medical College, Jammu to Government Dental College, Jammu. The deputation, in essence, means transfer from one Government Department to another. It is not in dispute that the services of the staff of the Government Medical College, Jammu when appellant was on deputation, stood transferred to the newly created department. The question that arises for consideration is as to whether the appellant will be entitled to her service rendered in her parent department. This issue is no longer res integra.

Learned counsel for the appellant has placed reliance on Rule 37-A of General Rules which reads as under :-

“37-A Unless in any case it be otherwise provided in these Regulations, Government servant 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. A Government servant on his substantive appointment to a tenure post may acquire a lien thereon without ceasing his lien on any other permanent post.”

The import of aforesaid Rule clearly states that a person appointed on substantive basis to any permanent post acquires a lien on that post and ceases to hold any lien previously acquired on any other post.

In case entitled K.Madhavan and another v. Union of India and others reported in AIR 1987 SC 2291, wherein their lordships in para no.21 held as under:-

“21. We may examine the question from a different point of view. There is not much difference between deputation and transfer. Indeed, when a deputationist is permanently absorbed in the CBI, he is under the rules appointed on transfer. In other words, deputation may be regarded as a transfer from one government department to another. It will be against all rules of service jurisprudence, if a government servant holding a particular post is transferred to the same or an equivalent post in another government department, the period of his service in the post before his transfer is not taken into consideration in computing his seniority in the transferred post. The transfer cannot wipe out his length of service in the post from which he has been transferred. It has been observed by this Court that it is a just and wholesome principle commonly applied where persons from different sources are drafted to serve in a new service that their pre-existing total length of service in the parent department should be respected and presented by taking the same into account in determining their ranking in the new service cadre. See R.S. Mokashi v. I.M. Menon, (1982) 1 SCC 379: (AIR 1982 SC 101) : Wing Commander J.Kumar v. Union of India, (1982) 3 SCR 453 : (AIR 1982 SC 1064).”

Similar issue has been dealt in case entitled S.I.Rooplal and another v. Lt. Governor through Chief

Secretary, Delhi and others reported in AIR 2000 SC 594, wherein their lordship have held as under :-

“ It was pursuant to the needs of Delhi Police that the appellants were deputed to Delhi Police from the BSF following the procedure laid down in R.5(h) of the Rules and subsequently absorbed as contemplated under the said Rules. It is also not in dispute that at some point of time in the BSF, the appellants’ services were regularized in the post of Sub-Inspector and they were transferred as regularly appointed Sub-Inspectors to Delhi Police force. Therefore, on being absorbed in an equivalent cadre in the transferred post there could be no reason why these transferred officials should not be permitted to count their service in the parent department.”

After having said so, it be seen that there is no formal order of her termination of lien from her parent department. In this case, the appellant has been working for the last more than five years in other department on deputation, her lien would stand terminated when substantively appointed on another post and acquire lien on that post. Reliance is placed on a Government Order dated 23.02.2006 which provides that the persons who were working in the Government Medical College, Jammu will acquire their lien in the newly created department i.e. Government Dental College, Jammu, as such, no formal order of termination of her lien was required to be passed by the respondents.

Learned counsel for the appellant also placed reliance in case entitled State of Rajasthan and another v. S.N.Tiwari and others reported in (2009) 4 SCC 700 wherein their lordship have held as under :-

“Service law-Lien-Termination of-When occurs-Formal order, when not required-Working for long period in another department on deputation-Treatment/conduct of parent department towards deputationist -Relevance-Lien of an employee, held, is terminated from previous post when he is appointed substantively on another post and acquires lien on that post-In such a situation, formal order terminating lien on previous post is not required as termination of lien is automatic-On facts held, respondent continued to retain lien in his parent department, namely, Directorate of Economics and Statistics Department, even though he had worked as homoeopathic doctor in ESI Corporation till his retirement, for the reason that he never acquired lien in ESI Corporation-Further held, High Court was right in holding that mere fact that respondent continued to work for a long period itself would not result in loss of lien in the parent department-Also, even after the respondent employee joined as homoeopathic doctor in ESI Corporation in 1980 the parent department treated the respondent employee as belonging to its own cadre- Rajasthan Service Rules-R.18-Labour Law-Employees’State Insurance Act, 1948, S.17”

In view of the above, this appeal deserves to be allowed on the following reasons:-

- (i) That the appellant was on deputation in Government Medical College, Jammu and was permanently absorbed in the Government Dental College, Jammu as she was on transfer from one Government Department to another.
- (ii) That seniority of the appellant in the parent department is required to be carried forward in the new department where she is permanently absorbed;

(iii) That on account of absorption of the appellant in the new department, her lien in the parent department shall cease to exist.

Accordingly, we allow this appeal and set aside judgment dated 17.07.2009 passed by the learned Single Judge. Consequently, final seniority list of Junior Staff Nurse in which appellant is shown at S.No.4 shall stand quashed.

Disposed of along with connected CMP(s).

(Sunil Hali)
Judge

(Dr. Aftab H.Saikia)
Chief Justice

Jammu
22.10.2010.
'Madan'