

HIGH COURT OF JAMMU & KASHMIR AT JAMMU

SWP No. 1526/2011 CMP No. 2218/2011 c/w
SWP no. 1583/2011 CMP No. 2312/2011

Date of order: 22.09.2011

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1. Sudarshan Kumar Mishra and ors. v. State and ors.
 2. Suresh Sethi v. State and ors.
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Coram:

Hon'ble Mr. Justice Muzaffar Hussain Attar, Judge

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1. Whether approved for Law Journal? **Yes**
 2. Whether approved for publication in Press?
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Appearing counsel:

For the petitioner(s): Mr. M. K. Bhardwaj, Sr. Advocate with
Mr. Ajay Abrol, Advocate
Mr. Sudershan Sharma, Advocate
Ms. Rozina Afzal, Advocate
Mr. Sunil Sethi, Sr. Advocate with
Ms. Veenu Gupta in SWP No.1583/2011

For the respondent(s): Mr. S. C. Gupta, AAG

(Oral)

SWP No. 1526/2011 CMP No. 2218/2011

Petitioners are substantively holding the posts of Junior Engineers (civil). In terms of Government Order No. 273-PW (Hyd) of 2011 dated 28.07.2011, they have been ordered to be transferred. Petitioners are aggrieved of this order and have challenged the same in this writ petition *inter alia* on the ground that impugned transfer order, so far

as it relates to the petitioners, is not made in the interest of administration; some of the petitioners have not completed minimum tenure of two years at the place of posting wherfrom they have been ordered to be transferred; some persons having more tenure than the petitioners have been retained whereas petitioners have been ordered to be transferred. It is also stated that petitioners have been ordered to be transferred in malafide exercise of power, inasmuch as, in terms of impugned order they have been deemed to have been relieved from their present place of posting with immediate effect.

Reply affidavit/objections have been filed. Paragraph 2 and 3 thereof is taken note of:

"2-3 For reference of the Hon'ble Court the sanctioned and working strength of Junior Engineer in the four divisions is given as under:

S. No.	Name of Division	Sanctioned Strength	Working Strength
1.	PHE City Division-I, Jammu	20	50
2.	PHE City Division-II, Jammu	29	45
3.	PHE Rural Division, Jammu	20	54
4.	PHE Division, Samba	15	29
Total		84	178

By aforesaid examination 94 Junior Engineers were found excess in said Divisions. The stay of petitioners was

found more than seven years in Jammu/Samba Divisions. The Departmental analysis further revealed that other Hydraulic Wings, Divisions/Departments are functioning with insufficient strength in the Cadre of Junior Engineers. Such situation existed prior to the passing of the impugned order.

In order to streamline the working, by impugned order petitioners and other Junior Engineers have been posted to Wings/Divisions suffering from shortage, where the Services shall be best utilized in public interest. In their places the substitution is not required.

The order impugned does not change the Cadre, the petitioners shall continue as Junior Engineers belonging to the Hydraulic Wing. It does not violate the spirit of Rule 17 J&K Subordinate (Engineering) Recruitment Rules, 1992.

The respondents submit that some of the petitioners claim their postings on medical ground or nearing retirement such petitioners may file appropriate representations, the same shall be examined and considered....."

SWP no. 1583/2011 CMP No. 2312/2011

Petitioner has been ordered to be transferred in terms of impugned order and this petition is filed on the ground that petitioner has been subjected to frequent transfers and State has formulated policy to govern and regulate the power of transfer and posting which is notified vide Government order No. 861-GAD of 2010 dated 28.07.2010. It is submitted that in a period of less than two years petitioner has been subjected to transfer more than four times.

Heard learned counsel for the parties. Considered the matter.

Mr. S. C. Gupta, learned Sr. AAG appearing for respondents in his fairness submitted that petitioner in SWP No. 1583/2011 in view of the pleadings made by him in the writ petition supported by material annexed therewith, may be directed to file a representation before the competent authority and competent authority will consider the same and take a decision thereon and until such time the decision is taken, impugned order will not be given effect to, to the extent of said petitioner.

Learned counsel for petitioners reiterated the stand taken by the petitioners in their pleadings. Learned counsel submitted that most of the petitioners have been transferred prematurely and it is not known as to how the petitioners could be said to be in excess as in terms of the earlier transfer and posting order, they were posted against the posts which were manned by other Junior Engineers prior to their posting in the respective offices. Learned counsel submitted that the entire exercise undertaken by the respondents in issuing the impugned transfer order so far as it relates to the petitioner suffers from non application of mind.

Mr. Gupta submitted that in order to streamline the administration and in view of the stand taken by the State in the reply affidavit/objections, it had become necessary to

withdraw those Junior Engineers whose services were not required at a particular place and they were ordered to be transferred and posted to that place where their services were required. Learned counsel submitted that none of the legal rights of the petitioners is infringed by issuance of impugned transfer order. Learned counsel however, submitted that in case of those of the petitioners who have to retire on superannuation within a period of one year and those who have been posted on medical grounds may file representation to the competent authority and competent authority will take a decision thereon and until such time the impugned order will not be given effect to the extent of those petitioners.

Employer is the best person to see where service of his employee can be utilized. The employer/competent authority has power to transfer an employee from one place to another place. This power of transfer however can not be said to be indefensible. The order transferring an employee can be reviewed by Court, however, on well recognized and established principles of law viz. if the order is issued by incompetent authority, or is issued in breach and violation of statutory rules or is issued in malafide exercise of power.

The power of transfer is conferred on the competent authority in terms of Rule 27 of J&K Civil Services

(Classification, Control and Appeal) Rules, 1956 (for short Rules of 1956). The said rule does not provide for any guidelines which would regulate power of transfer conferred on the competent authority. It is not only one authority who transfers an employee from one place to another. Different authorities in view of their administrative positions have power to transfer a person from one place to another. Every individual authority in accordance with its own understanding and perceptions may order transfer of employee from one place to another. The rule would thus confer unguided, unbridled and unregulated power on the competent authority and would consequently fall foul of Article 14 of the Constitution of India. In order to regulate this power conferred by Rule 27 of Rules of 1956, Government from time to time is framing guidelines which are notified by issuance of administrative orders. The Government has issued Government order No. 861-GAD of 2010 dated 28.07.2010 which reflects policy of the Government in the matter of transfers. These guidelines would thus form part of Rule 27 of Rules of 1956. The strict adherence of these guidelines in all circumstances may not be called for, but as far as possible they are to be adhered to. The adherence to the guidelines notified vide aforesaid Government order would exclude arbitrariness in exercise of

power of transfer. It is for this reason that the competent authority will be bound to follow these guidelines in the matter of transferring an employee from one place to another.

The impugned transfer order in respect of those of the persons who have not completed minimum tenure of two years at their respective place of posting would require by the competent authority to be re-considered, so as to ensure compliance with the guidelines notified vide Government Order No. 861-GAD of 2010 dated 28.07.2010. The ground of malafides urged on behalf of petitioners is devoid of any legal and factual support. The petitioners were deemed to have been relieved for the reason that they were large in number and because they were found to be in excess in the areas of working and no substitute was accordingly provided. Handing over and taking over of charge was not countenanced in these circumstances. The petitioner in SWP No. 1583/2011 admittedly has been subjected to frequent transfers and such an exercise of power has been held to be arbitrary by the Hon'ble Supreme Court in case reported in 1986 SC 1955. The transfer order of the petitioner in SWP No. 1583/2011 is rendered illegal.

For the above stated reasons these petitions are disposed of along with all connected CMP(s) in the following manner:

- a. By issuance of writ of Certiorari, impugned Government order no. 273-PW (Hyd) of 2011 dated 28.07.2011, so far it relates to petitioner in SWP no. 1583/2011 is quashed.
- b. Those of the petitioners in SWP No. 1526/2011 who have not completed their minimum tenure of two years are directed to file representation before the competent authority within a period of one week from today and competent authority is directed to take a decision thereon within a period of ten days. For the aforestated period the impugned transfer order to the extent of those petitioners shall not be acted upon.
- c. Those of the petitioners who are to retire on superannuation within a period of one year and those who have been posted on medical grounds will also file a representation within one week before the competent authority and competent authority will take a decision thereon within a period of ten days thereafter. For the aforestated period the impugned transfer order to the extent of those petitioners shall not be acted upon.

d. All other petitioners to comply with the transfer order and report at the places where they have been ordered to be transferred.

(Muzaffar Hussain Attar)

Judge

Jammu
22.09.2011
Paramjeet