

IN THE HIGH COURT OF UTTARAKHAND

AT NAINITAL

ON THE 28TH DAY OF JANUARY, 2021

BEFORE:

HON'BLE SHRI JUSTICE SHARAD KUMAR SHARMA

WRIT PETITION (S/B) No. 51 of 2021

BETWEEN:

Dr. Sandhya Raj (Female) aged about 32 years, W/o Shri Kamal Kishor presently posted as In-charge Medical Officer at Employee State Insurance Dispensary, Jaspur District Udham Singh Nagar Uttarakhand.

....Petitioner

(By Mr. D.S. Patni, Senior Advocate, assisted by Mr. Dharmendra Barthwal, Advocate)

AND:

1. State of Uttarakhand through Secretary Labour & Employment, Civil Secretariat Dehradun, Uttarakhand.

2. The District Magistrate Udham Singh Nagar Uttarakhand.

3. The Director Employees State Insurance Corporation Makkawala Dehradun.

4. The Chief Medical Officer Employees State Insurance Corporation Makkawala Dehradun.

5. Shri Narendra Singh Chauhan son of Shri Harpal Singh resident of Patti Chauhan Jaspur District Udham Singh Nagar, Uttarakhand.

.....Respondents

(By Mr. Puran Singh Bisht, Additional Chief Standing Counsel for the State of Uttarakhand/respondent nos. 1

& 2 and Ms. Sakshi Singh & Mr. C.K. Sharma, Advocates for respondent no. 3)

JUDGMENT

The petitioner, in the present writ petition, has given a challenge to the impugned order of transfer dated 20.01.2021, as was passed by respondent no. 1, whereby her services of the petitioner, which she was discharging, as an In-charge Medical Officer, E.S.I. Dispensary, Jaspur, District Udham Singh Nagar, have been sought to be transferred from the said place of posting to Kotdwar, District Pauri Garhwal. The impugned order of transfer, as had been passed by the Secretary, Labour Department, to the State of Uttarakhand, had been passed by making a reference to the provisions contained under Section 27, as well as Section 18(4) of the Transfer Act. Both the provisions are extracted hereunder:

"27. Removal of difficulties in the application of the Act. - (1) After the promulgation of this Act, this Act shall have over-riding effect on Acts/Annual Transfer Policies of other departments:

Provided that if any change in any provision of this Act, is required by any department due to any specific circumstances of the department or any deviation in necessary or relaxation is indispensable, the proposal of such changes/deviations/relaxations shall be submitted with reasons before the committee constituted under the Chairmanship of Chief Secretary and consisting the following members-

(a) Additional Chief Secretary/Principal Secretary Forest and Infrastructure Development Commissioner;

(b) Additional Chief Secretary/Principal Secretary Agricultural Production Commissioner; and

(c) Principal Secretary, Personnel as its member and necessary changes/deviations/relaxations shall be allowed after the approval of the Chief Minister on recommendations made by this committee.

(2) This committee shall submit its recommendations for the approval of Chief Minister regarding the difficulties arising in application of this Act or such unforeseen matters which are not included in this Act, thereafter the State Government may make rules as required."

“18. Procedure of Posting on Appointment/Promotion and other Transfer. - In addition to annual/general transfer, the procedure of posting in appointment/promotion and other transfers shall be in following conditions, as follows-

(1)

(2)

(3)

(4) On enquiry, on the grounds of serious complaints of misconduct, misbehaviour with senior officers and lack of interest in work, etc. after necessary enquiry and confirmation, transfer of such employee may be made on administrative grounds:

Provided that the transfer on administrative grounds shall not be made casually or on the basis of complaints of routine nature and in the orders of such transfer it shall be necessary to mention Administrative Grounds.”

2. When yesterday, the matter was taken up, the learned Senior Counsel for the petitioner has argued the writ petition under the pretext that, the impugned order of transfer, where it makes a reference to Section 27, it does not make a reference to the compliance of sub-section (2) of Section 27, which contemplates a ratification/approval of the decision, which had been taken by the Committee, which is provided under sub-section (1) of Section 27 of the Act. To which, the learned Additional Chief Standing Counsel, was granted time to complete his instructions and make his statement about the compliance of sub-section 2 of Section 27 of the Act.

3. If the provisions contained under Section 27(2) of the Act itself is taken into consideration, it provides that, where the Committee, thus, constituted under sub-section (1) of Section 27 takes a decision, it has had to be compulsorily approved by the Chief Minister, under sub-section (2) of Section 27.

4. The argument of the petitioner, is that the reference to Section 27 and the decision taken by the Committee, thus, provided under sub-section (1) of

Section 27 itself, was not validly constituted and even the decision making process itself is bad in the eyes of law. There are two reasons for not accepting this argument of the learned Senior Counsel for the petitioner. Because, at the **first instance**, the challenge to the subsequent recommendation made by a next superior authority i.e. none other than the Chief Minister of the State, would have its automatic implication that the decision of the Committee, thus, constituted was justified, and valid, because it was thereafter only the ratification, by way of an approval, has been made by the Chief Minister, which is not the subject matter of the challenge in the present writ petition. Thus, argument extended by the learned Senior Counsel for the petitioner, pertaining to the impugned order not meeting out the spirit and the provisions of Section 27 of the Act, is not accepted by this Court.

5. Reverting back to the **second limb** of his argument of invocation of sub-section 4 of Section 18 of the Act, he submits that, for the purposes of attracting sub-section 4 of Section 18 of the Act, it refers to an enquiry on the ground of a serious complaint of misconduct. He submits that the enquiry, which was said to have been conducted, does not reflect a commission of a serious misconduct on the part of the petitioner which could call for transfer and, hence, the invocation of sub-section 4 of Section 18, may not be justified in the circumstances of the present case, because the leasing out of the building, which was under the title and ownership of the husband of the petitioner for the purposes of E.S.I. Dispensary, may not be faulted, because it will not amount to be a misconduct. The Court is of the

view that the term 'enquiry' used under sub-section 4 of Section 18 of the Act, as per the opinion of this Court, will not be treated as to be a substitute to an enquiry contemplated under the Disciplinary and Appeal Rules of 2003, as it has been provided under Section 24 of the Act. The logic behind it is that, if a detailed enquiry, after recording of its evidence and satisfaction, is required to be conducted under sub-section (4) of Section 18 of the Act, then there was no need for the Legislature to independently attract the Disciplinary and Appeal Rules, by introducing its applicability by Section 24 of the Transfer Act, as referred therein.

6. As far as the allegations, which are reflected from the transfer order, I am of the view that since the petitioner herself was enjoying the office of In-charge Medical Officer of E.S.I. Dispensary, Jaspur, District Udham Singh Nagar, her instrumentality, in extending the property belonging to her husband, for the purposes of being leased out for establishment of the E.S.I. Dispensary, will fall to be within the ambit of sub-section (4) of Section 18 of the Act and, consequently, the attraction of sub-section (4) of Section 18 to be read with Section 27, is not erroneous, and legally faulted.

7. The **third limb** of the argument of the learned Senior Counsel, for the petitioner was from the prospective that the provisions of Section 18 and Section 27 contemplate a decision making process by a Committee and the Transfer Committee, the reference of which could be borrowed, is from Section 16 to be read with Section 17 of the Act itself and the distinction, which is being sought to be argued by the

learned Senior Counsel, is that, if Section 17 is harmoniously read with Section 18 of the Act, the decision ought to have been taken by the Special Transfer Committee, which is not contemplated under Section 27 of the Act. There is yet another justification for not accepting this argument of the learned Senior Counsel, for the reason being that, the constitution of a Committee, under Section 16, for the purposes of considering the Annual General Transfer, there happens to be a marked distinction, to the Committee which is contemplated under sub-section (1) of Section 27 and the Legislature has, that is why, deliberately introduced the constitution of two different distinct Committees, under Section 17 and Section 27 of the Act, to meet out altogether a different purpose of a specific set of allegations, falling under Section 18 sub-section 4, for which the Committee, to exercise the power, is provided under Section 27 and, for the purposes of regular transfer, its the Committee contemplated under Section 16 to be read with Section 17. Hence, this distinction, with regards to the defect pointed out by the learned Senior Counsel for the petitioner, with regards to the constitution of the Transfer Committee, is also not acceptable by this Court.

8. For the aforesaid reasons and coupled with the fact that the information supplied by the learned Additional Chief Standing Counsel for the State today that the approval of the decision of the Committee, taking a decision under sub-section (1) of Section 27, has been granted by the Chief Minister, I do not find any apparent error in the order of transfer.

9. Consequently, the writ petition lacks merit and the same is, accordingly, dismissed.

(SHARAD KUMAR SHARMA, J.)
Vacation Judge

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