

Tahira and ors. Vs. State and ors.

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Court : Jammu and Kashmir

Decided On : Aug-05-2003

Reported in : 2003(3)JKJ345

Judge : V.K. Jhanji, A.C.J. and; S.K. Gupta, J.

Acts : Service Law; ;Jammu and Kashmir Civil Services (Decentralization of and Recruitment to Non-gazetted Cadre) Rules, 1969 - Rule 10; ;Jammu and Kashmir Civil Services Recruitment Rules, 1992 - Rules 17 and 24; ;[Constitution of India](#) - Articles 14 and 226

Appeal No. : SWP Nos. 895/2003 and Ors. Pertaining to Srinagar wing and LAP (SWPdO No. 142/2003 and SWP No. 1110/

Appellant : Tahira and ors.

Respondent : State and ors.

Advocate for Def. : J.S. Kotwal,; U.K. Jalali,; V.R. Wazir,;

Advocate for Pet/Ap. : Z.A. Shah,; R.A. Jan,; Z.A. Qureshi,;

Judgement :

V.K. Jhanji, A.C.J.

1. Education is fundamental and pivotal, rather the cornerstone, to the social welfare and nation building. Looking back through history, it is found that the

aspiration to have a literate society was deeply rooted in our struggle for independence, so much so that resolutions were passed much earlier to independence by the mainstream political parties spearheading the freedom movement, for providing free and compulsory elementary education through out the country. The visionary founders of our Constitution enshrined this ideal dream of our forefathers in Articles 41 and 45 of the Constitution. The State of Jammu and Kashmir did not lag behind. The State Constituent Assembly set out identical goals for the State in Section 20 of the Constitution of Jammu and Kashmir. The Government of Jammu and Kashmir, in order to foster the social revolution, and with a view to practically implementing the constitutional directives, as aforesaid, framed law and established elementary schools through the length and breadth of the State. The social revolution was in the process of transformation and realisation when the State was caught in quagmire of the turmoil. In or around the year 1990, a section of the society migrated from the Valley on account of which the education system in the Valley was badly affected. However, with a view to saving the system from derailment, the State took immediate steps and filled up all such vacancies by substitute arrangements so that the children, receiving education in these Schools, did not suffer for want of teaching staff. It appears that, in and after mid-nineties, though there are few cases earlier to that, until recently, the Government has effected one-way at-the-request inter and intra district and inter provincial transfers and attachments of teachers / masters / lecturers, mostly ladies, (generally, hereinafter referred to as 'teachers'). Identical transfers and attachments were made from other Districts to the Districts of Srinagar, Jammu and Budgam. Budgam is a District abreast the city of Srinagar and its district headquarters are located just at a distance of 14 to 15 kilometers from the city of Srinagar. These inter and intra District and provincial transfers and attachments were sought on the basis of threat perception, medical grounds and / or on the ground of the privilege to live together as husband and wife, the husband being a Government servant and posted either at Srinagar or at Jammu. On the one hand, this led to concentration of such teaching staff particularly in the Districts of Srinagar, Budgam and Jammu, mostly in the urban areas, on the other the Schools in rural areas, for which these teachers were appointed, were left bereft of teaching staff. Realising the deviant feature and the chaotic situation this

trend had culminated into, the State Government in the Education Department issued Order No. 661-Edu of 2003 on 21st June, 2003, ordering, with immediate effect, the revocation of all intra-district / inter-district attachments / transfers of teachers and intra-district/inter-district attachments of Masters and Lecturers. Since the order had taken 'immediate effect' all these teachers were relieved by the concerned Heads of the educational institutions with direction to report back at their respective parent places of postings.

2. Numerous writ petitions came to be filed by these teachers before this Court, both at Jammu and Srinagar, challenging the legality of the aforesaid Government order dated 21st June, 2003. In the Srinagar wing of the Court alone, till the matter came up for hearing before us, 188 writ petitions were filed. In usual course, these petitions came up for consideration of admission, both at Jammu and Srinagar, before the learned Single Benches and, in most of the cases, interim directions for maintenance of status-quo, or orders staying the operation of relieving letters, were passed. Against the order of status-quo passed by the learned Single Bench at Jammu in one such petitions, being SWP No. 1110/2003, filed by as many as thirty-one petitioners, the State and its concerned functionaries came up in Appeal, being LPA(SWP)No. 142/2003, before the Division Bench of the Court at Jammu. Considering the exigency and the interests of the large number of teachers and students involved in the matter, the Division Bench, on 8th July, 2003, inter alia, observed as under:

' We are of the view that it would be in the interest of all, if the writ petitions arising out of Government order dated 21.6.2003 are heard by the Division Bench for an authoritative decision... '

Accordingly, these matters, both at Jammu and Srinagar, alongwith the aforesaid Letters Patent Appeal, were heard by us. Since all these petitions arise out of one and the same Government order dated 21st June, 2003 and involve almost identical questions of law and of fact, therefore, by this common order, we admit to hearing and proceed to decide all these writ petitions filed both at Srinagar and Jammu wings of this Court alongwith the Letters Patent Appeals.

3. Broadly speaking, these writ petitions can be divided into three sets and categories, namely:

(i) one, involving those teachers whose transfers/attachments have been made on medical grounds on account of their own ailment or of their kith and kin;

(ii) second, those teachers whose transfers/attachments have been ordered by the Government, from time to time, on the ground of threat perception; and

(iii) third, those teachers whose transfers/attachments have been ordered on the ground of living in a joint family, i. e., the husband is a government employee and posted at Srinagar and wife has sought the privilege of living with her husband. In this category of petitioners, there are several petitions wherein:

(a) the husband is not a government servant but is doing business or has retired from service;

(b) the husband, whether a government servant or not, has married a woman belonging to some other district.

4. We have heard at great length all the learned counsel, one by one, appearing in each of these petitions with particular reference to the facts of each case and the learned Advocate General, appearing for the State. However, at Srinagar, Mr. Z. A. Shah, learned counsel, appearing in few of the petitions, and at Jammu M/s Anil Sethi, J. S. Kotwal, U. K. Jalali, V. R. Wazir, J. P. Singh, D. C. Raina opened the case on behalf of all the learned counsel and advanced arguments touching all the possible issues arising in the matter. According to them, the outcome of these writ petitions hinges upon the determination of the following questions:

1. Whether the original orders, under which the transfers/attachments of petitioners were made, were void or valid and, even if, on any count, those orders were void, whether the Government could undo the same by one single order?

2. Whether the impugned order is bad in law?

3. If the answer to question No. 2 above is in negative and the order withstands the judicial scrutiny, then, whether such up-holding should be made subject to

reconsideration of the facts attendant to each case?

4. Whether the impugned order is really for administrative exigencies?

5. Whether the impugned order, in relation to the petitioners whose transfer / attachment was ordered on the ground of threat perception, will have the effect of invalidating the ground on which such original attachment order was passed?

6. Whether the impugned order is legally mala fide, i. e. whether it suffers from the vice of non-application of mind?

5. The validity of the orders under which these transfers and attachments in respect of the petitioners were made, is not in question before us, therefore, we need not delve into the question whether those orders were valid or void.

6. Learned counsel for the petitioners argued that the initial orders of attachment/transfer of all the petitioners were passed after due consideration of the relevant factors attendant to each case. According to them, in respect of those of the petitioners, whose transfers / attachments were ordered on security grounds, reports were duly obtained by the concerned functionaries of the Government, either from the Criminal Investigation Department (CID) or from the Police Department and, it was only after the apprehensions expressed by them about the imminent threat to their lives was verified and certified by the concerned governmental agencies, that their attachments were ordered. It was contended that the threat perception subsisted even till date and, in any case, once the Government, at one stage, was satisfied that such petitioners' lives were in peril, before passing the impugned order, it was obligatory on the part of the Government to obtain fresh reports from their concerned agencies to examine and satisfy themselves whether there was any substantial change in the threat perception on the basis of which the petitioners' earlier attachments and transfers were ordered, or else, to call upon such petitioners to show cause why they be not sent back to their parent cadres and Schools from where they had been brought so that the petitioners could themselves have an opportunity to establish before the Government that the threat perception subsisted. It was submitted that the State is bound to protect the life and liberty of each of its citizen and that, in the

facts and circumstances attendant to each such writ petition, the impugned order is clearly a death knell for these petitioners. Learned counsel have further contended that there was no fresh material before the State Government on the basis of which it could have passed the impugned order. On that count, it is urged, the impugned order suffers from the vice of non-application of mind. Arguments on similar lines were advanced with respect to the writ petitioners whose transfers and attachments were made on medical grounds. In so far as the petitioners, whose transfers and attachments, were made on the ground of living together with husband, it was argued that it was the policy of the Government declared way back in 1964 and the State Government could not go back on, or against, its declared policy.

7. During the course of arguments, we were taken through the annex-ures appended with each of these petitions and we noticed that, in most of the cases, there were reports from either the CID or the Inspector General of Police, testifying to the existence of security threat at the relevant times. All these documents were read out in the court in the presence of learned Advocate General and the same were neither disputed by the State in the objections nor by the learned Advocate General during the course of arguments. Given the large number of petitions and the record appended with them as annexures, which collectively is voluminous, we feel it impracticable and, in fact, unnecessary to narrate factual details of each case. The fact is that these orders of inter and intra district transfers and attachments were issued by the Government or its various functionaries.

8. Since the State has chosen not to contest the factual averments made by the petitioners, they have filed stereotype objections in each of these petitions, highlighting, inter alia, the chaotic and grim situation that had led to the issuance of the impugned order. In objections, it is stated that in various departments of the government, including the government Schools run by the State Education Department, posts have been created on State cadre, Divisional cadre and District cadre basis. The district cadre posts are being filled up from amongst the candidates of that particular district who have to serve in that district. A candidate appointed in a particular cadre has all the rights as a member of that cadre and equally has the duty to serve in that cadre. Ordinarily, a member of a particular

cadre has to serve in his own cadre and he cannot be transferred to another cadre, save and except in the public interest. It is stated that 'attachment' is not a recognised mode of transfer. Teachers, being mostly members of district cadre services, have to serve in their respective cadres. It is further stated that each district cadre has its own sanctioned strength of teachers and the idea behind localised appointments is to ensure that the candidates, on being appointed, serve in their respective district cadres so that the services do not suffer or become redundant. It is stated that for last some years some teachers in the State have managed to get themselves transferred from other districts either to district Jammu or Srinagar or certain areas of Budgam district falling within the municipal limits of Srinagar city. This, according to the State, has created a void in the district cadre teaching services in those of the districts wherefrom these teachers have been shifted; as a result the students of these respective districts are suffering for want of teachers. Further more, it is stated that, since there are large number of private schools run in the Districts of Jammu, Srinagar and Budgam and the people generally prefer these private schools, the roll in Government Schools in the urban areas, resultantly, is considerably low as compared to rural areas of the State, where the roll in Government Schools is high. Further, the urban students have better avenues of education at elementary level and that is not so in rural areas. It is stated that on account of these transfers and attachments, the Government Schools in urban areas were flooded with teachers as a result most of the urban Schools have teachers more than the sanctioned strength. By way of illustration, the State has appended with its objections filed at Srinagar, three comparative statements as annexures 'R1', 'R2' and 'R3', demonstrating the imbalance between the sanctioned and the posted strength of these teachers and the teacher-student ratio in the urban and rural Schools. Certain other statements have also been appended with the appeal in this regard. Few of these facts and figures would be referred to by us in this judgment at the relevant place. In regard to the posting of husband and wife nearer to each other, it is, firstly, stated that cannot be made a ground for seeking posting at one place and secondly the circular in this behalf has to be read in context of cadre of service.

9. Let us first examine the Rule position. The first set of Rules we were taken through by both sides are the Jammu and Kashmir Civil Services (Decentralisation

of and Recruitment to Non-Gazetted Cadres) Rules, 1969. Rule 10 of these Rules provided for transfers and it read as under:

'10. Transfers. -- A member of the State/Divisional/District cadre will ordinarily be transferable within his own cadre;

Provided that in public interest and for reasons to be recorded in writing he may, in exceptional cases, be transferred to a post in any of the cadres, but his lien and promotion prospects shall be protected in his parent cadre.

Note: -- (i) A member of any cadre shall be transferred to and from State cadre and from one State cadre to another under orders of the Government (General Department).

(ii) A member of Divisional cadre shall be transferred to another Divisional cadre or to any District cadre under orders of the Head of the Department with the approval of Administrative Department. Copies of all such orders shall be endorsed to the Chief Secretary for scrutiny.

(iii) A member of District cadre shall be transferred from one District cadre to another or from District cadre to Divisional cadre under orders of the Head of Department with approval of Administrative Department. Copies of all such orders shall be endorsed to the Chief Secretary for scrutiny;

Provided further that for posts in Ladakh District, irrespective of any other provision contained in these rules, members of any of the State, Divisional or District cadres may be transferred for such tenure as the Government may deem fit from time to time. In all such case the lien and promotion prospects of such members shall be protected in their parent cadre. '

10. Vide SRO 194 dated 18th August, 1992, the Government of Jammu and Kashmir in the General Administration Department promulgated the Jammu and Kashmir Subordinate Service Recruitment Rules, 1992 (hereinafter referred to as 'the Rules of 1992'). Rule 24 of these Rules reads as under:

'24. Repeal and Saving: -- Save as otherwise provided in these rules, if immediately before the commencement of these rules or before the commencement of the Jammu and Kashmir State Subordinate Service Recruitment Board Act, 1990, there were or are in force in the State, any rules, notifications or orders corresponding to these rules, those rules, notifications or orders shall stand repealed. Provided that the repeal shall not affect the previous operation of any law, rule, notification or order so repealed or anything duly done or suffered thereunder;

Provided further that any application invited or received or any other process initiated for selection of candidates for recruitment to the subordinate service by any authority before the commencement of these rules shall be transferred to the Board and the Board may take such action.'

11. The effect of the aforesaid repealing clause is that the Rule 10 of the Decentralisation Rules of 1969 is no more of any relevance. In terms of Rule 1, the Rules of 1992 are made applicable to all non-gazetted posts under the Government, excepting certain posts for which special treatment is expressly, or may be, provided under any law, rule, order or notification, and some other categories of posts enumerated therein. Rule 17 of these Rules deals with transfers and provides as under:

'17. Transfers. -- A member of the State/Divisional/District cadre will ordinarily be transferable within his own cadre;

Provided that in public interest he may be transferred to a post in any of the cadre, but his lien and promotion prospects shall be protected in his parent cadre.

Note; (1) a member of any cadre shall be transferred to another only under orders of the Government (General Administration Department).

(2) A member of Divisional cadre shall be transferred to another Divisional cadre or to any District cadre under orders of the Head of the Department.

(3) a member of District cadre shall be transferred from the district cadre to another or from District cadre to Divisional cadre under orders of the Head of the

Department:

Provided further that for posts in Ladakh District, irrespective of any other provision contained in these rules, members of any of the State, Divisional or District cadres may be transferred for such tenure as the Government may deem fit from time to time. In all such cases the lien and promotion prospects of such members shall be protected in their parent cadre. '

12. A perusal of the aforesaid Rule, inter alia, reveals that, ordinarily, a member of a cadre has to be transferred within his own cadre and that inter-cadre transfers can be made only in 'public interest';

13. There is no dispute with regard to the power of the Government to order inter-district and inter-divisional transfers. However, it is contended that once this power was exercised by the competent authority on specific grounds, the orders could not be revoked by the Government, that too, by a general order. On the other hand, the learned Advocate General argued that ordinarily the transfers have to be made within the cadre and, in case inter-division or inter-district transfers are to be made, it is only the Government in General Administration Department, who can do so. The argument put across is that since the earlier orders were passed in total disregard of the aforesaid rule, the Government was within its powers to set right the wrong that had been committed. Referring to note (1) under the first proviso to Rule 17 of the Rules of 1992, Mr. Naik, learned Advocate General, submitted that the word 'only' mentioned therein unambiguously demonstrates that the inter-division and division to district transfers and vice-versa fall solely within the domain of the Government in General Administration Department and that such orders cannot be passed by either the Secretary to Education Department or the Heads of Department.

14. It is the cardinal rule that he who has the power to do a thing has the power to undo the same. However, we are not convinced that the transfers could be ordered only by the Government in the General Administration Department. The impugned order, which the learned Advocate General is seeking to defend, has been issued by Secretary to Government Education department. If he did not have the power to transfer, how could he undo the same. Besides, there seems to be a

discrepancy within the Rule itself. We have two Directorates of School Education - one at Srinagar and another at Jammu. Each Directorate has jurisdiction over the Schools falling within its Division. One Directorate cannot exercise any of its powers with respect to the Schools falling in another Division. These powers include transfers and postings of teachers. Therefore, it is not understandable how can these Directorates effect inter-provincial or inter-divisional transfers of teachers. Then there are powers delegated under Jammu and Kashmir Civil Service Regulations, 1956, which are more specific and elaborate, contained in Schedule I-D thereof. Be that as it may, we have already observed that earlier orders are not in question before us, nor are any rules under challenge; therefore, it would be purely of academic interest to ascertain which authority has powers and to what extent.

15. With regard to transfer of Government employees, the first and the foremost accepted cardinal rule is that the same is an incident and basic feature of service. It is necessitated in order to run the administration with as high as possible a degree of efficiency, objectivity, integrity and speed. These help fostering a fusion of ideas and understanding in a particular service. That apart, the public interest and exigencies of service are of paramount importance and supreme, since the services are created for public good at large. Keeping this philosophy behind transfers in view, it has been the consistent view of the Supreme Court and of the High Courts in the country that courts should not ordinarily interfere with the orders of transfer. Courts cannot gauge the exigencies of a service. Vide Circular No. X of 1964 dated 31st July, 1964, the Government of Jammu and Kashmir declared its policy governing transfers and postings of Government servants. This Circular has been strenuously relied upon by the learned counsel for the petitioners. The said policy is extracted below.

'Government have considered and decided to lay down a broad policy, as outlined below, to govern transfers and postings of staff, in particular of those whose duties are of an executive nature. While Government servants are liable to be transferred anywhere within the territory of the State, it is fair that transfers follow a method and reasonable difficulties of Government servants involved are also given considerations. The basic need for transfers is to run the administration with as

high as possible a degree of efficiency, objectivity, integrity and speed. Incidentally, transfers from one province to the other, desirable in the interest of administration also help fostering a fusion of ideas and understanding and spirit of cohesive-ness:--

(a) Gazetted posts and also including Naib-Tehsildar, Inspector and Sub-Inspectors of Police and the like.

(i) Officers holding district level appointments such as Deputy Commissioners, S. Ps. , Executive Engineers should not be posted in the districts to which they belong;

(ii) Staff in Executive posts at Tehsil, Niabat and Block level such as Tehsildars, D.S. P/A. S.Ps. , DFOs, ACs(R), T.E. Os, BDOs, Inspectors and Sub-Inspectors of Police and the like should be posted in places outside the Tehsil, Niabat, Block and such other jurisdiction in a Tehsil and Division to which an Officer belongs;

(iii) The teachers, professors of Educational Institutions and such other similar posts may be excepted from the Policy laid down in (i) and (ii) above.

(c) Women employees Gazetted and Non-Gazetted:

(i) A woman employee, if she so desires, should be posted as near the home of her male supporter or Guardian, as administratively practical.

(ii) where both husband and wife are in Government service, the woman employee should be posted at the same place or as near her husband, as administratively practical. '

16. It is seen from this policy of the Government that emphasis has been laid on the efficiency, objectivity, integrity and speed in public functions. In relation to the Education Department, the parameters set out in the transfer policy assume all the more paramountcy so as to rationalise the teaching staff in each District in order that the constitutional directives are adequately and effectively complied with. Before proceeding further, it would be advantageous to quote hereinbelow the impugned order.

'Government of Jammu and Kashmir Education Department, Civil Sectt.

Sub: Inter-district transfer - cancellation thereof.

Government Order No. 661-Edu of 2003

Dated 21 6.2003.

Whereas the Government with a view to ensuring universal education has been opening schools in remote and difficult areas, in addition to the cities/towns etc;

Whereas in a bid to provide quality education, the Government has taken a series of measures to provide the required infrastructure and manpower to the schools;

Whereas the Government has also made efforts to fill up the teaching posts, over a period of time, through the Recruitment Board;

Whereas it was observed that, even so, the schools located in remote and difficult areas do not get the required staff because candidates with higher merit (who generally come from towns and cities) avoid posting to such areas;

Whereas to help overcome the resultant situation, appointment of Teachers was localised (with a Revenue village as the basic unit of selection) through the Rehbar-e-Taleem Scheme;

Whereas the Government took other initiatives like implementation of the Sarva Shiksha Abhiyan aimed at 100% enrollment, and retention, of children in the schools;

Whereas in order to maintain a reasonable pupil-teacher ratio the government opened hundreds of new schools and appointed thousands of teachers and para-teachers;

Whereas the bulk of teachers posted in rural, remote and difficult areas keep on seeking urban postings by way of intra/inter-district transfer/attachment for reasons like security, marriage, health grounds etc.

Whereas the matter has been examined and it has been found that such transfers/attachments are generally asked for personal reasons like living in one composite family, better education for the children and to avail better civic and other amenities which can best be described as personal convenience at the cost of a deprived child, belonging to a deprived family, in a village or habitation without proper drinking water, roads, electricity, health care etc.;

Now, therefore, in the interest of the public at large and the disad-vantaged school-going children in the remote and difficult areas of the State in particular, it is hereby ordered that all intra-dis-trict/inter-district attachments/transfers of Teachers and intra-dis-trict/inter-district attachments of Masters and Lecturers (as the case may be) are revoked with immediate effect.

Directors, School Education, Jammu and Kashmir, and Chief Education Officers shall immediately relieve such staff and ensure that they report at their respective places of posting by 30th instant.

District Development Commissioners shall monitor progress in implementation of the order in the respective Districts and review it at the end of this month. Cases of default, if any, be reported to this department enabling initiation of disciplinary proceedings under rules.

By order of the Government of Jammu and Kashmir. '

17. It was argued that the impugned order is in fact a change in the transfer policy of the Government and defeats the legitimate expectation of the petitioners; therefore, it is hit by the mandate of Article 14 of the [Constitution of India](#).

18. In this connection, it may be observed that expectations cannot be assumed in abstract. They must have some basis, some rule or policy of the Government and that rule, or policy has to be read and interpreted in context of the object sought to be achieved by such rule or policy. The object of the transfer policy declared by the State in 1964 is contained in its preamble, that is, its first paragraph. Therefore, any policy enumerated in the said Government circular has to be read in context of and in conjunction with the object of the declaration. As a necessary

corollary, whatever the nature and extent of expectations a Government servant may perceive, have to be subordinate and subservient to the object of the policy. Such expectations cannot be derived from the policy in isolation of the object of the State enumerated in the policy itself. Therefore, the achievement of the object by the State will always have primacy over the expectations perceived by a Government servant. At the cost of repetition, we may quote here the object of the transfer policy declared by the State.

'The basic need for transfers is to run the administration with as high as possible a degree of efficiency, objectivity, integrity and speed. Incidentally, transfers from one province to the other, desirable in the interest of administration also help fostering a fusion of ideas and understanding and spirit of cohesiveness. '

From a cursory reading of the preamble of the Circular, it is thus clear that the object of the policy is none other than administrative exigency and public interest. Therefore, the various clauses of the policy relied upon by the learned counsel have to be read and interpreted in context of the aforesaid objective. Since this policy has been made to secure administrative exigencies and public interest, this object of the declared policy will have overriding effect.

19. Learned counsel in support of his argument cited Punjab Communications Ltd. v. Union of India, AIR 1999 SC 1801. In the aforesaid case, their lordships of the Supreme Court in para 37 observed as under:

'The doctrine of legitimate expectation in the substantive sense has been accepted as part of our law and that the decision maker can normally be compelled to give effect to his representation in regard to the expectation based on previous practice or past conduct unless some overriding public interest comes in the way. (Underlining supplied)

20. It is seen from the aforesaid observations of their lordships of the Supreme Court that public interest will always get primacy over other policy decisions. In the present case, we notice that the impugned order is not against the transfer policy adopted by the Government and we also do not see any such contradiction or inconsistency as would constitute a defeat to any legitimate expectation of the

petitioners. There is no doubt that there is a mention in the transfer policy as quoted above, that a women employee should be posted as near as possible to her male supporter, be it a guardian or husband. But this policy of the Government does not enable any spouse to claim such a posting as of right if the Government considers it not feasible or some overriding public interest comes in the way. The words 'if administratively practicable and practical' mentioned therein assume importance. That means any such request has to be considered by the competent authority alongwith the exigencies of the public service. Moreover, if a Government servant's request for such posting is accepted by the Government at one stage that would not give her a right to claim continued posting at that place for an indefinite period. It is not a case where the Government, in the impugned order, has not shown their awareness of this aspect of the matter, but the public interest and the exigency of the service, as reflected in the impugned order, cannot be lost sight of; they will have an overriding effect. In *Bank of India v Jagjit Singh Mehta*, (1992) 1 SCC 306, this proposition came up for consideration of their lordships of the Supreme Court and their lordships were pleased to hold as under:

'Ordinarily and as far as practicable, the husband and wife who are both employed should be posted at the same station even if their employers are different. The government guidelines are also to the same effect. The guidelines do not enable any spouse to claim such a posting as of right if the departmental authorities do not consider it feasible. The only thing required is that the departmental authorities should consider this aspect along with the exigencies of administration and enable the two spouses to live together at one station if it is possible without any detriment to the administrative need and the claim of other employees. In the case of all India services, the hardship resulting from the two being posted at different stations may be unavoidable at times particularly when they belong to different services and one of them cannot be transferred to the place. of the other's posting. While choosing the career and a particular service, the couple have to bear in mind this factor and be prepared to face such a hardship if the administrative needs and transfer policy do not permit the posting of both at one place without sacrifice of the requirements of the administration and needs of other employees. In such a case the couple have to make their choice at the threshold between career prospects and family life. After giving preference to the career prospects by

accepting such a promotion or any appointment in an all-India service with the incident of transfer to any place in India, subordinating the need of the couple living together at one station, they cannot as of right claim to be relieved of the ordinary incidents of all India service and avoid transfer to a different place on the ground that the spouses thereby would be posted at different places. ' (Underlining supplied)

21. Again, in *F. C. I. v. Kamdhenu Cattle Feed Industries*, (1993)1 SCC 71 their lordships of the Supreme Court held:

'whether expectation is legitimate is a question of fact which has to be determined not according to the claimants' perception but in the larger public interest. '

It was further held that 'a bona fide decision would satisfy the requirement of non-arbitrariness. '

22. In *Union of India v. S. L. Abbas*, (1993) 4 SCC 3567, the Supreme Court held as under:

'The guidelines say that as far as possible, husband and wife must be posted at the same place. The same guideline however does not confer upon the Government employee a legally enforceable right. Executive instructions are in the nature of guidelines. They do not have statutory force. '

23. In *Laxmi Narain Mehar v. Union of India*, AIR 997 SC 1347, their lordships of the Supreme Court held that, 'though he might have been transferred on compassionate grounds, in view of the express indication in the order giving reasons for the transfer, i. e., need of experienced staff at the respective places, the transfer order cannot be said to be arbitrary'. In *State of Punjab v. Joginder Singh Dhatt*, AIR 1993 SC 2486, their lordships of the Supreme Court held as under:

'This Court has time and again expressed its disapproval of the courts below interfering with the order of transfer of public servant from one place to another. It is entirely for the employer to decide when, where and at what point of time a public servant is transferred from his present posting. Ordinarily the courts have no

jurisdiction to interfere with the order of transfer. '

24. In *Rajendra Roy v. Union of India*, AIR 1993 SC 1236, the Supreme Court has been pleased to lay down as under:

'It is true that the order of transfer often causes a lot of difficulties and dislocation in the family set up of the concerned employees but on that score the order of transfer is not liable to be struck down. Unless such order is passed mala fide or in violation of the rules of service and guidelines for transfer without any proper justification, the Court and the Tribunal should not interfere with the order of transfer. In a transferable post an order of transfer is a normal consequence and personal difficulties are matters for consideration of the department. ' (Underlining supplied)

25. It is thus seen that the law on the subject is no more *res integra*. However, a distinction is sought to be made out in the present case that, once the competent authority had taken a decision, that decision could not be up-set or reversed. In this connection, it would suffice to say that transfers, on whatever ground, cannot assume immutable character, especially when an incumbent is holding a transferable post. In the exigencies of service, even premature transfers can be made to meet the exigent requirements of a service.

26. Learned counsel for the petitioners cited various judgments to canvass that hardship of an employee is a sufficient ground for posting the employee outside the cadre and at a place of his/her choice. There can be no dispute about this proposition, but that power lies with the Government. This Court does not have the jurisdiction to compel the Government to make the transfer of an employee in a particular way or at a particular place. We, in these cases, are not testing the legality of an order made on compassionate grounds. We are dealing with a case where transfer or attachment on compassionate grounds earlier made has been undone. The Supreme Court in *Laxmi Narain Mehar v. Union of India* (supra) observed that 'though he (the government servant) might have been transferred on compassionate grounds, in view of the express indication in the order giving reasons for the transfer, the transfer order cannot be said to be arbitrary'. Even where the government decides to exercise its power of transfer on compassionate

grounds, we are of the opinion that such transfers cannot be one-way, leaving a huge void in a service. Transfer does not envisage or contemplate shifting of an employee from a post and leaving the post, entrusted with public duties, vacant. The concept of transfers partakes within its fold the swapping of different individuals holding different posts lest the public service should suffer for want of man-power. One of the judgments of the Supreme Court, in which hardship of an employee has been recognised as a ground for posting at a place of choice is reported as *Mrs. Shilpi Bose v. State of Bihar*, AIR 1991 SC 532. In that case, however, the Supreme Court observed that courts should not interfere with transfer orders which are made in public interest. The High Court in that case had quashed the transfer order. The facts of that case were that some lady employees sought posting nearer to their husbands, who were also Government employees. Transfer orders were issued as a result the employees, on whose posts these lady employees were posted, were displaced. The displaced employees filed writ petition and the High Court quashed the transfer orders. Matter was taken to the Supreme Court by the lady employees and the Apex Court held:

'If the competent authority issued transfer orders with a view to accommodate a public servant to avoid hardship, the same cannot and should not be interfered by the court merely because the transfer order were passed on the request of the employees concerned. '

It be noted that in *Bank of India v. Jagjit Singh Mehta* (supra), the Supreme Court was pleased to observe that 'the only thing required is that the departmental authorities should consider this aspect along with the exigencies of administration and enable the two spouses to live together at one station if it is possible without any detriment to the administrative need and the claim of other employees'. In *Mrs. Shilpi Bose u. State of Bihar* (supra), their lordships found that the displaced employees had continued to be posted at their respective places for the last several years and, therefore, it was held that, 'they had no vested right to remain posted at one place. Since they hold transferable posts they are liable to be transferred from one place to the other'. Not only that, in the same judgment, the Apex Court was further pleased to hold: (Underlining supplied)

' In our opinion, the courts should not interfere with transfer orders which are made in public interest and for administrative reasons unless the transfer orders are made in violation of any mandatory statutory rule or on the ground of mala fide. A Government servant holding a transferable post has no vested right to remain posted at one place or the other, he is liable to be transferred from one place to the other. Transfer orders issued by the competent authority do not violate any of his legal rights. Even if a transfer order is passed in violation of executive instructions or orders, the Courts ordinarily should not interfere with the order instead affected party should approach the higher authorities in the Department. If the courts continue to interfere with day-to-day transfer orders issued by the Government and its subordinate authorities, there will be complete chaos in the Administration which would not be conducive to public interest. The High Court over looked these aspects in interfering with the transfer orders. ' (Underlining supplied)

27. In the aforesaid judgment the Supreme Court has clearly said that courts cannot interfere with transfer orders unless they are mala fide or some statutory rule has been violated.

28. Learned counsel for the petitioners have also referred to Circular No. 32-GAD of 2002 dated 16.12.2002 issued by the General Administration Department, whereunder various instructions were issued as part of measures contemplated for providing effective and responsible administration to the people. Item No. 6 of the Circular reads as under:

'The Education and Health Deptt. Shall review cases of attachment of teachers / doctors and health. All those employees who have been attached whether within the district or outside the districts, except those who may have been attached outside the district for threat to their security or the case of women for reasons of marriage'

It is contended that unless the review contemplated in the above Circular was made, the petitioners could not have been transferred back. According to the learned counsel, the Circular to the aforesaid extent constituted a policy of the State. Basically the above Circular dated 16. 12. 2002 was issued by the

Government with the purpose of gearing up the administrative machinery. From a reading of the circular, which is on record of these petitions, it appears that apart from the petitioners herein, certain other categories of Government employees had also been brought out side their parent cadres and, apparently, its impact was felt by the Government. Consequently, the Government issued certain instructions, including that the case of all such Doctors, Health workers, teachers, who were earlier attached, be reviewed. The object ostensibly seems to have been to send them back. This fact by itself goes against the petitioners, since the Government had long since decided to review these attachments. There is no material brought on record by the petitioners that such a review was not made by the Government. Secondly, we have already noticed the law on executive instructions settled by the Apex Court in *Union of India v. S.L. Abbas* (supra), wherein the Supreme Court has held that executive instructions are in the nature of guidelines. They do not have statutory force. In that view of the matter, these instructions contained in the Circular in question are not enforceable in law. Therefore, the contention is untenable.

29. It was next contended that the impugned order has emanated from mala fide considerations. It was generally sought to be made out that the impugned order is actually politically motivated to undo some thing that had been done by the previous ruling party. During the course of arguments, one of the learned counsel, namely, Shri I Sofi, stated that the impugned order was passed not on the grounds reflected therein, but to please two legislators belonging to the ruling party. According to him, two legislators of the State Assembly, belonging to the ruling party, raised the issue of deficiency of teaching staff in their respective constituencies during the recent session of the Legislative Assembly which prompted the Government to issue the impugned order without looking into the pros and cons thereof. However, Mr. Naik, learned Advocate General, during the course of his reply, stated that, in fact, the concern was expressed by two Members of the State Legislative Assembly, namely, Shri Iftikhar Hussain Ansari and Shri Muhammad Dilawar Mir, both belonging to the opposition party, namely, National Conference, and that, on the issue being raised, there was a consensus among all the Members of the Legislative Assembly, cutting across party lines, that these Schools should be provided with teaching staff in tune with their

respective sanctioned strength. Therefore, there was no question of the impugned order having been issued to please any individual or to victimise any one or even with any object to undo what the earlier ruling party had done. The learned Advocate General made a statement at Bar that in pursuance of the impugned order the kith and kin of key and prominent political figures have been relieved. They are:

(i) three sisters-in-law of Shri Ghulam Nabi Azad, who happens to be the State President of Congress (I), a national political party;

(ii) two daughters-in-law of Shri Mangat Ram Sharma, Deputy Chief Minister in the present State Cabinet;

(iii) three daughters-in-law of Shri Abdul Aziz Zargar, Agriculture Minister in the present State Cabinet;

(iv) Wife of Ghulam Muhammad Sofi, another Cabinet Minister in the present Government;

According to the learned Advocate General, all these near relatives of the above political figures have been sent to their parent cadres, including Kupwara etc. Besides, it is stated that the wife of the present Secretary to Government, Education Department, and that of Director, School Education, Kashmir, are serving in their parent district cadres in District Anantnag.

30. It is settled law that he who alleges mala fides has not only to support the same, but establish the allegations with cogent and acceptable evidence. A mere statement at Bar for, or against, a political party cannot be taken into account unless supported by documents. Moreover, it does not sound in good taste to institutionalise such issues, unless the party, alleging mala fides on that count, has material in possession. Taking the statements made in this behalf by the learned counsel on both sides on their face value, it lends all the more support to the impugned order. There cannot be any better forum than the Legislative Assembly to discuss issues concerning public interest and social welfare. Whoever that Member of the Legislative Assembly was, to whatever political party he belonged

to, the fact remains that he has expressed the legitimate and genuine concern on behalf of the public at large, at least, of the constituency or constituencies he or they come from. It is not a case where that concerned Legislative Member was moved and prompted by any news item published in any newspaper. In view of the facts and figures given by the learned Advocate General, coupled with the fact that no material to support the allegation has been brought on record, the plea of mala fides is untenable.

31. It was next contended that transfer of government servants en masse is unknown to service jurisprudence and, in any case, not envisaged by Rule 17 of the 1992 Rules. Therefore, since the impugned order has the effect of transferring large number of employees by one single order, it is likely to give rise to a chaotic situation. On that count, it is argued, the impugned order suffers from the vice of non-application of mind. We have already observed that the concept of transfers does not visualise a one-way movement of employees. The object always is to balance the relevant services vis--vis the man-power commensurate with the sanctioned strength of the affected services. If, in such a situation, large scale transfers are made and the transferees are such officers as have to hand-over and take-over the charge of their respective offices, there may be a difficulty experienced by the respective services wherefrom the transferees would be shifted. Generally, however, when transfers of large number of such employees are made, the competent authority takes sufficient care of that by providing in the order itself as to which of the transferees shall move first. That way the transferees move one by one and no problem is faced. However, in the present case no such thing, as contended, is going to happen because the petitioners have neither to hand over their charge to anybody nor have to relieve anybody. They have simply to go and join against the respective posts. This would be just as thousands of employees leave their homes daily in the morning and reach their respective places of duty. That apart, no School or service is going to be affected by the shifting of the petitioners, since they are surplus and over and above the sanctioned strength of the Schools they are presently attached with. The resultant effect, of course, would be of advantage and benefit to the children of those Schools who are bereft of these teachers. Secondly, it is the admitted case that appointments of candidates to the posts are made locally in each District. When

these appointees were shifted from these Schools, a void was created in the respective district cadres. Therefore, the argument advanced can be self destructive, because mass transfers or attachments, as the case may be, from a service equally has chaotic consequences and is unprecedented, besides being not recognisable under any service law or policy.

32. Coming to the next point, as already observed, the learned counsel argued that the impugned order with respect to those of the petitioners, whose attachments and transfers were made by the Government after being satisfied about their threat perception on the basis of reports obtained from security agencies, suffers from non-application of mind and, in the facts and circumstances, has the effect of pushing them to perilous situations. One of the learned counsel, Ms. Shaban Lone, while arguing on her behalf, fairly stated that the intention behind the impugned order is faithful and good, but the way, earlier orders of transfer have been revoked, without collecting fresh material, invalidates the order.

33. We have a communication dated 17th May, 2000, addressed by Special Secretary to Government, Education Department, to Director School Education, Kashmir, with a copy endorsed to Director, School Education. Jammu on record. For facility of reference, it is extracted below:

'Sub : Inter-district transfer of teachers.

Reference : This office letter No. Edu/II/Trans/232/98 dated

27.4.2000 followed by reminder dated 10.5.2000.

Sir,

Please recall the telephonic conversation we had this morning regarding the subject cited above. In this regard I am to say that as has already been decided, inter-district transfers made on security and medical grounds by the Adm. Department will not be touched till the verification is carried out through CID. It is in this connection that the particulars are being sought; as such the transferees may be allowed to continue till further orders. ' (Underlining supplied)

34. From this document, it appears that the verification about the genuineness of the threat perception had begun somewhere in May, 2000 and, in that connection, the Government had called for the list of all such teachers from the two Directorates of Education. The impugned order is shown to have been issued after 'examining' the matter. 'To examine' means investigating the matter. Therefore, it is reasonably inferable that the verification was got done. This is further fortified by the executive instructions issued vide Circular dated 16th December, 2002 (supra). The learned counsel, however, contend that after having shown their awareness about the security and other grounds, the Government has not clearly recorded that the threat perceptions were either wrong or had been dispelled. We think that in transfer matters, the Government or the competent authority, as the case may be, is obliged to show only the administrative exigency or public interest. There is no other legally recognised requirement to be observed while issuing transfer orders. Going through the contents of the impugned order, we see that it fully satisfies that requirement of law. It was contended that safety of a public servant also constitutes public interest. However, we are of the view that the phrase 'public interest' has to be given a wider connotation, for example, the general welfare of the public and society at large, not the convenience of an individual. Public interest is something in which the public as a whole has a stake, especially such an interest which flows from the constitutional provisions, the law framed by the State and the policy of the Government that justifies the governmental action.

35. The learned Advocate General, citing the relevant Constitutional provisions, the law made by the State Legislature under the constitutional directives and the law settled by the Supreme Court, submitted that the State is duty bound to provide not only School buildings, but also teaching staff and other infrastructure to the children of rural areas and that these children also have the fundamental right to receive qualitative education, at least, upto elementary level. Since the petitioners have been appointed for that purpose and are being paid by the State, they cannot be allowed to shirk that duty on any count, whatsoever, to the prejudice and detriment of the rural children. Another dimension of the problem faced by the State Government, according to him, is that every employee in rural areas, be those belonging to Education Department or the Police and even

medical profession, wants his posting in urban areas on the ground of security and, in fact, numerous written requests in this behalf are in the pipeline. It was argued that, if the trend, which has assumed evil dimensions, is not nipped now, the chaos and catastrophe, that would be lying ahead, would be unprecedented and unmanageable. Another facet of the problem, according to him, is that the State is burdened with extra expenditure on account of city compensatory allowance being paid to these employees despite the fact that they do not actually perform any duties, being surplus and, as a matter of fact, are active pensioners. The State exchequer is also burdened with extra cost on account of 5% house rent these teachers are getting within the twin Municipal limits of Jammu and Srinagar. He also submitted that the petitioners before the court were all relieved and, in fact, almost all of them joined in their respective parent cadres but, when they came to know that in certain cases stay orders had been granted, they filed these writ petitions. In any case, according to him, most of these teachers, relieved from other Districts as well as from the urban areas, have already joined at their respective parent places of posting. With a view to illustratively demonstrating the disparity in the teacher-student ratio and the ratio between the sanctioned and posted strength of teachers in various Schools, the learned Advocate General drew our attention to annexures 'R1', 'R2' and 'R3' appended to the objections. For facility of reference, we quote few of these illustrations hereinbelow:

SRINAGAR DISTRICT	Total roll of students	Sanctioned Strength of teachers	No. of Teachers actually Posted
Government Girls Middle School, Tulsibagh	1071	1 Master, 13 teachers	1 Master, 25 teachers
Government Boys Middle School, Tulsibagh	1011	1 Master, 8 teachers	1 Master, 22 teachers
Government Boys Middle School, Rajbagh	801	1 Master, 11 teachers	1 Master, 31 teachers

Government High School, Rajbagh	2008 Masters, 22 teachers	8 Masters, 31 teachers
Government Girls Middle School, Amirakadal	651 Master, 14 teachers	1 Master, 26 teachers

Government Girls Higher Secondary School, Amirakadal	
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1496 (9th to 12th)7 Masters, 23 teachers and 22 Lecturers7 Masters, 38 teachers and 22 Lecturers. Government GirlsHigherSecondary School, Sonawar

375 (9th to 12th)8 Masters, 19 teachers and 13 Lecturers8 Masters, 24 teachers and 13 Lecturers.DISTRICT BUDGAM

Government BoysHigh School,Natipora

1807 Masters, 15 teachers7 Masters, 16 teachersGovernmentHigh School, Barzalla

889 Masters, 17 teachers12 Masters, 20 teachersGovernment BoysHigh School,Rawalpura

1026 Masters, 16 teachers10 Master, 21 teachersGovernment GirlsHigh School,Hyderpora

1056 Masters, 12 teachers 9 Masters, 16 teachersGovernment BoysHigh School,Humhama

3808 Masters, 13 teachers11 Masters, 16 teachersGovernment Girls MiddleSchool, Channapura

1931 Master, 13 teachers1 Master, 15 teachersGovernment Girls MiddleSchool, Natipora

1532 Masters, 17 teachers2 Masters, 20 teachersGovernment Girls MiddleSchool, Rawalpura

892 Masters, 14 teachers3 Masters, 15 teachersGovernment Girls MiddleSchool-B, Barzulla

451 Master, 13 teachers2 Master, 17 teachersGovernment Boys Middle School, Hyderpora

1221 Master, 7 teachers1 Master, 10 teachers DISTRICT BARAMULLA

Government Boys Middle School, Sumbal

1359 teachers8 teachersGovernment Girls PrimarySchool, Sumbal

512 teachers1 teacherGovernment Boys Primary School, Poshwari

1253 teachers2 teachersGovernment Boys Primary School, GathHakabara

1162 teachers1 teacherGovernment Middle School,Madwan

4479 teachers7 teachersGovernment Primary School,Gori Hajan

602 teachers1 teacherJammu:

Government GirlsHigh School,Kachichawni

26414 teachers19 teachersGovernmentHigherSecondary School, Balwal

42810 teachers12 teachersGovernmentHigh School,Paloura

41112 teachers20 teachersGovernment CBHS School, Jammu

11213 teachers15 teachersGovernment Middle School,Rehari

21413 teachers15 teachersGovernment Girls MiddleSchool, Rehari

22111 teachers19 teachersGovernmentHigh School,Sarwal

2716 teachers18 teachersGovernment Primary School,Toph Sherkhania

434 teachers6 teachersGovernment Girls MiddleSchool, Patta Bohri

24710 teachers13 teachersGovernment Central School,Jhanipor

1436 teachers15 teachersGovernment Primary School,Munshi Chak

672 teachers3 teachersGovernment Primary School,Thathrian

442 teachers4 teachers

Government Girls MiddleSchool, Patoli Mangotrian

958 teachers

12 teachersGovernment Primary School,Kabir Colony

724 teachers

7 teachersGovernmentHigherSecondary School, Akhnoor

15587 teachers8 teachersGovernmentHigherSecondary School, Domana

5563 teachers6 teachersGovernment Middle School, Bakshinagar

115 7 teachers10 teachersGovernmentHigherSecondary School, Canal Road11304 teachers15 teachers

36. The disparity in the Schools at Kupwara and other Districts, as per the statement of the learned Advocate General, is equally worse.

37. From the above comparative table, apart from what is glaring, the grim and grave scenario latent in the matter is that in the two Higher Secondary Schools located in the city of Srinagar, one each at Amirakadal and Sonawar, there is no student enrolled in these Schools upto class 8th. The teachers are meant for imparting elementary education upto 8th level and there are a total of 38 plus 24, i. e., 62 teachers posted in these two Higher Secondary Schools alone. Similar in the three Higher Secondary Schools at Akhnoor, Domana and Canal Road of Jammu province, there is no student enrolled at the elementary level. But there are 38 teachers posted in these three Schools, apparently, sitting idle. So much so, some teachers were even attached to the office of the Advocate General, where no teaching is imparted. The learned Advocate General has also placed on record a statement showing the teacher-pupil ratio at the elementary levels in the Districts of Jammu, Kathua, Udhampur, Doda, Rajouri and Poonch of Jammu Province which is 1 : 22; 1 : 26; 1 : 32; 1 : 27; 1 : 23 and 1:32 respectively. Another comparative statement placed on record, prepared on the basis of 1981 and 2001 census, depicts District-wise literacy rate in Jammu Division. We deem it appropriate to reproduce the same hereunder:

Name of District

Census 1981 Male

Female

Total

Census 2001 Male

Female

Total

Jammu

63.29

38.94

51.68

84.92

68.75

77.30

Kathua

51.20

26.31

39.36

73.73

53.92

65.29

Udhampur

40.42

17. 17

29.52

66.43

39.89

54.16

Doda

35.23

09.22

23.03

63.56

28.35

46.92

Rajouri

42.82

18.23

31.27

69.64

44.14

57.65

Poonch

42.33

14.14

29.16

65.41

35.30

51.07

38. From these facts and figures, one cannot resist to say that the State Government is faced with an enormously grave situation vis--vis its constitutional duty of imparting elementary education to the children of the State upto 14 years of age. It may be observed here that in tune with the Constitutional Directives, the State of Jammu and Kashmir has enacted the Jammu and Kashmir School Education Act, 1984. The object and the preamble of this Act read:

'Whereas it is expedient to achieve the goal of universalisation of elementary education and to provide for better organisation and development of School education in the State. '

39. Under Section 4 of the Act, the State is duty bound to provide for free and compulsory education for children upto the level of class eighth. The Section reads as under:

'4. Compulsolry education upto class eighth. - The Government shall provide for free and compulsory education for children upto the level of class eighth throughout the State within a period of ten years from the commencement of this Act and for this purpose it shall take appropriate steps to provide necessary facilities. '

40. In *Unni Krishnan, J. P. v. State of A. P.*, AIR 1993 SC 2178 the lords of the Supreme Court have held:

'The citizens have a fundamental right to education. The said right flows from Article 21. This right is, however, not an absolute right. Its content and parameters have to be determined in the light of Arts. 45 and 41. In other words every child / citizen of this country has a right to free education until he completes the age of fourteen years. The right to education which is implicit in the right to life and personal liberty guaranteed by Article 32 must be construed in the light of the directive principles in part IV of the Constitution. '

41. In order to achieve the statutory objective, the State has established elementary level Schools and has provided the necessary infrastructure and manpower to these Schools. Right to elementary education has now been held to be flowing from Article 21 of the [Constitution of India](#). The State is duty bound to make all the arrangements to reach out and carry this torch of enlightenment to every child of the State. Dealing with the impediments coming in that way is the duty of the State. In *Miss Mohini Jan v State of Karnataka*, AIR 1992 SC 1858, the Supreme Court was pleased to hold as under:

'The directive principles which are fundamental in the governance of the country cannot be isolated from the fundamental rights guaranteed under Part III. These principles have to be read into the fundamental rights. Both are supplementary to each other. The State is under a constitutional mandate to create conditions in which the fundamental rights guaranteed to the individuals under Part III could be enjoyed by all. Without making 'right to education' under Article 41 of the Constitution a reality the fundamental rights under Chapter III shall remain beyond the reach of large majority which is illiterate. The fundamental rights guaranteed under Part III of the [Constitution of India](#) including the right to freedom of speech and expression and other rights under Article 19 cannot be appreciated and fully enjoyed unless a citizen is educated and is conscious of his individualistic dignity.

The 'right to education', therefore, is concomitant to the fundamental rights enshrined under Part III of the Constitution, The State is under a constitutional-mandate to provide educational institutions at all levels for the benefit of the

citizens. The educational institutions must function to the best advantage of the citizens. '

42. The petitioners are tracing their inability to serve in their respective Districts to the threat perception and likelihood of violation or impairment of their right to life guaranteed under Article 21 of the [Constitution of India](#). The State Government is under constitutional duty to provide elementary education universally in the State to all children upto the age of 14 years and, in fact, they have made all the arrangements therefor. The State is incurring expenditure of crores of rupees in the field of education. If the State is not able to attain the constitutional objective on account of the non-availability of teaching staff, it has no alternative, but to make fresh appointments on these posts. In such a situation this Court is faced with a vexed problem. The Court, in these circumstances, has to have a comparative analysis of the advantages and disadvantages of the parties, i. e., whether, on account of the non-availability of teaching staff, the harm caused to the children of these rural areas would be more, or, if the teaching staff is asked to go to their respective places of posting, the harm likely to be caused to any one of them would be more. This is the real question involved in the matter.

43. We have already noticed, illustratively, the grim and severe disparity in the student-teacher ratio both in urban areas and the rural areas and other relevant facts. It is clear therefrom that the students of rural areas do not have sufficient teaching staff. For them teaching staff is a scarce commodity despite the fact that the State Government has, on its part, taken all necessary steps to achieve and realise the goal set by it for the people of the State in pursuance to and in compliance with the constitutional directives and the Education Act framed by the State. The education system has already been badly affected during the last a decade or so. Further delay in pursuit of the State policy on education would be detrimental and hazardous. The students of these rural areas, who are stated and shown to be a deprived lot, poor and backward, have no option but to wait for the teachers or the Government to make arrangements for their education. On the other hand, the State Government has taken all the steps to protect the lives of the people. It is nobody's case that the Government has not taken the requisite measures for the protection of people in general in the State. The learned

Advocate General has made a statement at Bar that so far no teacher has been harmed in any manner and that the State is bound to protect the lives of the citizens. In this fact scenario, it is axiomatic that the loss and harm being caused to the children of these rural areas as also to the State policy is a reality whereas the threat perceived by the petitioners may or may not be so. We reiterate here that by virtue of the impugned order members of the families of prominent political figures and Ministers, who, on account of their political affiliations, are more imminently exposed to such threats, have also been relieved to report back at their respective places and, as stated, they have already joined. In that view of the matter, we feel, quashing of the impugned order would cause more harm to the general public than do any good to anyone; accordingly, it has to be upheld and that is doctrine of necessity as well.

44. A suggestion was put that even while up-holding the impugned order, the State Government could be asked to reconsider the matter. We have already observed that transfers of public servants squarely fall within the domain of the Government and it is the Government alone who can gauge the exigencies of a public service. Secondly, a public servant, holding a transferable post, can neither claim placement against a particular post, nor retention against a post. Once a public servant is transferred, whether on request or otherwise, from one post to another, or is attached at another place, on whatever ground - be it the ground of living together with husband, medical ground, personal hardship - he does not get any right to continue at that place. As a necessary corollary, if the competent authority accedes to the request of a public servant for the desired posting on consideration of the reasons that may be supplied by the public servant in support of the request, or may even be certified by the agency of the competent authority, such consideration of the reasons and accession of the request on the part of the competent authority would not confer any enforceable right on such employee. In so far as the public servants, who seek transfers and postings in order to be able to live with their spouses, we are of the view that before choosing a career, they should make a choice between the career and married life. And once the choice is made for career, hardship becomes a reality and an incident of career pursuit. In order to entitle a petitioner to a writ of mandamus, he or she has to show infraction of some statutory right or arbitrariness on the part of the concerned authority.

Government policies pale into insignificance in the wake of public exigencies. Therefore, this Court cannot even direct the respondents to reconsider the matter and, in fact, there is no need of passing any such direction, this power is otherwise vested with the Government. We need not remind them of their powers.

45. Referring to Rule 17 of the Rules of 1992, Mr. Z. A. Shah, learned counsel, contended that in terms of proviso thereto, the government has the power to transfer a member of any of the cadres to Ladakh for such tenure as the government may deem fit and in doing so all other rules stand excluded. It is submitted that the element of 'public interest' is not involved in such cases. We have given our thought to the argument in context of the relevant rule. The relevant proviso says that for posts in Ladakh District, irrespective of any other provision contained in these rules, members of any of the State, Divisional or District cadres may be transferred for such tenure as the Government may deem fit from time to time. In all such cases, the lien and promotion prospects of such members shall be protected in their parent cadre. This provision of the Rules pertains to those of the government servants who are transferred from other places to Ladakh, obviously so, because there is scarcity of staff in Ladakh. After their tenure, as may be fixed by the Government, as of routine, they are to be transferred back to their parent cadres. The rule does not envisage that those of the persons, hailing from Ladakh, employed there and transferred to any other district cadre shall assume a right to continue in that district. Secondly, the proviso itself is indicative of the public interest involved in transfers to Ladakh. Therefore, the argument is wholly misconceived. We may observe here that Ladakh District has since been bifurcated into two Districts, viz, Leh District and Kargil District. Therefore, the proviso to Rule 17 of the 1992 has to be read in that context. It is further contended that transfers of employees for posts in Leh District (not Ladakh) can be ordered only after obtaining no objection from the Hill Development Council, Leh. According to the learned counsel, since in the present case that has not been done, therefore, the impugned order, insofar as it relates to the employees of the Leh District is vitiated. In this connection, we may observe that the relevant Act or the Rules, governing the relation between the Hill Development Council and the State Government, have not been brought to our notice by the learned counsel. Therefore, we are unable to express any definite opinion on the

subject. However, apparently, it appears that such need of consulting the Hill Development Council may be relevant only when employees are shifted from Leh to other Districts and the reason being obvious, lest the various services in that District should suffer. In case of employees who belong to Leh, are appointed to a post borne on the District cadre of Leh and transferred to some other District, while sending them back, the requirement pleaded may not be relevant,

46. Some of the learned counsel argued that the impugned order is discriminatory in nature insofar as they are not being treated similar with those of the citizens who migrated to Jammu and other parts of the country in early 1990's. According to the learned counsel, the Government is adopting double standards. On this count, infraction of right to equality under Article 14 is alleged. One of the petitioners has, in fact, made a prayer for a direction to the respondents to declare and treat her as a migrant. Article 14 of the Constitution states that the State shall not deny to any person equality before the law or the equal protection of the laws within the territory of India. There is no law or rule framed by the State governing these migrants. Existence of a statutory law or rule is a sine-qua-non for pleading discrimination under Article 14 of the [Constitution of India](#). In other words, discrimination under Article 14 pre-supposes the existence of a statutory rule or law. That being not the case in the petitions before us, no discrimination can be claimed by the petitioners. It may further be observed that Article 14, as interpreted by the Courts in general, permits the recognition of exceptions and qualifications on special grounds. Equal protection of the laws means the right to equal treatment in similar circumstances. The petitioners and those migrants are not and cannot be said to be similarly circumstanced. Therefore, we are of the considered view that petitioners cannot complain of any discrimination in this behalf. Consequently, no direction can be issued to treat any of the petitioners as a migrant.

47. Lastly, there may be cases where some of the petitioners have genuine apprehensions. It has time and again been held by the Supreme Court that, whatever be the nature of hardship, the concerned employee should, instead of approaching the courts, go to the competent authority. We may also say that threat perception, to an extent, is more a state of mind and each individual has his

own characteristic way of perceiving things, depending upon various factors. If any of the petitioners fears going back to his or her place of posting on that score, he or she would be at liberty to have a golden hand-shake with the Government on the terms we provide for in this judgment.

48. Article 230 of the Jammu and Kashmir Service Rules, 1956 provides for voluntarily retirement. Clause (i) of Article 230 reads as under:

'230. (i) A Government servant including the one listed in Schedule II of these rules may voluntarily retire from service any time after completing 20 years/40 completed six monthly periods of qualifying service or 45 years of age, provided that he shall give in this behalf a notice in writing to the appointing authority at least 3 months before the date on which he wants to retire. Such an officer shall be granted five years addition to the qualifying service as may have been put in by him, on the date he wants to retire, provided that his past record of service has been clean in the opinion of the appointing authority. Where in any such case addition in qualifying service is granted, pensionary benefits will be calculated on the basis of service as he would have put in had he retired at the normal age of superannuation [namely 55 years (should be 58 years)] or the service put in including five years addition whichever may be earlier. '

49. From a reading of the above Article of the Regulations, it is seen that the service prescribed for voluntary retirement is 20 years or 40 completed six monthly periods of qualifying service or 45 years of age. There is a further a condition that the retiring official shall give a three months' prior notice of his intention to the Government. The Article further provides for five years addition to the qualifying service as may have been put in by such official. There might be certain petitioners, who have not as yet put in the requisite years of service so as to entitle them to apply for voluntary retirement. As a special case and as a one-time exception, whatever service the petitioners have put in, can be deemed as qualifying service. Secondly, the Article provides for granting five years addition to the qualifying service as may have been put in by him. As an incentive, such addition to the deemed qualifying service put in by such petitioners can be raised from five years to ten years. Further, the requirement of prior notice of 3 months

can be waived. Further, again as an incentive, if a petitioner does not have five years' qualifying service to make him entitled to the retirement gratuity the service whatever put in could be deemed as qualifying service for that purpose.

50. There are certain petitions where, prior to the issuance of the impugned order by the Government, various learned Single Benches of this Court have issued some directions, final or interim, mostly for considering their cases. Those cases would be governed by those court directions. The learned Advocate General, in fact, made a statement that those cases would be considered in terms of the court directions passed therein.

51. During the course of arguments, it was brought to the notice of this Court that, pursuant to the impugned order, some persons, like Junior Assistants, inter-divisional transferees and petitioners in SWP No. 76/2003 titled Balbir Singh and Ors. v. State of J&K; and Ors. pertaining to the Jammu wing of this Court, have also been relieved, though the impugned order has no application in their case. Learned Advocate General has frankly conceded the mistake committed by the concerned local level officers and has made a statement that in their case the relieving orders would be revoked. We have taken his statement in this behalf on record. The same shall be de-linked and listed separately. Writ petition, SWP No. 178/2001, Prem Lata v. State of J&K; and Ors., pertaining to Jammu wing of the Court, though filed in 2001, has been heard with consent of the learned counsel alongwith these writ petitions. Therefore, the same shall be covered by the directions contained herein.

52. As regards the petitioners whose inter-district transfers were made on medical grounds, the State is directed to constitute two Medical Boards, one each at Srinagar and at Jammu, comprising Doctors of high repute, within a period of ten days from the date of this judgment. The respective Directors, School Education, shall over-see the proceedings of these Boards. The concerned petitioners shall report to the respective Director, School Education, within five days from the date of this judgment and, thereafter, such petitioners shall be referred to and examined by such Boards within a period of fifteen days after such reference. Investigations, if any, required would be conducted locally in the respective Hospitals. Decision on

all such cases shall be taken by the Government on the basis of such medical opinion to be formulated simultaneous with such examination, within a week after receipt of the medical opinion.

53. Learned counsel appearing in SWP No. 1031/2003, Shahzada Zarkoob v. State of J&K; and Ors., brought to the notice of the court that the petitioner is approaching her retirement. We understand that there is some rule or policy framed by the Government that Government servants nearing superannuation should be posted near their places of residence. Therefore, we observe that any of the petitioners, who is retiring within a period of two years from the date of this judgment, shall not be disturbed if he or she is presently posted near the place of residence.

54. While disposing of all these matters in terms of the above, we further provide that the State should float a scheme, in relaxation of rules, as a one-time exception and as an incentive to the following effect:

(i) whatever service an individual petitioner, or any other teacher affected by the impugned order, desirous of making a golden hand-shake with the Government, may have put in, if it falls short of the prescribed qualifying service, shall be deemed as qualifying service for entitlement to pension. A petitioner, who has already put in the qualifying service, shall be dealt with in terms of the relevant rules;

(ii) such a petitioner, as referred to in (i) above, shall be granted ten years addition to the 'deemed qualifying service'. A petitioner, who has already put in the prescribed qualifying service, shall be granted an addition of seven years to the service already put in by him or her. However, pension shall be calculated in terms of Article 230 (i) of J&K; CSRs.

(iii) the requirement of prior notice of 3 months in all cases shall be waived;

(iv) the service, whatever put in by such a petitioner, shall be deemed as qualifying service for the purpose of payment of gratuity.

(v) in addition to the leave encashment due under relevant rules, each such petitioner shall be entitled to compensation equivalent to fifteen days' average salary for every completed year of continuous service or any part thereof to be calculated on the basis of the salary the employee was being paid during each such year of service; provided that the total amount on account of compensation thus calculated shall not exceed ten months' present salary of such employee; provided further that, in case of persons retiring within one year, the total amount on account of such compensation shall not exceed the amount of salary to be drawn for the remaining period of service renderable by such person.

(vi) this scheme shall be floated by the Government within ten days from the date of this judgment; (vii) Petitioners, or any other teacher affected by the impugned order, desirous of availing the scheme, shall be given fifteen days' time to exercise their option;

(viii) Status-quo as on date with respect to postings shall be maintained with respect to all the writ petitioners for a period of fifteen days;

(ix) The posts, if any, thus falling vacant, shall be filled in on contractual basis by the Government, preferably, within a month after the expiration of twenty five days lest the school going children in rural areas should suffer more. The idea is to pick up the local qualified candidates so that they have no hesitation in working in the respective regions. It will be financially as well as administratively more viable to hire local candidates for the task;

(x) The scheme thus floated by the Government shall be given wide publicity through electronic and print media throughout the State.

55. It was brought to the notice of this Court by the learned Advocate General that some persons covered under the impugned order have occupied Government accommodations in the cities. Though we are not concerned with that in the present matter but, we make it clear that the directions contained in this judgment shall not be used as a garb to usurp the Government accommodation in any manner whatsoever.

56. We further direct that any writ petition concerning the impugned Government order pending in the court and not listed before this Court shall be governed by the terms of this judgment.

57. Since by this judgment we are disposing of the matters pertaining to two wings of this Court, we have prepared two sets of the judgment. One set, signed by us, shall be kept on record of the matters pertaining to Srinagar wing and the other set, signed by us, shall be kept on record of the matters pertaining to Jammu wing. However, for purposes of consigning the matters to record, the original judgment shall be kept on record of the cases shown at S. No. 1 in the list of matters pertaining to each wing, as contained in this judgment, and mention thereof shall be made in rest of the matters. Further, a copy of this judgment shall be kept on the record of each of rest of these writ petitions disposed of by this judgment.

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