

“Annexure to Government Order No.2486-LD(A) of 2011 dated 24-08-2011”



**Government of Jammu and Kashmir,
Department of Law, Justice and Parliamentary Affairs
Civil Secretariat
Srinagar/Jammu.**

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THE JAMMU AND KASHMIR STATE LITIGATION POLICY

1. THE VISION/MISSION

It is an undisputed fact that Government and its various agencies are major litigants in courts and other legal fora. The litigation against 'State' has increased manifold. Therefore the need of the hour is to take this increase in litigation against State seriously, because State interests especially financial interests when become target of litigation hit hard the society as a whole. Therefore, State litigation policy needs to be evolved on the pattern of National litigation policy. The policy is also based on the recognition that it is the responsibility of the Government to protect the rights of the citizens, to respect fundamental rights and those in charge of the conduct of Government litigation should never forget this principle.

I. Efficient Litigant means:

- A. The first and foremost step towards having a healthy litigation policy is that State litigation is to be taken seriously and the sole aim to be kept in mind is that good Government cases are to be won and bad cases are not unnecessarily pursued. For achieving the said goal, it is imperative to examine each writ petition/ civil suit when it is filed against Government, before the same is contested in court of law. For the said purpose, there should be a fool proof mechanism. It is to be made sure that all material facts supported by relevant documents are placed before courts / legal forums. This action is to be done with full transparency so that government does not become a compulsive litigant, every matter need not necessarily require seal of court. There are matters which can be decided administratively without intervention of court, even if, private parties try to knock the doors of court. In order to take first step to avoid unnecessary

litigation against the State the following stake-holders have to be pro-active:

1. Department of Law, Justice and Parliamentary Affairs;
2. Government Counsels/Law Officers of State; and
3. Concerned Departments/other functionaries against whom the litigation is initiated.

B. Department of Law & Justice of State Government has a role to play in appointing Law Officers who shall be the officers of the rank of Additional Secretary/ Deputy Secretary/ Under Secretary having legal expertise and background apart from being men of proven integrity. These Law officers will have to be posted in all administrative departments. They are required to be equipped with all facilities i.e. computers, internet and a sufficient subordinate staff. A Nodal Officer shall be nominated by the concerned Administrative Secretary for district subordinate office as well as for his administrative department in secretariat, who shall be solely responsible for providing factual material to the Law Officer posted by the Law Department. It shall be imperative for all of them to follow the Law Department Manual in letter and spirit particularly with regard to notices under CPC and other notices. As soon as the petition is filed against a particular department, Law Officer having full knowledge of law shall along with departmental officer discuss and examine the petition/plaint and see whether the petition/civil suit is worth to be contested or not, his examination should be based on reason and supported by law. The same exercise is required to be done by the Nodal officers in District offices. The examination should be time bound and after his examination if he reaches to the conclusion that there are no cogent reasons or valid grounds for facing the litigation, he should propose that the petition/civil suit need not be contested/defended and also suggest the ways and means to satisfy the claim of petitioner, out of court. Then the whole examination along with suggestions should be forwarded to the Law Department for examination and decision. the exercise should not take more than fifteen days.

Failure of this action on the part of Law Officers should be taken seriously by the Law Department and departmental action shall be initiated against defaulters. For this purpose Law Department will assign the task of monitoring to a senior officer of the department who will be assisted by such other officers/officials as the department may decide from time to time. All the officers manning the branch should have the good legal acumen and legal understanding.

- C. The appointment of Law Officers must be done carefully. The Law Officer has a crucial and important role to play in the overall and specific implementation of this Policy including but not limited to the references made hereinafter. Law Department must be mindful of the responsibility to appoint proper Law Officers who have legal background and expertise. They must be in a position to pro-actively manage litigation while making such appointments, care must be taken to see that there is continuity in the incumbents holding office. Frequent changes in persons holding the position must be avoided. Law Officers must also be subjected to training so that they are in a position to understand what is expected of them under the State Litigation Policy.
- D. Once the Law Officers are appointed, they shall have the full accountability. There should be accountability at every level. Lawyers also need to be made accountable. The litigation branch of Law Department shall **after full scrutiny fix the responsibility when good cases are lost.** The critical appreciation of cases by the litigation wing of Law Department is necessary. In this direction the institution of Directorates' of Litigation of Law Department will also be activated/strengthened. In order to carry the affects of State Litigation Policy to gross root level, District Litigation officers are required to be appointed by Law Department and they should be of the rank of Under Secretary, who shall have to be equipped with full man-power as the litigation against State in Districts goes un-noticed and sometimes it has heavy financial implications. The appointment/posting of District Litigation Officers will be made in a phased manner with necessary

creations from time to time. The said District litigation officers should have close liaison with nodal officers posted by administrative departments for their district offices. The said nodal officers of field offices along with appointed State counsels of district shall have to work jointly and have to be made accountable to District Litigation officer who shall have the day to day information of State Litigation in Districts and Tehsils. Further, Directorates of Litigation be given power to release counsel fee in favour of standing counsels / Government Advocates as per Government orders issued from time to time.

- E. Every administrative department shall have an effective legal cell headed by a Law Officer and Nodal Officer of administrative department with full fledged qualified staff. Then at District level a District litigation officer with full manpower. Every District office of every Government department shall as far as possible be provided a Law Officer heading legal cell of that District office. However, to begin with a District Law officer will look after the online litigation at District Level. The said Law Officer shall be a qualified person having legal background who shall be solely responsible to monitor State cases in all District courts in close liaison with Government counsels. The said Law Officers shall submit list of cases pending and the defence projected by the State counsels against those cases in their respective Districts to District Litigation Officer fortnightly, the laxity on the part of Law Officer shall have to be reported by District litigation officer to Director Litigation Kashmir/Jammu. Directors litigation Jammu/Kashmir shall take review meetings of District Litigation Officers after every three months and it shall be the duty of Director litigation to submit a full report of pendency, nature of cases and stage at which the matters are pending and the defence of State departments in various districts to the administrative Secretary Department of Law, Justice and Parliamentary Affairs quarterly. Any failure of departmental Nodal Officer is to be intimated to concerned administrative Secretary immediately by the Director Litigation.

- F. there shall be Empowered Committee to monitor the implementation of policy and overall accountability. The Law Officers and the heads of Department will ensure that all relevant data is sent to the Empowered Committees. The constitution of Empowered Committee shall be Advocate General of the State as head of the Committee. Three Members to be nominated by the Department of Law, Government of J&K with an Additional Secretary as Member Secretary. Then there shall be two Provincial Empowered Committees headed by the Senior Additional Advocate General with Director, Litigation as its Member and Deputy Director or Assistant Director, Litigation as its Member-Secretary. The Government may also nominate a Law officer as Member of the Committee.
- G. The State Empowered Committee shall be an apex body to receive and deal with suggestions and complaints including from litigants and Government Departments and take appropriate measures in connection therewith.
- H. Empowered Committee can recommend a panel to the Department of Law, Justice and Parliamentary Affairs for appointment of Government Counsels for the State. The Committee shall after full screening prepare a panel of lawyers who they think can efficiently represent Government in High Court. While doing so, Empowered Committee shall take into consideration the efficiency, reputation and integrity of said lawyers as also their willingness to take assignment of the Government. The provincial committees can prepare a list of counsels for Districts and submit it to Department of Law, Justice and Parliamentary Affairs. After preparing the panel of lawyers which the Empowered Committee thinks can best deliver while defending Government cases, submit the panel to Government in Law Department for final approval. Persons who recommend names for inclusion on the Panel have to be careful in making such recommendations and to take care to check the credentials of those recommended with particular reference to legal knowledge and integrity. Emphasis will be on identifying areas of core competence, domain expertise

and areas of specialization. It cannot be assumed that all lawyers are capable of conducting every form of litigation.

- I. Government need to consider the fee structure of State Counsels after regular intervals. Optimum utilization of available resources and elimination of wastage will itself provide for adequate resources for revision of fees. It should be ensured that the fees stipulated as per the Schedule of Fees should be paid within a reasonable time. There should be no scope for any malpractice in relation to release of payments.
- J. at the time of granting extension to any appointed Government Counsels, Empowered Committee shall after full scrutiny of performance of lawyer and consultation of relevant administrative department suggest whether to extend the term of said lawyer or to discontinue him.

II. Government Representation:

- A. The Empowered Committee can prepare a list of panel of lawyers having full legal knowledge and integrity. While the panel of Government lawyers is prepared, the Empowered Committee shall include representatives of the concerned Department and the thrust should be on the areas of specialization because it cannot be assumed that all lawyers are capable of conducting every form of litigation.
 - a. While it is recognized that Government Panels are a broad based opportunity for a cross section of lawyers, **Government Panels cannot be vehicles for sustaining incompetent and inefficient persons.** Persons who recommend names for inclusion on the Panel have to be careful in making such recommendations and to take care to check the credentials of those recommended with particular reference to legal knowledge and integrity.
 - b. Empowered Committee shall make it sure that emphasis will be on identifying areas of core competence domain expertise and areas of specialization. It cannot be assumed that all lawyers are capable of conducting every form of litigation.

- B. Government Counsels must be well equipped and provided with adequate infrastructure. **Modern facilities need to be provided so that delays are avoided and Government cases are presented before Hon'ble courts properly.** The modern facilities like computers, internet links and common research facilities need to be made available to Government lawyers.
- C. Training programs, seminars workshops and refresher courses for Government Counsels need to be encouraged. There must be continuing legal education for Government lawyers with particular emphasis on new areas of specialization. In this respect, coordination with Universities and law schools is necessary. Further, Government Counsels should be encouraged to attend National and regional conferences especially when the same are law based.
- D. Advocate General shall train the panel of lawyers in the fields of drafting and legal pleading so as to make them discharge their functions properly which is expected of them.
- E. Law Officers shall be responsible for active case management which will involve constant monitoring of cases particularly to examine whether cases have gone "off track" or have been unnecessarily delayed.
- F. The Government Counsels are to be given complete briefs by the Department concerned and that shall be the responsibility of Law Officer posted in that particular Administrative Department. Law Officer should make it sure that the record which has been filed in the court and the copies of the said record which have been retained in the said administrative Department tally to each other.
- G. The Government Counsels whether at High Court level or subordinate courts are expected to discharge their obligations with the sense of responsibility towards the court as well as to the Government. Since they are bridge between the Government and the court, they are supposed to follow code of conduct towards their client i.e., Government. They are not supposed to give any assurance before the court without consulting administrative department and if, in any case it is found that any Government Counsel has made any commitment before the court without consulting administrative Department or the Law Department, the

matter shall be immediately reported to Empowered Committee and the serious action against the Government Counsel should follow which even may entail his termination.

- H. Incomplete briefs are frequently given to Government Counsel. This must be discontinued. The Law Officers and Advocates-on-Record will be held responsible if incomplete briefs are given. It is the responsibility of the person in charge to ensure that proper records are kept of cases filed and that copies retained by the Department are complete and tally with what has been filed in Court. If any Department or Agency has a complaint in this regard it can complain to the Empowered Committee.

III. Adjournment:

- A. It has been observed that frequent adjournments are resorted to by Government lawyers which result in weakening of Government cases. Therefore, instructions will be issued to the Government Counsels that they should not resort to unnecessary adjournments. In extreme cases if instructions are required to be received from the concerned departments, the Government Counsels should try to get those instructions from the concerned department before the next date of hearing. For this purpose Law Officer should immediately be contacted by the concerned departmental counsel and, if necessary, he shall contact Head of the Department also. The same procedure should be followed in Appellate Courts also. Adjournments should not become a routine course.
- B. One of the functions of Law Officer will be to coordinate the conduct of litigation. It will also be his responsibility to monitor the progress of litigation, particularly to identify the cases in which repeated adjournments have been taken. It will be the responsibility of Law Officer to report cases of repeated and unjustified adjournments to Head of the Department and Advocate General and it shall be open to concerned HoD's and Advocate General to call for reasons for the adjournments. The Head of Department shall ensure that the record of the case reflect reasons for adjournment. If there are repeated adjournments, serious note shall be taken of cases of negligence or default and the matter be dealt with appropriately by referring such cases to the Empowered Committee. If Government Counsel is at

- fault action against him shall be taken which may entail his suspension/removal of his name from the Government panel.
- C. Cases in which costs are awarded against the Government as a condition of grant of adjournment shall be viewed very seriously. In all such cases head of department of the litigant department must give a report to the Empowered Committee of the reasons as to why such costs were awarded. The names of the persons responsible for the default, entailing the imposition of costs, shall be identified and suitable action should be taken against them.

IV. Pleadings / Counters:

- A. Suits or other proceedings initiated by or on behalf of Government have to be drafted with precision and clarity. There should be no repetition either in narration or in the grounds.
- B. The Empowered Committee should scrutinize and see that the appeals are drafted with particular attention to the synopsis and the list of dates which will carefully crystallize the facts in dispute and the issues involved. Slipshod and loose drafting will have to be taken seriously and defaulting advocates may be suspended / removed from the panels.
- C. Care is required to be taken with regard to the attachments of relevant documents to the pleadings/ appeal paper books and if it is found that some documents have not been annexed which has led to adjournment or which led to adverse comments of the court, the matter should be enquired into by the Law Officer and reported to the head of department concerned who in turn shall take suitable action against the persons responsible for such laxity.
- D. Counter affidavits in important cases should not be filed unless properly vetted by Government counsels in consultation with Law Officer of the department who in turn shall submit it to head of department for signatures and approval, but the action should be time bound and should not cause delay in filing the counters. Delay shall be attributed to Law Officer.

V. Filing of Appeals:

- A. Government Counsels should avoid filing appeals against ex parte or interim orders and in the first instance they should try their best to

- get the order vacated and in extreme cases when the order is not vacated, the appeals should be filed by the Government Counsels after consulting the concerned Department who in turn shall seek approval of Law Department.
- B. Given that tribunalization is meant to remove the loads from the courts, challenge to orders of tribunal should be the exceptional and not a matter of routine.
 - C. In service matters where the matter pertains to cases of pensions or retirement benefits without involving any principle and without setting any precedent or financial implications, appeal need not to be filed.
 - D. Appeals in Revenue matters will not be filed:
 - a. If the stakes are not high and are less than the amount to be fixed by the Revenue authorities.
 - b. If the matter is covered by a series of judgments of the High Court which have held the field and which have not been challenged in the Supreme Court.
 - c. Where assessee has acted in accordance with the long industry standing practice.
 - d. Merely because of the change of opinion on the part of jurisdictional officers.
 - E. Appeals will not be filed in Supreme Court unless:
 - e. The case involves the question of law.
 - f. If it is question of fact, the conclusion of the fact is so perverse that an honest judicial opinion could not have arrived at that conclusion.
 - g. Where public finances are adversely affected.
 - h. Where there is substantial interference with public justice.
 - i. Where there is a question of law arising under the Constitution.
 - j. Where the High Court has exceeded its jurisdiction.
 - k. Where the High Court has struck down statutory provision as ultra vires.

- l. Where the interpretation of the High Court is plainly erroneous.
- m. In each case, there will be a proper certification of the need to file an appeal. Such certification will contain brief but cogent reasons in support. At the same time reasons will also be recorded as to why it was not considered fit or proper to file an appeal. This exercise is to be done by the administrative litigant department in consultation with Law Department.

VI. Limitation: Delayed Appeals:

- A. It is recognized that good cases are being lost because appeals are filed well beyond the period of limitation and without any proper explanation for the delay or without a proper application for condonation of delay. It is recognized that such delays are not always bonafide particularly in cases where high revenue stakes are involved. In this respect, the legal cell of each administrative department and every field office shall keep an official of the rank of Jr. Legal Assistant (JLA) on duty to attend courts and get certified copies of court orders without any delay. They shall also be asked to record the court proceedings on daily basis and then submit the report of court proceedings to Nodal Officers concerned. For this purpose Law Department will make efforts to appoint Jr. Legal Assistants in administrative offices as well as in field offices at district levels subject to creation of posts. The Nodal Officers of the Department should keep an up to date record of such daily proceedings and after every six months submit it to concerned head of the department and Administrative Secretary, Law Department. The said JLA's will be given clear instructions to make efforts to get the certified copy of court orders in shortest possible time. Failure on the part of JLA's should be taken seriously by the concerned officers.
- B. Each head of the department of field office/administrative secretary will be required to call for detail of cases filed on behalf of the department and to maintain a record of cases which have been dismissed on the ground of delay. The Nodal Officers must submit a report in every individual case to the head of

department/administrative secretary concerned explaining all the reasons for such delay and identifying the persons responsible. Every such case will be investigated and if it is found that the delay was not bonafide appropriate action must be taken. Action will be such that it operates as deterrent for unsatisfactory work and malpractices in the conduct of Government litigation. For this purpose obtaining of the data and fixing of the responsibility will play a vital role. Data must be obtained on regular basis, annually, bi-annually or quarterly.

- C. Applications for condonation of delay are presently drafted in routine terms without proper application of mind and resorting to word processed “Boiler Plate”. This practice must immediately be stopped. It is the responsibility of the State counsel to carefully draft an application for condonation of delay, identifying the areas of delay and identifying the causes with particularity. concerned Government counsel who fails to adhere to this may be suspended / removed by the Department of Law. The Empowered Committee may also make recommendation in this regard. Every attempt must be made to reduce delays in filing appeals or applications. It shall be the responsibility of each head of the department to work out an appropriate system for elimination of delays and ensure its implementation. Belated appeals filed beyond the period of limitation cannot be approached merely from the point of view that courts have different approaches towards the condonation of delay. Since some courts liberally grant condonation of delay, a general apathy seems to have taken over. The tendency on the part of Government Counsel to expect leniency towards Government for condonation of delay should be discouraged.

VII. Alternative Dispute Resolution Arbitration.

- A. More and more Government departments and PSU's are resorting to arbitration. Careful drafting of commercial contracts including arbitration agreements, lease deeds and other legal documents must be given utmost priority. Since this job is to be exercised by the Law Department, therefore, the department has to entrust the drafting of agreements, contacts and other legal documents to legally well equipped / experienced officers. For further improvement in this direction, Law Department may depute officers

for undergoing legal drafting courses. the said section will have to study modern drafting technicalities while drafting arbitration agreements. Lack of precision in drafting arbitration documents is a major cause of delay in arbitration proceedings. This leads to dispute about appointment of arbitrators and arbitrability which results in prolonged litigation even before the start of arbitration. Care must be taken while drafting an arbitration agreement. It must correctly and clearly reflect the intention of the parties particularly if certain items are required to be left to the decision of named persons such as engineers are not meant to be referred as arbitration. Arbitration agreement must reflect a well defined procedure for appointment of arbitrators. Sole arbitrator may be preferred over a panel of three arbitrators. In technical matters, reference may be made to trained technical persons instead of retired judicial persons and the fee payable to arbitrators should be fixed in the first instance.

- B. The resort to arbitration as an alternative dispute resolution mechanism must be encouraged at every level, but this entails the responsibility that such arbitration will be cost effective, efficacious, and expeditious and conducted with high rectitude. In most cases arbitration has become a mirror of court litigation. This must be stopped.
- C. It is recognized that the conduct of the arbitration at present leaves a lot to be desired. Arbitrations are needlessly dragged on for various reasons. One of them is by repeatedly seeking adjournments. This practice must be stopped.
- D. The head of department will call for the date of pending arbitration. Copies of roznama, etc must be obtained to find out why arbitration is delayed and ascertain who is responsible for adjournments. Government counsels found to be conducting arbitration lethargically and inefficiently must not only be removed from the conduct of such cases but also not be briefed in future arbitrations. It shall be the responsibility of the head of the department to call for regular review meetings to assess the status of pending arbitration cases.
- E. It is also found that certain persons are preferred as arbitrators by

certain departments or corporations. The arbitrator must be chosen solely on the basis of knowledge, skill and integrity and not for extraneous reasons. It must be ascertained whether the arbitrator will be in a position to devote time for expeditious disposal of the reference or not.

- F. If it is found that an arbitration award goes against Government it is almost invariably challenged by way of objections filed in the arbitrations. Very often these objections lack merit and the grounds do not fall within the purview of the scope of challenge before the courts. Routine challenge to arbitration awards must be discouraged. A clear formulation of the reasons to challenge awards must precede the decision to file proceedings to challenge the awards.

VIII. Specialized Litigation:

- A. Proceedings seeking judicial review including in the matter of award of contracts or tenders.

Such matters should be defended keeping in mind constitutional imperatives and good governance. If the proceedings are founded on an allegation of the breach of natural justice and if it is found that there is substance in allegation, the case shall not be proceeded with and the order may be set aside to provide for a proper hearing in the matter. Cases where projects may be held up have to be defended vigorously keeping in mind public interest. They must be dealt with and disposed off as expeditiously as possible.

- B. Cases involving vires or statutes or rules and regulations:

In all such cases, proper affidavits should be filed explaining the rationale between the statute or regulation and also making appropriate averments with regard to legislative competence.

- C. Public Interest Litigation (PILS)

Public Interest Litigation must be approached in a balanced manner. On the one hand, PILs should not be taken as matters of convenience to let the courts do what Government finds inconvenient. It is recognized that the increase in PILs stems from a perception that there is government in action. This

perception must be changed. It must be recognized that several PILs are filed for collateral reasons including publicity and at the instance of third parties. Such litigation must be exposed as being not bonafide. PILs challenging public contracts must be seriously defended. If interim orders are passed stopping such projects then appropriate conditions must be insisted upon for the petitioners to pay compensation if the PIL is ultimately rejected. Advocate General shall have the competence to act in this direction.

D. PSU Litigation

Litigation between PSU's inter se between Government Public Sector Undertakings is causing great concern. It needs to be avoided as such litigation is at the cost of State on either side.

IX. Review of Pending Cases:

- A. All pending cases involving Government will have to be reviewed. This Due Diligence process shall involve drawing upon Statistics of all pending matters which shall be provided for by all Government Departments (including PSU's). Advocate General shall be responsible for reviewing all pending cases and filtering frivolous and vexatious matters from the meritorious ones. Advocate General shall present his report after every 2 months to the Empowered Committee which shall then be submitted to Law Department.
- B. Cases will be grouped and categorized. The practice of grouping should be introduced whereby cases should be assigned a particular number of identity according to subject and statute involved. In fact further sub-grouping will also be attempted. To facilitate this process standard forms must be devised to fill up at the time of filing of cases. Panels will be set up by the Advocate General to implement categorization and undertake review of cases to identify cases which can be withdrawn. These include cases which are covered by decisions of courts and cases which are found without merit will be withdrawn. This should be done in a time bound fashion by the Empowered Committee.
