(2019) 05 KAR CK 0002

In the Karnataka High Court

Case No : Writ Petition No. 23621, 31145, 58300 Of 2015, 54089, 2756 Of 2016, 6694 Of 2017

Abdul Aziz K APPELLANT

Vs

Managing Director RESPONDENT

Date of Decision : 28-05-2019

Acts Referred:

Road Transport Corporation Act, 1950, — Section 3, 34, 14(1), 14(2), 14(3), 15(1), 17(A), 19(1)(c), 45(1)
University Of Agricultural Sciences Act, 1963 — Section 7(5)
Constitution Of India, 1950 — Article 14, 16, 311

Citation : (2019) 05 KAR CK 0002

Hon'ble Judges : R. Devdas, J

Bench : Single Bench

Advocate : Shekar L, B L Sanjeev

Judgement

1. The petitioners in all these petitions are employees of Karnataka State Road Transport Corporation (hereinafter referred to as 'KSRTC'). The questions of law and facts raised in all these petitions being similar, these petitions are clubbed, heard together and disposed of by this common order.

2. The common question raised in these petitions is "whether it is legally permissible for the KSRTC to transfer on deputation an employee of KSRTC to the other three subsequently established Corporations i.e., Bangalore Metropolitan Transport Corporation (BMTC), North-West Karnataka Road Transport Corporation (NWKRTC) and North-East Karnataka Road Transport Corporation (NEKRTC)?"

3. The undisputed facts are that by order dated 15.08.1987, the State Government, by virtue of powers vested under Section 3 of the Road Transport Corporation Act, 1950, (hereinafter referred to as 'Act') established three new Corporations viz., BMTC, NWKRTC and NEKRTC, while retaining the earlier established KSRTC, however curtailing its area of operation. BMTC was established w.e.f. 15.08.1987, NWKRTC w.e.f. 01.11.1997 and NEKRTC w.e.f.

01.11.2000. The bifurcation and orders of the State Government establishing new Corporations were challenged by the KSRTC Staff and Workers Federation in W.P.No.22194/1997. The writ petition was allowed by order dated 02.07.2007, while quashing the Government Notification. However, the Division Bench in W.A.No.1459/2007, set aside the order dated 02.07.2007. The Special Leave Petition in SLP No.8010-8017/2014 came to be rejected by the Hon'ble Supreme Court of India vide order dated 29.08.2014.

4. In the Government Orders dated 15.08.1987, 01.11.1998 and 05.08.2000 under which the new Corporations were established, one of the clauses would provide that "the maintenance of class-I and II officers cadre shall continue in the KSRTC. The KSRTC shall have powers to depute these officers to the newly constituted Corporations subject to requirement. There is no provision to draw deputation allowance on such deputation." The Government Orders would also provides that the Vice-Chairman and Managing Director of KSRTC is vested with the powers in the matter of deputation of officers from one Corporation to the other as also deputation orders would be issued in respect of class-I and II officers as well as supervisory posts of class-III from KSRTC.

5. The Government Order dated 02.01.2012 clarified that the power in the matter of deputation of officer from one Corporation to the other is vested with the Managing Director of the KSRTC. In effect, the word "Vice-Chairman" which was found in the earlier Government Orders stood deleted.

6. During the course of these proceedings, the respondent-State and the Corporation have placed on record Government Order dated 07.07.2017, whereby the State Government has issued a direction to frame modalities in respect of transfer of cadre controlling authority to the respective Corporations. It has been submitted that a committee constituted in this behalf has submitted the draft rules in the matter of cadre control in respect of class-I and II officers of the Corporation, to the State Government. The State Government is yet to take a decision in this regard.

7. It is also an admitted fact that the earlier litigations and the decisions of this Court as well as the Hon'ble Supreme Court were in respect of class-III and IV employees of the Corporation. It is also submitted by the learned counsel for the respondent-Corporation that the decision of this Court that in all the three Government Orders by which the new Corporations were established and the letter dated 08.10.2001 written by the State Government to the Managing Director of the KSRTC and a Circular dated 21.11.2001 issued by the KSRTC, in exercise of powers conferred under Section 34 of the Act, the position emerges that in respect of class-III and IV employees, once the employee has exercised his option to either remain in KSRTC or be transferred permanently to the newly established Corporations, such an employee could not be transferred subsequently to any other Corporation or Division, has been accepted by the State and the Corporations.

8. Therefore, the question of validity of transfer on deputation remains to be considered as regards class-I and II employees of the Corporation. Admittedly, the petitioners herein above are class-I or class-II employees.

9. The arguments on behalf of the petitioners is lead by Prof. Ravivarma Kumar, learned Senior Counsel and the other learned counsels have adopted the arguments of the learned Senior Counsel. To counter the contention of the respondent-Corporation that the Government Orders, the Circular dated 21.11.2001 and the modified Circular dated 02.01.2012 would empower the Managing Director of the KSRTC as the cadre controlling authority to transfer an employee from one Corporation to another, the learned Senior Counsel Prof.Ravivarma Kumar submitted that Section 14(1) of the Act would empower the State Government to appoint a Managing Director, a Chief Accounts Officer and a Financial Advisor, while Section 14(2) empowers the Corporation to appoint a Secretary and such other officers and employees as it considers necessary for the efficient performance of its functions. It is therefore submitted that it is the respective Corporation alone which is empowered to appoint other officers and employees to the Corporation. It is further submitted that the Managing Director of KSRTC cannot appoint or depute by transfer, an employee of KSRTC to another Corporation. Section 14(3) provides that the conditions of appointment and service and scales of pay of the officers and the employees of the Corporation shall be determined by regulations made under the Act, subject to the provisions of Section 34. It was submitted that Section 15(1) of the Act would provide that the Managing Director shall be the Executive Head of the Corporation and all other officers and employees of the Corporation shall be subordinate to him. Similarly, it was submitted that Section 19(1)(c) provides that the Corporation shall provide its employees suitable conditions of service.

10. Learned Senior Counsel submits that Section 45(1) of the Act empowers the Corporation to make regulations, not inconsistent with the Act and the Rules made there under, while 45(2)(c) provides that such regulations may provide for the conditions of appointment and service of the officers and other employees of the Corporation.

11. Learned Senior Counsel draws the attention of this Court to Section 34 which would empower the State Government to give directions to the Corporation. It was submitted that by no stretch of imagination, could the powers conferred on the State Government under Section 34 empower it to confer or delegate power on the Managing Director of one Corporation to exercise powers, to interfere with or pass orders affecting the service conditions of an employee of another Corporation or transfer or depute an employee of the Corporation to another Corporation. It was therefore submitted that Section 34 would not empower the State Government to direct the Managing Director of one Corporation to meddle with the affairs of another Corporation. It was submitted that such a power is not vested even with the State Government.

12. The learned Senior Counsel further draws the attention of this Court to the

K.S.R.T.C (Cadre and Recruitment) Regulations, 1982. Regulation 3 (g) provides that appointment to a post in the Corporation shall be made by the methods enumerated therein, including by deputation of a person already in service in the State or Central Government or any undertakings owned or controlled by the State or Central Government undertaking to fill up any direct recruitment vacancy of class-III or class-IV post. Similarly, Regulation 3(2)(d) would empower the Managing Director, while filling up a vacancy of class-III or class-IV post, by deputation, to ensure that such deputation could be made on such pay, pay-scale and allowance as may be determined by the Corporation.

13. Moreover, it is submitted that the provisions would only enable the Managing Director of a Corporation to make appointments or take a person on deputation from another Corporation. Therefore, it is submitted that the underlying principles, taking into consideration all the relevant provisions stated above, would be that the Managing Director of a Corporation can only appoint or receive on deputation an employee of another Corporation, if that employee has consented to it.

14. In this regard, the learned Senior Counsel places reliance on the following judgments:

1) H.Papanna Gowda Vs. State of Mysore and Another, reported in ILR 1968 MYSORE 672;

2) Jawaharlal Nehru University Vs. Dr. K. S. Jawatkar and Others, reported in 1989 Supp (1) SCC 679;

3) Dipak Babaria and Another Vs. State of Gujarat and Others, reported in (2014) 3 SCC 502;

4) BALCO Captive Power Plant Mazdoor Sangh and Another Vs. National Thermal Power Corporation and Others, reported in (2007)14 SCC 234;

5) Umapati Choudhary Vs. State of Bihar and Another, reported in (1999) 4 SCC 659; and

6) B.Chinnaswamy Vs. The Management of Karnataka State Road Transport Corporation, Rep. by its Chief Law Officer and Others, reported in ILR 2011 KAR 2246.

15. Smt. H.R.Renuka and Sri.B.L.Sanjeev, learned counsels have addressed their arguments on behalf of the respondent-Corporation. Smt. H.R.Renuka, learned counsel submits that the petitions required to be rejected on the ground of delay and laches. It is submitted that the impugned Government Orders were issued way back in the years 1997, 1998 and 2000, while the impugned Circulars were issued in the year 2001 and clarified vide a Government Order dated 02.01.2012. It is therefore submitted that challenge to the said Government Orders and Circulars are inordinately delayed.

16. Smt.H.R.Renuka, learned counsel submits that as regards class-I and II

employees, a common state-wise seniority list comprising of the employees of all the four Corporations are maintained even till date and this is an undisputed fact. Learned counsel submits that one of the conditions stipulated in all the three Government Orders of the year 1997, 1998 and 2000 is that "the maintenance of class-I and II officers' cadre shall continue in the KSRTC. The KSRTC shall have powers to depute these officers to the newly constituted Corporations subject to requirement. There is no provision to draw deputation allowance on such deputation." It is further submitted that the petitioners herein have availed the benefits of promotion and request transfer, flowing from the common seniority list, while they have called in question the impugned orders of transfer on deputation when it was not to their liking. It is therefore submitted that the conduct of the petitioners should be taken note of.

17. Learned counsel for the respondent-Corporation draws the attention of this Court to Regulation 13 of the K.S.R.T.C (Cadre and Recruitment) Regulations, 1982 and submits that the petitioners are working in state-wise posts. It is therefore submitted that as per Regulation 13, the Corporation is obliged to maintain a state-wise seniority list and the petitioners have not raised their little finger against the common state-wise seniority list.

18. The learned counsel would further submit that transfer on deputation does not amount to change of employer, since the appointing authority and the disciplinary authority continues to be the Managing Director of KSRTC. Moreover, it is submitted that a co-ordinate bench of this Court, in the case of P.Ashok Kumar Vs. KSRTC and Others, in W.P.No.42163-42164/2011, which was disposed of on 24.08.2012 has held that since a common seniority list of class-I and II officers of all the four Corporations is maintained and acted upon and since the cadre controlling authority of class-I and II officers working in all the four Corporations is the Managing Director of KSRTC, the order of transfer on deputation of a class-I officer, from KSRTC to NEKRTC, Gulbarga has been upheld. It was also submitted that a Division Bench of this Court, in the case of S.B.Doddamani Vs. General Manager, KSRTC and Another, in W.A.No.17883/2011 has held that when the appellant has not attributed any malafides on the part of the KSRTC in transferring him on promotion to Gulbarga Division, the order of transfer was not interfered with.

19. Learned counsel Sri. B.L.Sanjeev, while adopting the arguments of Smt.H.R.Renuka, learned counsel, on facts in respect of W.P.No.6694/2017, submitted that the petitioner was transferred as he was involved in acts of serious misconducts attracting the provisions of Sexual Harassment of Women at Workplace (Provision, Prohibition and Redressal) Act, 2013 and therefore, sought to justify the order of transfer. While placing reliance on the judgments of the Apex Court in the case of Vishaka and Others Vs. State of Rajasthan and Others, reported in (1997) 6 SCC 241 and other judgments, it was submitted that the employer was duty bound to take action against the delinquent officer and the purpose of transfer of such delinquent officer would be frustrated if holding an

elaborated enquiry is to be insisted upon.

20. Heard the learned Senior Counsel for the petitioners, the learned counsels for the respondents and perused the writ papers.

21. The Hon'ble Apex Court in the case of Jawaharlal Nehru University2 (supra) has held that,

"The contract of service entered into by the respondent was a contract with the appellant University and no law can convert that contract into a contract between the respondent and the Manipur University without simultaneously making it, either expressly or by necessary implication, subject to the respondent's consent. When the 2 1989 Supp (1) SCC 679 Manipur University Act provides for the transfer of the services of the staff working at the Center of Post-Graduate Studies, Imphal, to employment in the Manipur University, it must be construed as a provision enabling such transfer of employment but only on the assumption that the employee concern is a consenting party to such transfer...... The position in law is clear, that no employee can be transferred, without his consent, from one employer to another. The consent may be express or implied."

22. Moreover, as rightly pointed out by Prof.Ravivarma Kumar, learned Senior Counsel, the impugned Government Orders and Circulars have been issued by the State Government in excess of powers conferred under Section 34 of the Act. In exercise of the power of general superintendence bestowed on the State Government, the State Government has neither the power nor could it delegate any such power to the Managing Director of KSRTC to appoint or transfer on deputation an employee of KSRTC to any other Corporation; likewise the Managing Directors of the other three Corporations also are not invested with power to appoint or transfer on deputation an employee of the respective Corporation to the other Corporation.

23. Admittedly, separate cadre and recruitment Rules have not been notified for the newly established Corporations. Therefore, reliance was placed on the K.S.R.T.C (Cadre and Recruitment) Regulations, 1982. Regulation No.3(g) would only empower the 'Corporation' to appoint on deputation a person of other State Transport Corporation to fill up any direct recruitment vacancy of class-III or IV post. Likewise, Regulation 3(2) (d) would empower the Managing Director, while filling up a vacancy of class-III or class-IV post, by deputation, to ensure that such deputation could be made on such pay, pay-scale and allowance as may be determined by the Corporation. A plain reading of the Regulation makes it clear that the Corporation or its Managing Director may appoint an employee of another Corporation on deputation, which implies that such an appointment could be made if the employee of such other Corporation is willing to come on deputation. This position is clear in the light of the decision of the Apex Court in the case of Jawaharlal Nehru University 1989 Supp (1) SCC 679, where it has been held that the position in law is clear - no employee can be transferred without his consent, from one employer to another.

(Emphasis supplied)

24. It is also interesting to note that the view of the Division Bench of this Court in H.Papanna Gowda1 is also the view of the Apex Court in the case of Jawaharlal Nehru University 1989 Supp (1) SCC 679, in case of application of the principles "last come, first go". In the matter before the Apex Court, where the Center of Post-Graduates Studies in the Jawaharlal Nehru University was transferred to Manipur University, it was held that a person employed in the Center of Post-Graduate Studies would not automatically get transferred to Manipur University. It was concluded that the employee continues in the employment of the earlier employer i.e., Jawaharlal Nehru University. The transfer of the Center of Post-Graduates Studies to Manipur University may be regarded as resulting in abolition of the post held by the respondent-employee. In that event, if the post held by the respondent-employee is regarded as one of a number of posts in a group, the principle "last come, first go" will apply, and someone junior to the respondent must go. If the post held by him constitutes a class by itself, it is possible to say that he is surplus to the requirements of Jawaharlal Nehru University and is liable to be retrenched. In essence, it means that the same benefit that was given to class-III and IV employees, in seeking their consent or option either to stay back in KSRTC or to opt for services under the new Corporations, should have been offered to class-I and II employees also.

25. The argument of the learned counsels for the respondents that some of the petitioners herein have taken the benefit of promotion and transfer at request and therefore, their consent is implied, is an argument which cannot be countenanced. It is clear from the decision of the Apex Court and Regulation No.3(g) of Regulations, 1982 that deputation is permissible with the consent of the employee. Therefore, if the petitioner has taken the benefit of promotion under the common seniority list, it was as a matter of right and the willingness expressed by the petitioner to be transferred on promotion. Such an action on the part of some of the petitioners cannot be held as consent given for all times to come. So long as the petitioners feel that maintenance of State-wise common Seniority List is beneficial to them, they will take advantage of the same. Therefore, they are not obliged to challenge the common seniority list.

26. In H.Papanna Gowda ILR 1968 MYSORE 672, the Division Bench, in fact declared Section 7(5) of the University of Agricultural Sciences Act, 1963 which provided for compulsory transfer to the University of those Government servants whose services under the State could not have been discontinued when the research and educational institutions to which Sub-section(4) refers to became part of the University organization, as unconstitutional piece of legislation, which did not affect the right of the petitioner therein to continue in government service as an agricultural demonstrator in the Department of Agriculture. Section 7(5) of the University of Agricultural Sciences Act, 1963, reads as follows:

"7. Transfer of certain colleges and institutions to the University. -

(1)....

(5) Every person employed in any of the colleges specified in sub-section (1) or in any of the institutions referred to in sub-section (4) immediately before the appointed day or the date specified in the order under sub-section (4), as the case may be, shall, as from the appointed day or the specified date, become an employee of the University on such terms and conditions as may be determined by the State Government in consultation with the Board."

27. A challenge has been raised in W.P.Nos.31145/2015, 23621/2015 and 58300/2015, seeking quashment of the Government Order bearing No.O.SA.E. 65TRA/99, dated 05.08.2000, so far it relates to paragraph No.3, which would provide "the maintenance of class-I and II officers cadre shall continue in the KSRTC. The KSRTC shall have powers to depute these officers to the newly constituted Corporations subject to requirement. There is no provision to draw deputation allowance on such deputation." This provision is akin to Section 7(5) of the University of Agricultural Sciences Act, 1963, since it compels class-I and II officers to continue in the KSRTC while KSRTC is vested with powers to depute these officers to the newly constituted Corporations, without obtaining their consent. The liberty which was granted to class-III and IV employees to exercise their option either to continue in KSRTC or chose any of the new Corporations, was denied to class-I and II officers. As held by the Division Bench, in H.Papanna Gowda's ILR 1968 MYSORE 672 case, change of conditions of service as provided under Article 311 of the Constitution of India, could be brought about while following the principles enshrined in Articles 14 and 16 of the Constitution of India. Transfer on deputation from one Corporation to another amounts to change of employer. Such being the position, transfer on deputation cannot be compelled on an employee of a Corporation or cannot be effected without his/her consent. Since, the said provision is opposed to the principles enunciated above, this Court proceeds to hold that portion of paragraph No.3 of the impugned Government Order dated 05.08.2000 as unconstitutional and therefore, the same stands quashed.

28. The change brought about in the Government Order dated 02.01.2012, is only a cosmetic change inasmuch as, the power earlier vested in the Government Order dated 05.08.2000, in the Vice-Chairman and Managing Director of KSRTC, is vested in the Managing Director of KSRTC, by deleting the word "Vice-Chairman". Since, this Court has declared a portion of the Government Order dated 05.08.2000 unconstitutional, consequently, the subsequent Order dated 02.01.2012 also meets the same fate.

29. The argument of the learned counsels for the respondents that transfer on deputation of an employee of KSRTC to the other Corporations would not amount to change of employer, cannot be countenanced. It is noticeable that a Division Bench of this Court in the matter of The KSRTC Vs. The Workmen of KSRTC and Others, reported in 2014 (1) AKR 506, has held that the three subsequently established Corporations have been established by the State Government by

virtue of the power conferred under Section 3 of the Act. Section 3 empowers the State Government to establish more than one Road Transport Corporation for the whole or any part of the State. The argument that the new Corporations were established as subsidiary Corporations under Section 17(A) of the Act, has been specifically rejected. The Division Bench has clearly held that the newly established Corporations are not subsidiary Corporations. Each of the newly established Corporations or every Corporation established under Section 3 of the Act shall be a body corporate by the name notified under Section 3 having perpetual succession and a common seal, and shall by the said name sue and be sued. Therefore, the moment an employee of one Corporation, is transferred on deputation to another Corporation established under the Act, such an employee becomes an employee of the Corporation to which the employee is deputed. Such an employee receives salary from the Corporation to which he is deputed.

30. In the opinion of this Court, it is not necessary to go into the aspects of whether the impugned transfer orders were punitive in nature or passed with malafide intentions.

31. The cause of action for the present writ petitions is the impugned orders of transfer. Therefore there is no delay in filing the petitions. Moreover, a Division Bench of this Court in the matter of The KSRTC Vs. The Workmen of KSRTC and others 2014(1) AKR 506, has taken note of the statement of objections filed by KSRTC in the writ petitions that all the employees of KSRTC would continue as employees of KSRTC notwithstanding the establishment of the new Corporations and they would be transferred to the Corporations only if they give their consent. The Division Bench held that even otherwise, if the employees of KSRTC are transferred against their wish and consent to the newly established Corporations, their rights are protected under law. If and when their rights are so infringed, it is open to them to approach a competent Court and adjudicate their rights.

32. The question raised for consideration is answered thus-it is not legally permissible to transfer an employee of KSRTC to BMTC, NWKRTC or NEKRTC, without the consent of the employee.

33. Having declared the offending portion of paragraph No.3 of the Government Order dated 05.08.2000 as unconstitutional, the decision of the co-ordinate Bench in the case of P. Ashok Kumar4, should not detain this Court any further. No challenge was raised to the Government Order dated 05.08.2000 in P. Ashok Kumar4. The basis for the decision in P. Ashok Kumar4, was the Government Order dated 05.08.2000 and the maintenance of common seniority list of class-I and II employees of all the four Corporations. Moreover, the decision of the Division Bench, in The KSRTC Vs. The Workmen of KSRTC and Others 2014(1) AKR 506 has come subsequent to the decision in P.Ashok Kumar W.P.NOs.42163-42164 of 2011. Further, since, the basis has been removed herein above, by quashing the offending portion of paragraph No.3 of Government Order dated 05.08.2000, this Court proceeds to pass the following:

ORDER

The writ petitions are allowed.

A portion of paragraph No.3 of the Government Order dated 05.08.2000 which reads as "the maintenance of class-I and II officers cadre shall continue in the KSRTC. The KSRTC shall have powers to depute these officers to the newly constituted Corporations subject to requirement. There is no provision to draw deputation allowance on such deputation" is hereby declared as unconstitutional and consequently quashed.

The impugned orders of transfer are quashed and set aside.

No order as to costs.

