
(2010) 04 MP CK 0014
In the Madhya Pradesh High Court

Ashok Tiwari

APPELLANT

Vs

Madhya Pradesh Text Book Corporation and Another

RESPONDENT

Date of Decision : 20-04-2010

Acts Referred:

Constitution of India, 1950 — Article 16, 310, 311

Citation : (2010) 04 MP CK 0014

Hon'ble Judges : Rajendra Menon, J;K.K. Lahoti, J;A.K. Mishra, J

Bench : Full Bench

Judgement

Rajendra Menon, J.—While hearing the present writ petition pertaining to transfer of a "daily rated employee", the Writ Court found that the principles laid down by a Division Bench of this Court, in the case of Udai Singh Yadav v. Depot Manager, MPSRTC 1994 (2) MPWN 50, warrants reconsideration due to reasons indicated in the order dated 23-7-2003 and, therefore, the following reference is made to this Bench. The questions requiring considering as indicated by the learned Single Judge are:

(i) Whether a "daily rated employee", who is not governed by any service rules, can be transferred from one place to another ?

OR

(ii) Whether his services are transferable ?

OR

(iii) In case of transfer, what emoluments will be available to him and whether on this ground, he is entitled to any protection under the Rules ?

2. Facts, in brief, necessary for answering the aforesaid question indicates that the petitioner herein was employed in the M.P. Text Book Corporation, Bhopal as a "daily rated employee". He was assigned duties in the Library as an Incharge and while so working it was found that he has acted in a manner unbecoming of an employee, in as much as he was found to be taking out photocopies of certain

important documents, in an unauthorized manner. In view of the above, vide Annexure P-12, dated 4-4-2003, he was transferred from the Head Office of the Corporation, i.e., from Bhopal to Panna Depot.

3. The writ petition in question is filed assailing the aforesaid order of transfer. During the course of hearing of the writ petition, on 23-7-2003 before the Writ Court, petitioner assailed the transfer mainly on the ground that he is a "daily rated employee", in spite of certain orders passed in an earlier writ petition filed by him being W.P. No. 800/2000, he has not been regularized and he continues to be a "daily rated employee". Accordingly, contending that he is not holding any post and the terms and conditions of his appointment do not permit for his transfer from one place to another, challenge was made to the order of transfer. Placing reliance on certain judgments indicating the status of a "daily rated employee", it was argued before the learned Single Judge (Writ Court) that a "daily rated employee" does not hold any post, therefore, cannot be transferred from one place to another. The contention advanced by the petitioner was refuted on behalf of the respondents before the learned Single Judge, by pointing out that petitioner had been working at one place, i.e., at Bhopal, since the last 13 years, he is being transferred because of certain administrative exigency and placing reliance on the Division Bench judgment of this Court, in the case of Udai Singh Yadav (supra), it was argued that transfer of the petitioner is proper and permissible.

4. After considering the rival contentions, learned Single Judge found that a "daily rated employee" does not hold any post, the legal rights available to him were limited and keeping in view certain principles laid down by a Bench of this Court, in the case of Tilak Singh Tomar Vs. State of Madhya Pradesh and Others, the learned Single Judge found that transfer of a Government servant is permissible only when he is appointed to a cadre of transferable post and whose case transfer is an ordinary incident of service, which does not result in any alteration of the condition of service to the disadvantage of the employee. It was found by the learned Single Judge that in the present case, petitioner was a "daily rated employee", he is not regularized and no service rules are applicable to the petitioner, he is getting a meagre emolument as fixed by the Collector and there is no rule showing that in the establishment of the respondent a "daily rated employee" is holding a post, which is transferable. Prima facie finding that an employee, who does not hold a post and to whom no rules are applicable, cannot be transferred and observing that the principle laid down in this regard, in the case of Udai Singh Yadav (supra), warrants reconsideration, the reference in question as indicated hereinabove was made by the learned Single Judge (Writ Court).

5. During the course of hearing of this writ petition, Smt. Shobha Menon, learned Senior Advocate for the petitioner, emphasized that the admitted position in the present case are that the petitioner is a "daily rated employee", he has not been regularized, there is no rule or regulation applicable in the respondent's

establishment, which permits transfer of a "daily rated employee". Referring to the import and meaning of the words "civil post", "Government servant" and the principle laid down by the Supreme Court in the case of State of Assam and Others Vs. Shri Kanak Chandra Dutta, , learned Senior Advocate argued that transfer of an employee is permissible only if he is holder of a post, like a "civil servant" or a "Government servant", and to whom the statutory rules and regulations governing the service are applicable.

6. Placing reliance on the following judgments:- The Superintendent of Post Offices and Others Vs. P.K. Rajamma, Chief General Manager (Telecom), N.E. Telecom Circle and another Vs. Rajendra Ch. Bhattacharjee and others, Tilak Singh Tomar (supra); National Hydroelectric Power Corporation Ltd. Vs. Shri Bhagwan and others, Om Prakash Pali Vs. State of M.P. and Others, R.K. Khare v. M.P. State Mining Corporation Limited, Bhopal and Anr. 2002 (4) MPLJ 33 ; State of Haryana and Another Vs. Tilak Raj and Others, ; State of U.P. and Others Vs. Siya Ram and Another, ; M.P. Housing Board and Another Vs. Manoj Shrivastava, State of M.P. and Others Vs. Arjunlal Rajak, ; Branch Manager, M.P. State Agro Industries Development Corpn. Ltd. and Another Vs. Shri S.C. Pandey, ; Union Public Service Commission Vs. Girish Jayanti Lal Vaghela and Others, ; and, State of Bihar Vs. Upendra Narayan Singh and Others, , learned Senior Advocate argued that the reference made be answered by holding that a "daily rated employee" cannot be transferred. Taking us through the judgments as referred to hereinabove, the status held by a "daily rated employee" and the concept of transfer, learned Senior Advocate argued that transfer of a "daily rated employee" like the petitioner is not permissible.

7. Refuting the aforesaid contention and placing reliance on the judgment rendered by the Division Bench, in the case of Udai Singh Yadav (supra), Shri Ashish Pathak, learned Counsel for the respondent Corporation, submitted that transfer is an incident of service and it is the prerogative of an employer to transfer an employee from one place to another, as per the administrative exigency. Contending that there is no prohibition in transferring an employee even a "daily rated employee", from one place to another, Shri Ashish Pathak prays for answering the reference by holding that transfer of a "daily rated employee" is permissible.

8. We have heard learned Counsel for the parties at length and perused the records.

9. Transfer in relation to a service normally means a change of place of employment within an organization. This is the meaning of the word "transfer" as defined in the New Oxford English Dictionary, 1993 Edition. It is a normal incident of public service and, generally, does not require the consent of an employee. In most of the service rules, governing the terms and conditions of employment, particularly in Government service so also in statutory organizations, an express provision relating to transfer is contemplated. For instance, in the Fundamental Rules governing service of Central Government

employees, transfer in Supplementary Rule 2 (18) to the Fundamental Rules is defined in the following manner:

Transfer means the movement of a Government servant from one headquarter station in which he is employed to another such station, either:

- (a) to take up the duties of a new post, or
- (b) in consequence of change of his headquarter.

In the Supplementary Rule to M.P. Fundamental Rules also, transfer is defined in Supplementary Rule 2(17), in identical manner and reads as under:

(17) "Transfer" means the movement of a Government servant from one headquarter station in which is employed to another such station either (a) to take up the duties of a new post, or (b) in consequence of a change of his headquarters.

Identical definition of "transfer" as provided in the Supplementary Rules to the Fundamental Rules and as indicated hereinabove, is contained in Rule 8(19) of the Mysore Civil Services Rules, 1958 and in the case of U.M. Anigol v. State of Mysore 1974 (2) SLR 110, Jagannatha Shetty, J., as He then was, considering the meaning of the word "transfer" appearing in Rule 8 (12) of the Mysore Civil Service Rules, observed that from the aforesaid definition it would be clear that a "Government servant" can be said to have been transferred only when he is posted to a post outside his normal headquarters. It is observed by the learned Judge that if a "Government servant" is moved and posted in different posts within the same headquarters, it may not amount to transfer. It is held that transfer contemplates change in the headquarter and joining duties in a new post, in the changed headquarter. Definition of transfer may differ, but it contemplates movement of an employee from one post to another and from one place to another within the organization. Primarily, therefore, transfer is from one post to another and, therefore, holding of a post by the incumbent, who is transferred is one of the primary conditions to be fulfilled while transferring an employee. The aforesaid would be clear if the meaning of the word "transfer" as defined in the Supplementary Rules applicable to the Central Government and State Government employees, as indicated hereinabove, is taken note of.

10. In the case of Udai Singh Yadav (supra), a Division Bench of this Court has held that transfer is an incident of service and an employee can claim no right to remain posted at a particular place. The Division Bench has held that it is for the employer to see where the services of an employee are required most. It was after holding so that transfer of a daily rated conductor working in the M.P. State Road Transport Corporation was upheld by the learned Division Bench, in the case of Udai Singh Yadav (supra).

11. However, while so holding the learned Division Bench in the said judgment has not adverted to consider the question of transfer in relation to and with reference to the requirement of holding a post and certain other conditions to be

fulfilled for appointment to a service in a particular establishment or an organization. In that view of the matter, it would be appropriate to evaluate the principle governing appointment to a service or post, the concept of such an appointment and the concept of appointment of a person on daily wage basis and the rights etc., available to such an employee and the terms and conditions governing his service.

12. As far as services in the Government so also in relation to service under statutory corporation and organization created by the State are concerned, the Rules and Regulations applicable to Government employees are made applicable or rules and regulation similar in nature are formulated. In the present case also, in the respondents Corporation, it is stated by the learned Senior Advocate for the petitioner that the rules of the Government are made applicable. In that view of the matter, it would be appropriate at this stage to consider the law governing the concept of appointment to service in the Government or to a post in statutory establishments and organizations and various other aspects relating to such employment.

13. In the case of Kanak Chandra Dutta (supra), the Supreme Court was required to consider the meaning and scope of the words "civil post" as appearing in Article 311 of the Constitution and the fact as to whether a "Mauzadar" appointed under the Assam Land and Revenue Regulation, was holder of a "civil post" or not. After taking note of various provisions, particularly "the provisions of Articles 310 and 311 of the Constitution, it has been held by the Supreme Court that there is no formal definition of "post" and "civil post". It is held that a post is a service or employment. A person holding a post under a State is a person serving or employed under the State. It is observed by the Supreme Court that a person who holds a "civil post" under the State holds office during the pleasure of the Governor of the State and a post under the State is an office or a position in which duty in connection with affairs of the State are attached. It is held by the Supreme Court that a post may be created before appointment or simultaneously with it. It therefore flows from the aforesaid principle that if there is no post in existence, there can be no appointment. It is further held by the Supreme Court that a post is an employment, but every employment is not a post. A casual labourer, it has been held by the Supreme Court in the aforesaid case, does not hold a post. It would, therefore, be clear from the aforesaid judgment that appointment to a post normally means existence of a sanctioned and approved post in the organization or the department as the case may be and appointment of a person against such a post. If the person is appointed in a casual manner or otherwise and not to any post created for such appointment, he is not a "civil post" holder nor is he an appointee to such a post. The said principle is clear on a scanning of the aforesaid judgment of the Supreme Court.

14. Again, in the case of Superintendent of Post Offices and Ors. (supra), the meaning and concept of the words "civil post" is considered by the Supreme

Court in relation to Extra Departmental Postal Agents working in the Postal and Telegraph Department and it is held by the Supreme Court in the aforesaid case that a post exists apart from the holder of the post. After following the principle laid down in the case of Kanak Chandra Dutta (supra), and after taking note of the rights and duties of an Extra Departmental Agent's post, it is held that an Extra Departmental Agent is a "civil post" holder under the Union of India. However, while doing so the principle laid down in the case of Kanak Chandra Dutta (supra), was approved and it is held that a "civil post" holder is appointed on a created and sanctioned post and a casual labourer is not a holder of a post. In this case, it was found that an Extra Departmental Agent was appointed to a separate post, statutorily created.

15. In the case of Chief General Manager, (Telecom) N.E. Telecom Circle and Anr. (supra), the question of transfer of an employee from one place to another is taken note of and the scope of judicial review in the matter of transfer is evaluated. Even though it is held that transfer is an administrative function and is made in public interest, but in the aforesaid judgment the principle laid down is that if a person holds a transferable post, his transfer is a normal incident of service. It is, therefore, clear from the aforesaid judgments that transfer of a Government servant is from one place to another and holding of a transferable post is one of the pre-conditions, which is required to be fulfilled before a Government servant can be transferred. That being so, it would be appropriate now to examine as to what is the status of a "daily rated employee" and what are the rights available to him and what are the statutory provisions, if any, which govern his terms and conditions of employment with regard to transfer, as is borne out from the records in the present case.

16. In the case of Tilak Singh Tomar (supra), reference to which has been made by the learned Single Judge, in the order of reference the question before the Court was with regard to the status of a "daily rated employee" and his rights to seek absorption in services of a Municipal Council. While considering the rights available to a "daily rated employee" in the matter of seeking absorption in the regular service, the learned Judge in the aforesaid case has found that a "daily rated employee" has no right to hold a post. The foundation of his engagement is expressed by the expression "daily wager", which is indicative of the fact that his engagement is subject to availability of work. It is held by the learned Judge in the aforesaid case that a "daily rated employee" is appointed for a day, and his engagement on the next day depends upon availability of work. A daily wager is not obliged to report for duty on every day nor is his engagement every day guaranteed. It has been held that mere continuous working for a long period will not permit him to seek absorption by over-reaching the law and without following the normal rules of selection and recruitment. The aforesaid case clearly lays down the principle that a "daily rated employee" does not hold any post and his engagement is on day-to-day basis.

17. The status of a "daily rated employee" is again taken note of by the Supreme

Court in the case of Tilak Raj and Ors. (supra), while considering the rights of a "daily rated employee" to seek parity with regular employees in the matter of payment of salary and an earlier judgment of the Supreme Court, in the case of State of Haryana and Others Vs. Jasmer Singh and Others, is considered and it is found that a "daily rated employee" is not appointed as per the recruitment rules. The rigors of selection or recruitment are not undergone by him and the normal service rules are not applicable to him as is made applicable to a member of the regular service. It is also observed that such an employee is not liable to be transferred as a member of the regular service. The following observations made in this case may be taken note of:

8. At this juncture, it would be proper to take note of what was stated in Jasmer Singh's case. In Paragraph 10, it was noted as under:

10. The respondents, therefore, in the present appeals who are employed on daily wages cannot be treated as on par with person in regular service of the State of Haryana holding similar posts. Daily rate workers are not required to possess the qualifications prescribed for regular workers, nor do they have to fulfil the requirement relating to age at the time of recruitment. They are not selected in the manner in which regular employees are selected. In other words the requirements for selection are not as rigorous. There are also other provisions relating to regular service such as the liability of a member of the service to be transferred, and his subject to the disciplinary jurisdiction of the authorities as prescribed, which the daily-rated workmen are not subjected to. They cannot, therefore, be equated with regular workmen for the purposes for their wages. Nor can they claim the minimum of the regular pay scale of the regularly employed.

(Emphasis supplied)

18. Again, in the case of M.P. State Agro Industries Development Corporation Limited (supra), the status of a "daily rated employee" is considered and after taking note of a judgment of the Supreme Court in the case of Manoj Shrivastava (supra), in Paragraph 17 the matter is so dealt with:

17. The question raised in this appeal is now covered by a decision of this Court in M.P. Housing Board and Another Vs. Manoj Shrivastava, wherein this Court clearly opined that: (1) when the conditions of service are governed by two statutes; one relating to selection and appointment and the other relating to the terms and conditions of service, an endeavour should be made to give effect to both the statutes; (2) a daily-wager does not hold a post as he is not appointed in terms of the provisions of the Act and the Rules framed thereunder and in that view of the matter he does not derive any legal right; (3) only because an employee had been working for more than 240 days that by itself would not confer any legal right upon him to be regularized in service; (4) if an appointment has been made contrary to the provisions of the statute the same would be void and the effect thereof would be that no legal right was derived by

the employee by reason thereof.

From the aforesaid, it would be clear that a "daily rated employee" does not hold a post as he is not appointed in terms of the provisions of the Act and rules framed thereunder. It is, therefore, clear from a perusal of the principles laid down in the aforesaid cases that a "daily rated employee" does not hold a post and his appointment is not made on a sanctioned or post created as per the rules after following the due procedure contemplated for appointment to the post.

19. The next question of importance, which requires consideration for answering the question referred to would be with regard to the fact as to whether a "daily rated employee" holds a transferable service and whether transfer is an incident of service in the case of such a category of employee. A Division Bench of this Court in the case of R.K. Khare(supra), has laid down the principle that an employee holding a transferable post is liable to be transferred from one place to another.

20. The Supreme Court in the case of National Hydroelectric Power Corporation Limited (supra), has laid down the principle that a Government servant or an employee of a public sector undertaking has no legal right to be posted at one particular place, in case he is holding service on a transferable post. It is, therefore, clear from this judgment that transfer of an employee is an incident and a condition of service provided he is holding a transferable post, as transfer is from one post to another.

21. Finally, the principle laid down by the Supreme Court in the case of Union Public Service Commission v. Girish Jayanti Bai Vaghela (supra), maybe taken note of. The case pertains to the rights available to a person appointed on contract basis and the question is as to whether such a person can be called a Government servant. After considering the meaning of the word "Government servant" as appearing in Rule 2 (4) of the Central Civil Services (Classification, Control and Appeal) Rules so also judgments of the Supreme Court in various other cases, it has been held that a person appointed on a contract basis for a specific period and when the appointment is without following the normal rules of recruitment either on contract basis or on daily wage basis, such a person cannot have any right to the post until and unless they are duly selected or appointed to the post as per the recruitment rules. Finally, in Paragraph 17, the Supreme Court has crystallized the principle in the following manner as under:

17. It is neither pleaded nor there is any material to show that the appointment of respondent No. 1 had been made after issuing public advertisement or the body authorized under the relevant rules governing the conditions of service of Drug Inspectors in the Union Territory of Daman and Diu had selected him. His contractual appointment for six months was de hors the rules. The appointment was not made in a manner which could even remotely be said to be complaint of Article 16 of the Constitution. The appointment being purely contractual, the stage of acquiring the status of a Government servant had not arrived. While

working as a contractual employee respondent No. 1 was not governed by the relevant service rules applicable to Drug Inspector. He did not enjoy the privilege of availing casual or earned leave. He was not entitled to avail the benefit of General Provident Fund nor was entitled to any pension which are normal incidents of a Government service. Similarly, he could neither be placed under suspension entitling him to a suspension allowance nor he could be transferred. Some of the minor penalties which can be inflicted on a Government servant while they continue to be in Government service could not be imposed upon him nor he was entitled to any protection under Article 311 of the Constitution. In view of these features it is not possible to hold that respondent No. 1 was a Government servant.

(Emphasis supplied)

22. From the aforesaid principle it would be clear that a person, who is appointed on contract basis or on daily wage basis and who is not appointed to a service or a post, as per the recruitment rules, is not subjected to normal rules governing suspension, transfer etc. The concept of appointment to a service or post and the rights available to an employee appointed on daily wage basis to claim absorption or regularization has been considered by the Supreme Court in the case of Upendra Narayan Singh (supra), and it has been held that such persons who are engaged on contract basis or on daily wage basis without following the normal rules regarding recruitment do not hold service in the Government or post till their appointment is regulated by the normal recruitment rules.

23. The principle that emerges on the basis of the aforesaid judgments would clearly indicate that transfer is of a Government servant or an employee, who is appointed to a post and transfer even though an incident and condition of service, is from one post to another, i.e., from one place to another without altering the basic terms and conditions of service to the disadvantage of the employee concerned. That being so, one of the preconditions necessary for transfer of an employee is that he should be holder of a post, his appointment should be substantive in nature to a regular post in the establishment after following the due process contemplated for appointment to the post and even though transfer is an incident of service, but transfer is permissible only if the conditions of service and the contract of service contemplates a provision for transfer from one place to another. It is also clear from the aforesaid judgments and the principle, that a "daily rated employee" is not appointed to any post and before he is appointed, the pre-conditions contemplated for appointment to the post are not followed. His appointment is on day-to-day basis as per the need of work and normally the conditions of service regarding transfer, suspension, disciplinary action cannot be applied to such an employee.

24. In the case of Girish Jayanti Lal Vaghela (supra), as already indicated in Paragraph 17 hereinabove, it would be clear that a contractual employee, who has not acquired the status of a Government servant and to whom the relevant service rules are not made applicable, it is held that he cannot be transferred. If

that be the principle governing the status of a "daily rated employee" and his position in service and when it is clear that transfer in normal parlance means transfer of a person holding a post from one place to another, a "daily rated employee" who is not appointed to a post and who does not hold any regular post in the establishment cannot be transferred. Transfer is an incident of service only if the person concerned or the employee holds a transferable post and not otherwise. In the present case, there is nothing available on record to indicate that the terms and conditions on which the petitioner was appointed on daily wage contemplates a provision for his transfer from one place to another. Accordingly, we are of the considered view that as a "daily rated employee" is not appointed to any post and as his services are not governed by any service rules contemplating a provision for transfer, he, therefore, cannot be transferred.

25. The Division Bench of this Court in the case of Udai Singh Yadav (supra), has not considered the question of transfer of a "daily rated employee" after evaluating the status of a "daily rated employee" and the concept of transfer in relation to the post held by such an employee. As the principle laid down in the said case is without appreciating and considering the entire gamut governing the concept of appointment to public service and transfer, we are of the considered view that the law laid down in the said case holding that a "daily rated employee" can be transferred, as transfer is an incident of service, does not lay down the correct law. The correct law is that transfer is an incident of service only in case of an employee, who is either a Government servant, a "civil post" holder or a person, who is appointed substantively to a post, which is transferable and if a person is not appointed to a post, which is transferable, then in his case transfer will not be an incident of service.

26. Accordingly, holding that the law laid down in the case of Udai Singh Yadav (supra), is not correct, the said judgment is over-ruled and the reference is answered in the following manner namely:

(i) A "daily rated employee", who is not appointed to a post and whose services are not governed by any service rules, cannot be transferred from one place to another, as he does not hold a transferable service.

(ii) A "daily rated employee" cannot be transferred from one place to another in normal circumstances. However, in exceptional cases where appointment on daily basis is made to a Project or a Scheme, and if the Project or the Scheme is itself transferred or shifted, the "daily rated employee" moves alongwith the Project or the Scheme to the new place.

In cases where the Project, Scheme or Establishment or Department or Office itself is shifted from one place to another and as a consequence thereof, a "daily rated employee", appointed specifically to work in such Project, Scheme or Establishment or Department or Office, is also required to be shifted. In such cases they may be shifted alongwith the Establishment or Department or Office, in which they are appointed.

(iii) Similarly, if a "daily rated employee" is appointed in a particular Establishment, Department or Office and if the entire Establishment, Department or the Office is shifted, the "daily rated employee" moves with the Establishment, Department or the Office. Otherwise, a "daily rated employee" cannot be transferred from one place to another. It may be clarified that in such cases, the "daily rated employee" is not transferred, but he moves with the office in which is working and, therefore, this class of cases will not come within the purview of transfer of a "daily rated employee".

27. As questions (i) and (ii) are answered by holding that a "daily rated employee" cannot be normally transferred, the question of emoluments payable to him and protection under the Rules becomes redundant and need not be considered now in this reference.

The Reference is accordingly answered. Matter be placed before Appropriate Bench for proceeding in accordance with law.