
(2010) 07 RAJ CK 0070
In the Rajasthan High Court

Badur Ram Khileri and Others

APPELLANT

Vs

State of Rajasthan and Others

RESPONDENT

Date of Decision : 13-07-2010

Acts Referred:

Rajasthan Panchayati Raj Act, 1994 — Section 10, 11, 13, 51, 89(8)
Rajasthan Panchayati Raj Rules, 1996 — Rule 289(3), 336(26)

Citation : (2010) 07 RAJ CK 0070

Hon'ble Judges : Vineet Kothari, J

Bench : Single Bench

Final Decision : Allowed

Judgement

Vineet Kothari, J.—This bunch of writ petitions, as per details given in the Schedule, are being disposed of by this common order.

2. By these writ petitions, the only question raised before this Court is the jurisdiction of the Deputy Secretary of the Panchayati Raj Department (Elementary Education), Govt. of Rajasthan, who passed the impugned transfer order dated 20/6/2010 transferring the petitioner-teachers from one place to another within the same Panchayat Samiti.

3. Learned Counsel for the petitioner submitted at the outset that the controversy in hand is squarely covered by the judgment of Coordinate Bench of this Court in the case of Ram Singh and Others Vs. State of Rajasthan and Others, decided on 18/2/2008, wherein, this Court has already held that the State Government acting through its Deputy Secretary does not have such power to transfer the teachers, members of the service, from one school to another school within the same Panchayat Samiti since Section 89(8-A) of the Rajasthan Panchayati Raj Act, 1994 specifically omit such power of the State Government while giving power to transfer to the State Government of such members of service from one Panchayat Samiti to another Panchayat Samiti or from one Zila Parishad to another Zila Parishad.

4. On the other hand, learned Counsel Mr. R.L. Jangid for the State submitted that the State Government has overriding and non-obstante power to effect such transfers of the teachers even within the same Panchayat Samiti and even though such power is not specifically stipulated in Section 89(8-A) of the said Act, such power should be inferred in view of Rule 289(3) and 336(26) of the Rajasthan Panchayati Raj Rules, 1996. He further submitted relying upon the provisions contained in Section 9, 10, 11 & 13 of the said Act, 1994 that since in the different constituents of Panchayati Raj Institution, Gram Panchayat being at the lowest level, Panchayat Samit at one step higher and Zila Parishad being still higher, since the said powers are conferred for transfer of members of service including the teachers from one Panchayat Samiti to another Panchayat Samiti from one Zila Parishad to another Zila Parishad as per Section 89(8-A) of the Act upon the State Government and such overriding power has been given to the State Government, such power can be exercised by the Deputy Secretary of the State Government even for effecting such transfer within the same Panchayat Samiti from one school to another school. He further submitted that this contention has not been raised and decided in earlier judgment in Ram Singh's case (supra) and, therefore, the said decision is distinguishable or deserves to be reconsidered.

5. Having heard the learned Counsels, this Court is of the opinion that the issue raised in the present writ petitions is squarely covered by the aforesaid decision of the Coordinate Bench in the Ram Singh's case (supra), which is a well considered and detailed judgment deciding all the contentions raised on behalf of the State including as aforesaid. It would be appropriate to reproduce the relevant paras of the said judgment for ready reference:

5. The contesting respondents have filed reply in a few of the petitions. Objections have been taken in relation to the petition directly filed to this Court that the petitioner has alternative remedy of filing appeal before the Tribunal and for availability of such alternative remedy, the petition is not competent. It has also been contended that the scope of interference in the transfer order remains limited and unless there be a case of malafide exercise of powers or violation of statutory rules, the order of transfer made in administrative exigency, being of an incident of service, calls for no interference.

6. While justifying issuance of the impugned transfer order by the State Government, it has been contended with reference to 73rd Amendment to the Constitution of India that the elementary education has been placed under the control of Panchayati Raj Department with a view to strengthen the Panchayati Raj institutions and, therefore, according to the respondents, the transfer of the teachers working in elementary schools has rightly been effected by the Deputy Secretary in Panchayati Raj (Elementary Education) Department. It is further the stand of the respondents that the State Government is clothed with powers to make transfers in administrative exigencies; that the powers of the State Government u/s 89(8-A) of the Act of 1994 are of wide range and amplitude and

the State Government is very much authorized to effect such transfers. It has also been contended that the provisions of Sub-section (8-A) of Section 89 of the Act of 1994 starting with a non-obstante Clause have to be harmoniously construed; and the powers of the State Government to issue transfer orders over and above the powers of other functionaries is required to be given full effect; and likewise, even under Rule 289(3) of the Rules of 1996, the State Government has ample competence to effect transfers within Panchayati Samiti/District. It is contended that the petitioners hold transferable posts and cannot insist on sticking to the same place of posting. The learned Government Counsel, while opposing the writ petitions, has referred to and relied upon a decision of this Court in the case of Mahendra Kumar Yadav v. State of Rajasthan (2001) 1 WLC 328.

7. Before embarking on the core question involved in the matter, it appears appropriate to dispose of the preliminary objection regarding availability of alternative remedy. Availability of an alternative remedy is not of absolute bar on exercise of writ jurisdiction by this Court; and then, in the matters of the present nature questioning the transfer orders specifically on the ground of violation of statute, there appears no reason to relegate the petitioners to the alternative remedy of appeal before the Tribunal. Noteworthy it is that at least two petitions in this batch have been filed after the concerned petitioner had approached the Tribunal and the appeal has been dismissed. In the overall view, the objection regarding alternative remedy in these matters deserves to be, and is, overruled.

8. The short question calling for determination is as to whether the impugned transfer orders suffer from violation of any statutory requirement; or, more appropriately, as to whether the impugned transfer orders issued by the State Government transferring the petitioners from one place to another within the same Panchayat Samiti remain unauthorized and beyond the powers conferred by the statute? The answer, in the opinion of this Court, remains in the affirmative. The impugned transfer orders suffer fundamentally from want of authority.

9. It is the stand of the respondents that the State Government is clothed with powers to make transfers in administrative exigencies; that the powers u/s 89(8-A) of the Act of 1994 are of wide amplitude and thereby the State Government is authorized to effect such transfers. It has also been contended that Sub-section (8-A) of Section 89 of the Act of 1994 starting with a non-obstante Clause provides for the powers of the State Government to issue transfer orders over and above the powers of other functionaries; and that under Rule 289(3) of the Rules of 1996, the State Government has competence to effect transfers within Panchayati Samiti too. A bare look at the relevant statutory provisions is sufficient to find that such contentions remain hollow and spineless; and that the impugned transfer orders of the employees like the petitioners within the same Panchayat Samiti suffer from want of authority with the State Government.

12. A comprehension of the provisions aforesaid makes it clear that even while

clothing the State Government with powers to issue transfer orders in relation to the employees of Panchayati Raj institutions from one institution to another, and with further powers to stay the operation of, or cancel, any order of transfer made by other functionary, the legislature has consciously omitted to invest the State Government with any power to issue transfer order within the same Panchayat Samiti. The Government has, of course, been given powers, and rather over-riding powers, under Sub-section (8-A) of Section 89, to transfer any member of service: (i) from one Panchayat Samiti to another Panchayat Samiti, within the same district or outside it; (ii) from one Zila Parishad to another Zila Parishad; (iii) from Panchayati Samiti to Zila Parishad; and (iv) from Zila Parishad to Panchayat Samiti; and further, the State Government has been given powers to stay operation of, or cancel, any order of transfer made under Sub-section (8) yet and however, the power to transfer a member of Panchayati Raj Service from one place to another within the same Panchayat Samiti is not available with the State Government under Sub-section (8-A) of Section 89 of the Act of 1994.

13. No such authority to issue the orders of the present nature being available with the State Government in the parent statute, the respondents have attempted to suggest that such authority exists by virtue of Sub-rule (3) of Rule 289 of the Rules of 1996. The submission is not well founded. The Rules of 1996 could only be read as providing the methods to implement the provisions contained in the main statute; and cannot be read overriding the substantive provisions contained in the principal enactment i.e., the Act of 1994. When specific provision has been made in the statute for the purpose of investing the State Government with some powers to deal with the matters of transfer of the employees of the Panchayati Raj institutions, operation of the Rules would obviously remain confined to such provisions of the Act of 1994. When the power to transfer a member of Panchayati Raj Service from one place to another within the same Panchayat Samiti has specifically been omitted from mention in Sub-section (8-A) of Section 89 of the Act of 1994, the State Government cannot be considered having separately been conferred such powers by Rule 289(3) of the Rule of 1996. There is no such indication in the scheme of the enactment that independent of the provisions contained in the Act of 1994, any power relating to the employees of Panchayat Raj service could be provided by the Rules. The orders envisaged by Rule 289(3) of the Rules of 1996 would obviously be such as could be issued u/s 89(8-A) of the Act of 1994; and not beyond. Viewed from any angle, the State Government does not carry power or authority to transfer a member of Panchayati Raj Service from one place to another within the same Panchayat Samiti. The impugned orders purporting to transfer the petitioners within the same Panchayat Samiti, thus, cannot be sustained.

17. Therefore, it is clear that transfer orders made by the State Government from one Panchayati Raj institution like Panchyat Samiti or Zila Parishad to another such institution have not been interfered by this Court for such powers with the State Government being available under Sub-section (8-A) of Section 89

of the Act of 1994. However, the present one are the cases where the State Government has, with impunity and without having regard to the scheme of the aforesaid statutory provisions, proceeded to issue transfer orders even within the same Panchayat Samiti without any power or authority in that regard. No such power being available with the state Government to effect transfers within Panchayat Samiti also, the impugned transfer orders remain unauthorised.

19. The respondents have taken the stand in the replies filed in some of the petitions with reference to the 73rd Amendment to the Constitution of India that the elementary education has been placed under the control of Panchayati Raj Department with a view to strengthen the Panchayati Raj Institutions and, therefore, according to the respondents, the transfer of the teachers working in elementary schools has rightly been ordered by the Deputy Secretary in Panchayati Raj (Elementary Education) Department. The stand of the respondents is fundamentally incorrect and is rather incongruous. The scheme of 73rd amendment to the Constitution, if of any indication, has been to confer constitutional status to the Panchayati Raj Institutions; and to make them effective units of self-governance. When the Panchayat Samiti concerned is to perform the functions and exercise powers specified in Second Schedule to the Act of 1994 [per Section 51], and running of the primary education is fundamentally the task to be undertaken by the Panchayat Samiti concerned, of course subject to the conditions as may be specified by the State Government from time to time, the role of the Government is essentially that of general superintendence and cannot in any case be of thorough interference. The interference by the State Government even to the extent of ordering transfer of an employee within Panchayat Samiti would not be in conformity with the constitutional scheme, and would rather be an antithesis to the constitutional mandate. However, other aspects of the matter in this regard need no dilatation herein because the relevant statutory provision, of Sub-section (8-A) of Section 89, itself makes it clear that the powers have been assigned to the State Government to effect transfers from one institution to another but not within. The State Government has of course been given further powers to stay or cancel any order made under Sub-section (8) but has yet not been extended such powers as to issue all kind of orders that could be made under Sub-section (8) of Section 89 of the Act of 1994. For specific omission in Sub-section (8-A), where the State Government has not been authorized to effect transfers within Panchayat Samiti, the impugned transfer orders made only for the purpose of transfers within the same Panchayat Samiti are required to be declared unauthorized and are, thus, required to be quashed. For the same reasons, the orders as made by the Tribunal, rejecting the appeals filed by the petitioners in writ petition No. 6697/2007 and 7781/2007, deserve to be set aside.

21. As a result of the aforesaid, these writ petitions deserve to be succeed. However, it is required to be and hence is made clear that the petitioners otherwise hold transferable posts and the impugned transfer orders are disapproved only for the reason that the State Government does not have

authority to issue such transfer orders within same Panchayat Samiti; and else, this Court has not pronounced on any other aspect of the matter. The concerned competent authorities are obviously free to pass appropriate transfer orders, if so expedient, but strictly in accordance with law; and, at the same time, it is also clarified that these observations shall not prejudice any other right of either of the parties.

Sd/-

Dinesh Maheshwari, J.

6. As far as transfers of such teachers from one Panchayat Samiti to another Panchayat Samiti is concerned, which is ofcourse not the case in the present set of writ petitions, this Bench also recently pronounced on 7/7/2010 in favour of the State giving such overriding powers to the State Government by virtue of Section 89(8A) of the Act in the case of Manjulata Bohra v. State of Rajasthan and Ors. SBCWP No. 5956/2010 in the following terms:

11. In the considered opinion of this Court, no scope is left for the Chief Executive Officer/Vikas Adhikari to take a different view in the matter in conflict with the orders passed by the State Government and he is bound to carry out such orders passed by the State Government. In view of this interpretation given upon harmonious reading of Rule 289(3) with Sub-section (8A) of Section 89 of the Act, the contention of the learned Counsels raised that the impugned order passed by the Dist. Education Officer-cum-Additional Chief Executive Officer to carry out the orders passed by the Director of the Elementary Education, Government of Rajasthan, Jaipur is without jurisdiction, cannot be sustained, even if the said implementing order is passed by the authority, may be one step lower or different from the authority mentioned in Sub-rule (3) of Rule 289 and the same cannot be said to be with patent lack of jurisdiction. The purpose of Sub-rule (3) of Rule 289 is to carry out the orders passed by the State Government. Since the orders passed by the State Government have over-riding effect when such transfers are affected from one Panchayat Samiti to another Panchayat Samiti or from one Zila Parishad to another Zila Parishad as envisaged in Section 89(8A) of the Act and when the authorities of the Panchayati Samiti are not allowed to take a different view of the matter and irrespective of recommendations or disagreement of the Dist. Establishment Committee, the authority who is carrying out such orders of State Government cannot be said to be without jurisdiction even though passed by the authority one step lower than the Chief Executive Officer/Vikas Adhikari as mentioned in Rule 289(3) of the Rules of 1996. Under the relevant Rules governing the delegation of powers of Chief Executive Officer to the Addl. Chief Executive Officer, the authority who passed the impugned order, the said authority can be assumed to have such power as nothing has been placed on record nor even pleaded in writ petition or contended that the Addl. Chief Executive Officer cannot exercise powers of Chief Executive Officer. It is not such a patent lack of jurisdiction which could entitle the petitioners to invoke extraordinary jurisdiction of this Court assailing the

validity of said order because what is being carried out is the orders passed by the Director, Elementary Education, Government of Rajasthan being the orders passed by the State Government, which in any case have over-riding effect and are intended and mandated to be carried out by the authorities working in the Panchayat Samiti or the Panchayati Raj Department, as the case may be, including the Dist. Establishment Committee.

12. It is made clear that this Court has decided only the question of jurisdiction and interpretation of Rule 289(3) and Section 89(8A) of the Act in the present writ petitions.

7. In view of aforesaid, these writ petitions are also allowed in terms of aforesaid judgment in Ram Singh's case (Supra) and the impugned transfer orders qua the petitioners are quashed with liberty to the respondents to pass fresh orders, if so considered necessary. No order as to costs.