

(2020) 03 CAL CK 0037

In the Calcutta High Court

Case No : C. Appeal From Order (FMA) No. 994 Of 2018

Basumati Corporation Ltd. & Ors

APPELLANT

Vs

Kaberi Maitra & Ors

RESPONDENT

Date of Decision : 06-03-2020

Acts Referred:

Constitution Of India, 1950 — Article 162
Industrial Employment (Standing Orders) Act, 1946 — Section 7
Basumati Private Limited (Acquisition of Undertaking) Act, 1974 — Section 3, 3(a),
4(1), 4(2), 5, 6, 6(1), 6(3)

Citation : (2020) 03 CAL CK 0037

Hon'ble Judges : I. P. Mukerji, J;Md. Nizamuddin, J

Bench : Divison Bench

Advocate : L.K. Gupta, Jaytosh Majumder, Shayak Chakraborty, Avishek Prasad, Abhratosh Majumder, Jaharlal De, Shamim Ul Bari, Srijib Chakraborty, Subhasis Chakraborty, Suryaneel Das, Sushmita Singh

Final Decision : Allowed

Judgement

I. P. Mukerji, J

In this case the respondent/writ petitioner (â??the respondentâ?), an employee of Basumati Corporation Ltd., hereinafter referred to as

â??Basumatiâ? was asked to work in the government department in Nabanna, Howrah. The expression used while sending her to Nabanna was

that she was â??deployedâ? in the establishment there.

It is agreed by learned counsel for the parties that â??deploymentâ? is synonymous with the word â??deputationâ?.

Now, this case is about the said deputation order. She has resisted this order on the ground that she could not be â??deployedâ? or sent on

deputation from Basumati to a state government establishment.

Now, I come to the facts of this case.

On 30th June, 1994 Basumati appointed the respondent as a junior clerk in Siliguri. Within three weeks, she was transferred to the organization's head office in Kolkata.

Standing orders were made on 10th May, 1965 under Section 7 of the Industrial Employment (Standing Orders) Act, 1946 to govern the terms and conditions of employment of all workmen of M/s. Basumati Sahitya Mandir. Clause 7 of the said standing orders is as follows:-

7. Transfer:- Service of any workman is liable to be transferred from one post to another or from one department to another or from one shift to another.

In 1974 the Basumati Private Limited (Acquisition of Undertaking) Act, 1974 (the 1974 Act) was enacted by the state legislature. Sections 3, 4(2), 5,

6 and 7 of the said Act are very material for the purposes of this appeal. They are set out below:-

3. On and from the appointed day, the undertaking of the company shall, by virtue of this Act, stand transferred to, and vest in, the State

Government free from all trusts, liabilities and encumbrances.

4.(2) Any contract, whether express or implied, or other arrangement, whether under any statute or otherwise, in so far as it relates to the

management of the business and affairs of the company in relation to its undertaking and in force immediately before the appointed day, or any order

made by any court in so far as it relates to the management of the business and affairs of the company in relation to its undertaking and in force

immediately before the appointed day, shall be deemed to have terminated on the appointed day.

5. The undertaking which has vested in the State Government under section 3 shall be managed by such person or body of persons as may be

nominated by the State Government in this behalf and such person or body of persons shall carry on the management in accordance with such rules as

may be made by the State Government.

6. (1) Notwithstanding anything contained in sections 3, 4 and 5, the State Government may by order in writing direct that the undertaking of the

company together with all its properties and assets, specified in sub-section (1) of section 4, shall, instead of continuing to vest in the State

Government, vest in such corporation owned or controlled by the State Government (hereinafter referred to as the corporation) and on such date, as may be specified in the direction.

(2) Where an order vesting the undertaking of the company in a corporation is made under sub-section (1), all the rights, liabilities and obligations of the State Government in relation to the undertaking of the company shall, on and from the date of such vesting, be deemed to have become the rights, liabilities and obligations, respectively, of such corporation.

(3) The corporation shall, for the purpose of management and administration of the undertaking of the company, act in accordance with such direction, if any, as may be issued by the State Government in this behalf.

(4) The corporation may also apply to the State Government at any time for instructions as to the manner in which the management of the undertaking of the company or in relation to any matter arising in the course of such management shall be conducted.

7. (1) Every person who is a workman within the meaning of the Industrial Disputes Act, 1947, and has been, immediately before the appointed day, in the employment of the company shall, on and from the appointed day, be deemed to be reappointed as an employee of the State Government or, as the case may be, of the corporation in which the undertaking may be vested by an order under sub-section (1) of section 6 and shall hold office on the same terms and conditions and with the same rights to pay, gratuity and other matters as would have been admissible to him if the undertaking of the company had not been vested in the State Government or in such corporation, as the case may be, and continue to do so unless and until his employment is duly terminated or until his remuneration, terms and conditions of employment are duly altered by the State Government or such corporation, as the case may be.

(2) The State Government or the corporation may employ, on mutually acceptable terms and conditions, any person who is not a workman within the meaning of the Industrial Disputes Act, 1947 and who has been, immediately before the appointed day, in the employment of the company, and on such employment the said person shall become an employee of the State Government or such corporation, as the case may be.

(3) Save as otherwise provided in sub-sections (1) and (2), the services of any

or every person employed in the company before the appointed day shall stand terminated on and from the appointed day.â??

On 17th June, 2014 the governor of the state promulgated a scheme entitled â?? The scheme for Utilization of Persons Employed under Local Fund

administered or not administered by Government of West Bengal or in any Company, Corporation, Undertaking, Statutory Body, Board etc. which is

wholly or partially owned or controlled by the Government of West Bengal or by any Body which is funded wholly or partially by the Government of

West Bengal for deployment or detailment in any Government offices or in any other local fund authority or any such entity.â??

It was notified in the Kolkata gazette on 24th June, 2014.

From the nature of this order in the form of a scheme, it can safely be said that it was an administrative order or policy in exercise of the executive

power of the governor under Article 162 of the Constitution of India.

Paragraph 5 of the scheme is relevant. It is set out hereunder:

5. Detailment or deployment of person employed in Company, Corporation, Undertaking etc.- (1) A person employed in any Company, Corporation,

Undertaking, Statutory Body, Board etc., wholly or partially owned or controlled by the Government of West Bengal or by any Body which is funded

wholly or partially by the Government of West Bengal, may, if the Government of West Bengal in consultation with the concerned authority of such

entity, deems fit and proper to do so, utilize his/her service, by way of deployment or detailment in any Government offices or in any other Company,

Corporation, Undertaking, Statutory Body, Board etc. and during such deployment or detailment all the terms and conditions of service shall remain

with such entity. (2) The power to draw pay and allowances, to report on performance and to sanction of leave shall be exercised by the concerned

head of Government office or the entity where he is deployed or detailed provided no service condition shall be any way altered to the disadvantage of

such person:

Provided that in case of winding up or cessation of functioning of such entity, the Government of West Bengal may appoint an authority to continue

the service matters of such persons till cessation of their services on retirement or otherwise:

Provided further that in case of winding up or cessation of functioning, such persons shall continue to enjoy all the benefits as were enjoyed by them in their parent entity excepting promotion.â??

It is plain from this part of the scheme that the government could direct Basumati to depute any employee with the organization to be posted inter alia, in a government department.

On 29th September, 2014 the Principal Secretary to the government of West Bengal made an order that on deputation the respondent was to be

placed in the I&CA department of the government â??for further deployment according to the necessity of the departmentâ?. The Managing

Director of Basumati was directed to release the respondent immediately with a direction to report at Nabanna.

The reason for this order as cited in the above order was that there was a shortage of man power â??in the offices under administrative control of

the I&CA departmentâ?? and that it became necessary to â??relocateâ?? employees of organizations under the control of the said department.

In obedience to the said direction, the Managing Director of Basumati, on 9th October, 2014 released the respondent.

On 11th November, 2014 the instant writ application [WP No. 30095(W) of 2014] was filed in this court challenging this deputation.

A learned single judge of this Court on 5th December, 2016 allowed the writ application by quashing the order of the Principal Secretary dated 29th

September, 2014 and of the Managing Director of Basumati dated 9th October, 2014. Basumati was directed to immediately allow the respondent to

resume service in their office.

Basumati appeals to this court from that judgement and order. The government of West Bengal is a proforma respondent supporting them.

A short history of this appeal is also to be recounted.

On 7th September, 2017 a division bench of this court allowed the appeal. The respondent writ petitioner filed an application for review of that order

(RVW 33 of 2018). On 22nd August, 2019 referring to State of Punjab & Ors. Vs. Inder Singh & Ors. reported in (1997) 8 SCC 37,2 a division bench

of this court opined that there existed sufficient grounds for review. The judgement and order of the division bench dated 7th September, 2017 was set

aside and the instant appeal directed to be heard de novo.

The issues involved in the writ application as well as in this appeal are not very complicated at all but involve determination of very important questions of law.

Was there any binding term and condition of service which permitted the respondent to be sent on deputation to the state government? Could the respondent be compelled to accept the deputation order?

The case run by the respondent was that she was an employee of Basumati. The above standing orders govern her service. There was no provision for her being sent out on deputation to the state government.

Neither did she consent to be sent on deputation. Therefore, the deputation order was invalid. She could only be transferred within Basumati.

Mr. L. K. Gupta, learned senior counsel argued the appeal on behalf of the appellant. He referred to the said standing orders.

Mr. Gupta relied on Section 4(2) of the Act of 1974 which stated that any contract concerning the management of Basumati was terminated by the

Act, to contend that paragraph 7 of the standing orders stood superseded by this enactment. Therefore, the state had the power to deploy the

respondent in any of its department.

He also showed us Section 6(3) of the said Act which empowered the state government to issue directions for the management of Basumati.

He took us through the said scheme dated 17th June, 2014 and notified in the official gazette on 24th June, 2014 of the finance department of the state

government. The recital to the scheme stated that there was need to make provision for utilization of the available man power in government

companies, corporations or statutory bodies, boards etc. which were substantially funded by the government. Paragraph 5 provided deployment of

these employees in the government or in the organization referred to above. Learned counsel submitted that the order of the Principal Secretary was

in implementation of this Act and the scheme.

Learned counsel also said that at the point of time when the order of deployment was made, Basumati was in a very bad financial condition.

Practically it had no business apart from a small amount given to it by the state or corporations or bodies under its control. There was not enough work

to be given to each employee. In those circumstances, the order dated 29th September, 2014 was issued by the Principal Secretary to the Information

and Cultural Affairs department of the government under Section 6(3) of the said Act read with the scheme. This sub-section as the source of power

was not recited in the said order dated 29th September, 2014. Mr. Gupta relied on Narayan Singh Chauhan Vs. State of Chhattisgarh reported in

(2003) 4 SCC 712 paragraph 53 to submit that it did not matter if the source of the power was not recited. It was enough that the source of power

could be identified on reading an administrative order.

The Additional Advocate General supplemented the submissions of Mr. Gupta. He made some pinpointed submissions.

He said that the scheme of the government empowering it to transfer employees in government organizations to government departments was not challenged.

He added to the submissions of Mr. Gupta on the certified standing orders by saying that they were not statutory and had been effectively revoked by

the said Act of 1974, the scheme and the exercise of powers under it by issuance of the impugned order dated 29th September, 2014 and the

corresponding order of Basumati dated 9th October, 2014 deputing the respondent to Nabanna. To support his submissions that the certified standing

orders were not statutory and had been effectively revoked, he relied on Rajasthan State Road Transport Corporation and Anr. Vs. Krishna Kant and

Ors. reported in (1995) 5 SCC 75,

Rajasthan State Road Transport Corporation and Ors. Vs. Deen Dayal Sharma reported in (2010) 6 SCC 69 7and Balco Employeesâ?? Union

(Regd.) Vs. Union of India and Ors. reported in (2002) 2 SCC 333.

He also stated that the said Act read with the scheme authorized the government to change the terms and conditions of service of any employee in a

government organization. He also submitted that in the last three financial years the net worth of Basumati had been eroded. It had a large number of

employees. For their proper utilization the scheme had been formulated. In implementation of the scheme the respondent had been placed in Nabanna

for deployment.

Mr. Chakraborty, for the respondent relied on paragraph 7 of the Standing Order relating to M/s. Basumati Sahitya Mandir. He submitted that an

employee of Basumati could only be transferred and could not be sent on deputation under those standing orders. The said Act of 1946 was made by

parliament under its powers of legislation in the concurrent list. The said Act had primacy over the 1974 Act which was a State Act. Standing orders

made under the said Act of 1946, could not be superseded by any state legislation. It could only be altered by consent or through other procedure

provided in the said Central Act. He cited *Western India Match Company Ltd. Vs. Workmen* reported in (1974) 3 SCC 330 and *Guest, Keen,*

Williams Private Ltd., Calcutta Vs. P. J. Sterling and Ors. reported in AIR 1959 SC 1279. He submitted that the deputation order of the government in

relation to the respondent could only be valid if there was no standing order and with the employee's consent.

The only point made by Mr. Gupta in reply was that the standing orders related to Basumati Sahitya Mandir and hence did not apply to Basumati

Corporation. In answer to this Mr. Chakraborty showed us Section 3(a) of the affidavit-in-opposition of the State respondents where a specific

reference was made to the standing orders. He submitted that being the creature of the Government, Basumati Corporation could not disown the

standing orders.

DISCUSSION

Mr. Justice Sabyasachi Mukharji in *Sri Ranjit Basu Vs. The State of West Bengal & Ors.* reported in 1982 (2) CHN 380 approved a passage from

the judgment of the Gujarat High Court in *Bhagawari Prasad Gordhandas Bhatt Vs. State of Gujarat and Ors.* reported in 1977 (2) SLR 551. It is thus:

“The word “deputation” itself connected service outside the parent department. He could be deputed to other department. If a person was

holding an office and was bound to render duty must be in the cadre and the post to which he was to be taken away from that post and sent to another

department it was said that he was being deputed to that department. Now, when one was in the department or was in the cadre, the proper authority

could post him wherever it was open to the authority to post such a person belonging to that cadre and take duty which was assigned to them.”

At a later point of time, the Supreme Court in *State of Punjab & Ors. Vs. Inder Singh & Ors.* reported in (1997) 8 SCC 372 opined as follows on this

branch of the law:

“18. The concept of “deputation” is well understood in service law and has a recognised meaning. “Deputation” has a different connotation in

service law and the dictionary meaning of the word 'deputation' is of no help. In simple words 'deputation' means service outside the cadre

or outside the parent department. Deputation is deputing or transferring an employee to a post outside his cadre, that is to say, to another department

on a temporary basis. After the expiry period of deputation the employee has to come back to his parent department to occupy the same position

unless in the meanwhile he has earned promotion in his parent department as per the Recruitment Rules. Whether the transfer is outside the normal

field of deployment or not is decided by the authority who controls the service or post from which the employee is transferred. There can be no

deputation without the consent of the person so deputed and he would, therefore, know his rights and privileges in the deputation post. The law on

deputation and repatriation is quite settled as we have also seen in various judgments which we have referred to above. There is no escape for the

respondents now to go back to their parent departments and working there as Constables or Head Constables as the case may be.

I will only discuss deputation, as understood in government or in government agency service. Transfer is from one post to another in the same cadre

and in the same department. Transfer could only be to equivalent posts in the same cadre.

In deputation, there has to be a borrowing department and a lending department. The borrowing department makes a request to the lending

department to borrow its employee or employees. The lending department agrees. But that is not enough. It has to ascertain whether it has the

employee's consent. If consent is there, the employee is sent on deputation by the lending department to the borrowing department.

'Deputation' connotes service outside the parent department. Or, in other words, an employee is deputed to another department. A person can

be compelled to perform duty in a post in the cadre to which he belongs. If he is taken away from that post and sent to another department with a

different cadre, it can never be done without his consent. The post on deputation may or may not be an equivalent post. This rule assumes that there

are no rules of service permitting compulsory deputation of an employee to another department. If the rules governing service or the contract

document governing service authorises deputation, then consent is to be implied.

This concept is to be found in R212 of the Orissa Service Code, which is referred to in the chapter "deputation" under the heading

"Deputation and Foreign Service" in Samaraditya Pal's "The Law Relating to Public Service". Rule 212 is as under:-

"(a) No Government servant may be transferred to foreign service or on deputation to other Governments against his will unless he is so liable

by the terms of his appointment or by special rules, if any, applicable to the service of which he is a member:

Provided that where the transfer is on deputation to bodies, incorporated or not, which are wholly or substantially owned or controlled by the State

Government, no consent of the Government servant is necessary."

In my opinion, it is not necessary to go into the question whether the said standing order was applicable to Basumati and whether it was superseded by the 1974 Act.

We shall assume that the standing order was valid and governed the terms and conditions of employment of the respondent. Paragraph 7 of the

standing order only stipulated that a workman's service was liable to be transferred from one post to another or from one department to another

or from one shift to another. This stipulation was under the heading "transfer". These standing orders did not contain any provision with regard

to deputation. They did not expressly or impliedly prohibit deputation. Now, if the standing orders are silent about deputation, then following the above

authorities, deputation of an employee to another establishment could only be made by his or her consent or under enforceable rules.

There is no dispute that the respondent did not consent to her deputation to Nabanna. In fact, she has resisted this deputation tooth and nail.

Is she entitled to do so?

Section 6(3) of the 1974 Act provided that the state government could issue directions for management and administration of Basumati. The

corporation was bound to act according to these directions. The power to direct the corporation to send out its employees on deputation, is implicit in

this provision.

On 17th June, 2014 the Governor of the state in exercise of its administrative power under Article 162 of the Constitution of India propounded a

scheme for "deployment" of persons engaged in inter alia a government

company or undertaking in inter alia any government office. This simply meant that the government could send an employee of Basumati to a government department, after consultation with the management of the corporation. This tantamounts to deputation.

The scheme, in my opinion is a valid piece of an executive order. In the absence of any legislation in this field, it is prima facie valid. Under it,

Basumati had the right to send any employee on deputation to the government, on the latter's request. This request was made in the form of an

order on 29th September, 2014 by the Principal Secretary to the I&CA department of the government to the Managing Director of Basumati. On 9th

October, 2014, acting under that order the Managing Director of Basumati deputed the respondent to Nabanna. In my opinion, it was a valid exercise

of power by the Principal Secretary and the Managing Director of Basumati.

Furthermore, the respondent has not challenged the scheme. She is bound by it. It was wrongful on her part to have resisted this deputation order for

so many years.

The learned single judge allowed the writ application, on the premise that there was no provision in the standing orders for an employee to be sent on

deputation. This interpretation of the standing orders was not correct. The subject standing orders are to be taken as rules governing the service of the

employees of Basumati in the areas of service covered by that instrument. It is not to be construed by implying terms and conditions. The said

standing orders are silent on deputation. Therefore, the respondent could be deputed to a government department in accordance with law. Such was

validly done, in exercise of powers under the 1974 Act read with the said scheme. Hence, the learned single judge fell into error in not taking an

overall view of the binding terms and conditions of employment concerning the respondent.

In those circumstances, I would allow the appeal. The impugned judgment and order dated 5th December, 2016 is set aside.

No order as to costs.

Certified photocopy of this order, if applied for, be supplied to the parties upon compliance with all requisite formalities.

I agree,