

(2015) 06 SHI CK 0030

In the High Court Of Himachal Pradesh

Case No : CWP No. 1098 of 2015 a/w CWP Nos. 3238 of 2014, 1099, 1102, 1103, 1104, 1105, 1106, 1107, 1108, 1109, 1110, 1124, 1617, 1622, 1624, 1658, 1743, 1744, 1745, 1748, 1749, 1750, 1755, 1756, 1757 and 1758 of 2015

Desh Raj and Others

APPELLANT

Vs

Chaudhary Shrawan Kumar Himachal Pradesh Krishi
Vishvavidyalaya

RESPONDENT

Date of Decision : 04-06-2015

Acts Referred:

Himachal Pradesh University of Agriculture Horticulture and Forestry Act, 1986 —
Section 9

Citation : (2015) LabIC 3393

Hon'ble Judges : Mansoor Ahmad Mir, C.J; Tarlok Singh Chauhan, J

Bench : Division Bench

Advocate : Ajay Kumar Dhiman, for the Appellant; B.M. Chauhan, Advocates for the Respondent

Judgement

Tarlok Singh Chauhan, J.—Since these petitions can be disposed of by a common judgment, therefore, they are being taken up together for disposal.

2. This batch of writ petitions can be categorized into two sets. One set pertains to the cases where the petitioners were sent on secondment and have joined without raising any objection. This set comprises of the following writ petitions:

"CWP Nos. 1617, 1622, 1624, 1658, 1743, 1744, 1745, 1748, 1749 and CWP No. 1750 of 2015."

3. The second set of petitions is those where the petitioners immediately on the issuance of order of secondment, approached this Court and obtained interim relief. This set comprises of the following writ petitions:

"CWP Nos. 1098 of 2015, 3238 of 2014, 1099, 1102, 1103, 1104, 1105, 1106, 1107, 1108, 1109, 1110, 1124, 1755, 1756, 1757 and 1758 of 2015."

4. It is not in dispute that in all these cases the petitioners are beldars whose services have been placed beyond the parent cadre by way of secondment.

5. The challenge to these orders of secondment is common to both sets of petitions and it is alleged that the impugned order(s) is/are illegal, arbitrary and unconstitutional on the ground that the petitioners consent was not obtained before ordering their transfer on secondment basis.

6. In response to the petition, the respondents have filed the reply wherein it has been alleged that the Government of Himachal Pradesh in accordance with the provisions of Section 9 of the H.P. Universities of Agriculture, Horticulture and Forestry Act, 1986 (for short "Act") has constituted a Council for Education and Research to be called "The Himachal Pradesh Council of Agricultural, Horticultural and Forestry Education and Research", (for short "Council"), who in its meeting held on 28.7.2012 had vide item No. 13 decided that the total core strength of the University be fixed at 1403 which includes the core strength of category "D" staff as 250 only. It is pointed out that the University is facing acute financial crisis and has therefore to reduce its establishment cost.

7. As per the decision of the Council, the respondent University declared 200 category "D" and "C" employees surplus and sent list of 185 category "D" employees and 15 category "C" employees to the Additional Chief Secretary (Agriculture) to the Govt. of H.P. in the first phase. Out of the above list, 175 category "D" and 10 category "C" employees had been placed on secondment basis with the various departments of H.P.

8. Thereafter, since the working strength of the category "D" employees in the University happens to be more than the fixed core strength of 250 and there was again communication from the Government to reduce the establishment cost, 289 more category "D" employees were declared surplus in the second phase, out of which 146 employees have been ordered to be placed on secondment basis with the various departments of the Government. As per the requirement of Engineer-in-Chief (Project), IPH Department, Fatehpur, District Kangra, vide his letter dated 15.1.2015, 39 category "D" employees including the petitioners had been placed on secondment basis with the Swan River Flood Management Project, Circle Una, H.P.

9. It is further contended that as per the appointment letter of the petitioners, their service condition are to be governed by the Act, Statutes and Rules/Regulations framed from time to time. There is no provision in the Act and Statute of the University to obtain any consent for placement on deputation/secondment/foreign service. However, as per Clause 7.11 (iv) of the Statutes, Vice Chancellor may send any employee/teacher of the University on deputation/secondment/foreign service. Since the University is facing acute financial crisis as such keeping in view this aspect the services of the petitioners had been placed on secondment basis and, therefore, the same is legal and valid and not contrary to the provisions of law.

10. We have heard the learned counsel for the parties and have gone through the records of the case.

11. Learned counsel for the petitioners would contend that the issue in hand is squarely covered by a judgment rendered by learned Single Judge of this Court in similar case titled *Bishan Dass v. Chaudhary Shrawan Kumar, H.P. Krishi Vishvavidyalaya*, CWP No. 352 of 2015, decided on 15.5.2015 wherein the learned Single Judge has held as follows:

"Petitioner was appointed as Beldar in the respondent -University in the month of July, 1993. He was regularized on the post of Chowkidar in the year 2007. He is aggrieved by the issuance of office order dated 1.1.2015, whereby his services have been placed at the disposal of the Ex -Servicemen Corporation, Hamirpur on secondment basis. It is averred in the reply that in sequel to Notification dated 22.12.2012; total cadre strength of University has been fixed at 1403, which includes the core strength of category "D" staff as 250 only. 6 category "D" employees including the petitioner have been placed on secondment basis with the Ex-servicemen Corporation, Hamipur. The authority to send an employee/teacher by the University on secondment basis/Foreign Service by the University has been derived from clause 7.11 (iv) of the Statutes.

2. Petitioner is merely working as a Beldar. It is stipulated in clause 7.11 (v) of the Statutes that the employee at the time of transfer or on Foreign Service/deputation should hold a substantive post in the University. It is in grey area whether the petitioner is holding a substantive post or not, as stipulated in clause 7.11 (v) of the Statutes.

3. It is settled law by now that an employee can not be sent on deputation without his/her consent. The petitioner is working in the respondent University and transferring him to the H.P. Ex-servicemen Corporation, Hamirpur would amount to change in the Department/cadre, which is not permissible under law.

4. Their Lordships of the Hon'ble Supreme Court in *Jawaharlal Nehru University Vs. Dr. K.S. Jawatkar and Others*, AIR 1989 SC 1577 : (1989) 59 FLR 190 : (1989) 2 JT 538 : (1989) LabIC 1526 : (1989) 2 LLJ 586 : (1989) 1 SCALE 1438 : (1989) 1 SCC 679 Supp : (1989) 3 SCR 273 : (1989) 3 SLJ 48 : (1989) 2 UJ 463 , have held that contract of service entered into by the respondents 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. In this case, the employee of the university i.e. Jawaharlal Nehru University was transferred to Manipur University without his consent, which was held to be bad in law. Their Lordships have held as under:

"[7] In this appeal the main contention of the appellant is that the respondent was appointed at the Centre of Post -graduate Studies, Imphal, and when the Centre A as transferred to the Manipur University his services were automatically transferred to that University, and consequently he could not claim to be an

employee of the appellant University. The argument proceeds on the assumption that the Centre of Post-graduate Studies at Imphal was an independent entity which existed by itself and was not a department of the appellant University. The submission proceeds on a fallacy. The Centre of Post -graduate Studies was set up at Imphal as an activity of the appellant University. To give expression to that activity, the appellant University set up and organised the Centre at Imphal and appointed a teaching and administrative staff to man it. Since the Centre represented an activity of the appellant University the teaching and administrative staff must be understood as employees of the appellant University. In the case of the respondent, there can be no doubt whatever that he was, and continues to be, an employee of the appellant University. There is also no doubt that his employment could not be transferred by the appellant University to the Manipur University without his consent, notwithstanding any statutory provision to that effect whether in the Manipur University Act or elsewhere. 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 Manipur University Act provides for the transfer of the services of the staff working at the Centre 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 concerned is a consenting party to such transfer. It makes no difference that the respondent was not shown in the list of Assistant Professors of the appellant University or that the provision was not indicated in its budget; that must be regarded as proceeding from an erroneous conception of the status of the respondent. 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. We do not find it necessary to refer to any case law in support of this conclusion.

[8] Inasmuch as the transfer of the Centre of Post -graduate Studies from the appellant University to the Manipur University could not result in a transfer of the employment of the respondent from the one to the other, it must be concluded that the respondent continues in the employment of the appellant University. The transfer of the Centre of Postgraduate Studies to the Manipur University may be regarded as resulting in the abolition of the post held by the respondent in the appellant University. In that event, if the post held by the respondent 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 the appellant University and is liable to be retrenched, But it appears that the respondent has been adjusted against a suitable post in the appellant University and, has been working there without break during the pendency of this litigation, and we cannot, therefore, permit the appellant

University to retrench him."

5. Their Lordships of the Hon"ble Supreme Court in *State of Punjab and Others Vs. Inder Singh and Others*, (1997) 8 JT 466 : (1997) 6 SCALE 442 : (1997) 8 SCC 372 : (1998) SCC(L&S) 34 : (1997) 4 SCR 425 Supp , have held that deputation is deputing or transferring an employee to a post outside his cadre, that is to say, to another department on a temporary basis and there should be no deputation without the consent of the person so deputed and would therefore know his right and privileges in the deputation post. Their Lordships have held as under:

[19] 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 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."

6. In the case in hand, the transfer of the petitioner ordered by the respondent University without his consent is illegal.

7. Accordingly, the writ petition is allowed. Annexure P-2 dated 1.1.2015, qua the petitioner, is quashed and set aside. Pending applications, if any, also stand disposed of. No costs."

12. On the other hand, learned counsel for the respondents would contend that the ratio of the judgment in *Bishan Dass* case (*supra*) can at best be applicable to the second set of cases where the petitioners had approached the Court immediately on the issuance of the orders of secondment and had obtained the stay but the same would not apply to the category of cases where the petitioners had joined and after joining for years together had not protested and had come to the Court only when interim orders in the case of the recently deputed employees had been obtained.

13. Clause 7.11 (v) of the Statutes of the respondent reads as follows:

"(v) The Vice-Chancellor may send any employee/teacher of the University on

deputation/foreign service."

A perusal of the aforesaid provision only goes to show that the Vice Chancellor may send any employee/teacher of the University on deputation/foreign service. But then it is nowhere provided that this power can be exercised without obtaining the consent of the employee/teacher.

14. In *Kavi Raj and Others Vs. State of Jammu & Kashmir and Others*, (2013) 1 AD 581 : AIR 2013 SC 767 : (2013) 1 JT 526 : (2013) LabIC 1160 : (2013) 1 LLN 383 : (2013) 1 SCALE 197 : (2013) 3 SCC 526 : (2013) 1 SCC(L&S) 701 : (2013) 1 SCT 730 : (2013) 1 SLJ 401 : (2013) AIRSCW 660 , the Hon"ble Supreme Court was seized of a matter where the writ court had interfered with the posting of the employees to a different department on the ground that before sending them on deputation outside the parent department, their consent was not obtained. The Division Bench in LPA disturbed the said finding. The Hon"ble Supreme Court opined that the view taken by the learned Single Judge was clearly erroneous on the aspect of obtaining consent before deputation. The Hon"ble Supreme Court opined that no statutory rule was brought to its notice requiring the prior consent of an employee before his deployment against a post beyond his parent cadre. It further held that "the mere fact that the appellants" consent was not sought before their posting at Government Medical College, Jammu (and/or at the hospitals associated therewith) would not in our view have any determinative effect on the present controversy. Broadly, an employee can only be posted (or transferred) to a post against which he is selected. This would ensure his stationing, within the cadre of posts, under his principal employer. His posting may, however, be regulated differently, by statutory rules, governing his conditions of service. In the absence of any such rules, an employee cannot be posted (or transferred) beyond the cadre to which he is selected, without his willingness/readiness. Therefore, an employee's posting (or transfer), to a department other than the one to which he is appointed, against his will, would be impermissible." This squarely answers the proposition as canvassed in the second set of cases.

15. Insofar as the first set of the petitioners, who have already joined the places outside the parent cadre without any objection or demur, even their cases are squarely covered by the ratio of the judgment in *Kavi Raj*'s case where the Hon"ble Supreme Court held that willingness of posting beyond the cadre need not be expressly sought and can be implied. It was held that "willingness of posting beyond the cadre (and/or parent department) need not be expressly sought and can be implied. It need not be in the nature of a written consent. Consent of posting (or transfer) beyond the cadre (or parent department) is inferable from the conduct of the employee, who does not protest or contest such posting/transfer".

16. At this stage it is apt to reproduce para 24 of the judgment wherein both the propositions have been answered in the following terms:

"24. Before concluding, it is essential to deal with certain inferences drawn by the learned Single Judge of the High Court. According to the learned Single Judge, prior consent of an employee is imperative, binding, peremptory and mandatory, before he is posted on deputation outside his parent department. No statutory rule has been brought to our notice, requiring prior consent of an employee, before his deployment against a post beyond his parent cadre. The mere fact, that the appellants consent was not sought before their posting at the Government Medical College, Jammu (and/or at the hospitals associated therewith) would not, in our view have any determinative effect on the present controversy. Broadly, an employee can only be posted (or transferred) to a post against which he is selected. This would ensure his stationing, within the cadre of posts, under his principal employer. His posting may, however, be regulated differently, by statutory rules, governing his conditions of service. In the absence of any such rules, an employee cannot be posted (or transferred) beyond the cadre to which he is selected, without his willingness/readiness. Therefore, an employee's posting (or transfer), to a department other than the one to which he is appointed, against his will, would be impermissible. But willingness of posting beyond the cadre (and/or parent department) need not be expressly sought. It can be implied. It need not be in the nature of a written consent. Consent of posting (or transfer) beyond the cadre (or parent department) is inferable from the conduct of the employee, who does not protest or contest such posting/transfer. In the present controversy, the appellants were issued posting orders by the Principal, Government Medical College, Jammu, dated 30.12.1997. They accepted the same, and assumed charge as Senior/Junior House Officers at the Government Medical College, Jammu, despite their selection and appointment as Assistant Surgeons. Even now, they wish to continue to serve against posts, in the Directorate of Medical Education. There cannot be any doubt, about their willingness/readiness to serve with the borrowing Directorate. The consent of the appellants is tacit and unquestionable. We are therefore of the view, that the learned Single Judge of the High Court, clearly erred on the instant aspect of the matter."

17. In view of the aforesaid exposition of law, the judgment rendered by the learned Single Judge of this Court in Bishan Dass case (supra) would only be applicable in cases of employees, who have immediately on the order of their secondment approached this Court but the same cannot be applied to the cases of employees, who have been transferred outside the parent cadre and have already joined there.

18. In view of the aforesaid discussion, the first set of petitions, as detailed above, is dismissed, whereas the second set of petitions is allowed and the impugned order of secondment is quashed and set-aside. Pending application(s) if any also stands disposed of. The parties to bear their own costs. The Registry is directed to place a copy of this judgment on the files of connected matters.