

(1994) 03 MP CK 0023

In the Madhya Pradesh High Court

Case No : Miscellaneous Petition No. 1573 of 1992

Dinesh Kumar Sharma

APPELLANT

Vs

Madhya Pradesh Dugdha Mahasangh Sahakari Maryadit and
Another

RESPONDENT

Date of Decision : 16-03-1994

Acts Referred:

Constitution of India, 1950 — Article 14

Citation : (1994) 1 MPJR 306 : (1994) 39 MPLJ 692 : (1994) MPLJ 692

Hon'ble Judges : S.K. Dubey, J; S.K. Chawla, J

Bench : Division Bench

Advocate : H.N. Upadhyay and Arun Mishra, for the Appellant; R.D. Jain, for the Respondent

Final Decision : Allowed

Judgement

S.K. Dubey, J.

This order shall also govern disposal of Misc. Petition No. 1578 of 1992. Facts in brief are thus : The two petitioners are holding the posts of Village Extension Organisers in the pay scale of Rs. 1,600-2,720/- and are posted at Banmore, District Morena, under the employment of respondent No. 2, a co-operative society registered and classified as "Central Society" under the M. P. Co-operative Societies Act, 1960 (for short, the Act"). The respondent No. 1 is also a registered society under the Act, classified as "Federal Society" and is an apex body of Central Societies like respondent No. 1. The Managing Director of the respondent No. 1, passed an order dated 20-9-1992 (Annexure P/I) of transferring the petitioners Dinesh Kumar and Narendra Pal Singh Rana, on deputation to the Integrated Tribal Dairy Project at Raigarh and Surguja (Ambikapur), respectively. The order speaks that the two petitioners would have their lien in the services on their substantive post under respondents, after the expiry of the period of the Scheme, services of the two petitioners shall be replaced at the disposal of respondent No. 2.

Petitioners by their separate petitions under Articles 226 and 227 of the Constitution of India, challenged this order of transfer contending that the petitioners transfer on deputation to a foreign service is without their consent; petitioners are non-cadre and class III employees, who cannot be transferred in view of Rule 16 of the M. P. Rajya Dugdha Mahasangh (Sahakari) Maryadit, Karmachari Bharti, Vargikaran Tatha Sewa Sharten Adhiniyam, 1985, (sic) (for short, the "Service Rules") (Annexure P/19B). Petitioner Dinesh Kumar is the President and petitioner Narendra Pal Singh Rana is the Secretary of the recognised Union, registered under the Trade Unions Act, hence are "protected workmen" u/s 33 of the Industrial Disputes Act, 1947, (for short, the "ID Act"), who cannot be transferred till they hold office. The transfer is in breach of settlement arrived at u/s 18 of the ID Act. In pursuance to advertisement the petitioners did not apply for sending them on deputation. Juniors to the petitioners on taking their consent have been posted on higher scale of pay in selection grade of Rs. 1,600-2,900/-. while the petitioners are being sent in the same pay, which they are drawing. The petitioners now shall have to work under the juniors who have been sent on deputation by promoting them on higher pay scale. The petitioners would be lowered down in their status. For {he above and other reasons, the transfer order by way of victimisation for their trade union activities, is mala fide and is in violation of statutory Service Rules.

The respondents, in their return, denied the allegations and contended that the respondent No. 1 has undertaken the project of the State Government to implement the Scheme, wherein the villagers and tribals of the tribal areas are to be trained in procurement of milk and its supply. Therefore, to discharge the public duty, the petitioners, who were appointed by the respondent No. 1, have been transferred and sent on deputation under the project to implement the Scheme, which is temporary.

The respondents also raised a preliminary objection that the two societies are not instrumentalities or agencies of the State, and therefore, do not fall within the expression "the State" under Article 12 of the Constitution of India, hence are not amenable to writ jurisdiction. As there was cleavage of opinions in the unreported decisions of this Court, to have an authoritative opinion of this Court, we vide order dated 10-12-1992 referred the matter to larger Bench. A Full Bench of this Court, of which one of us (S. K. Dubey, J.) was a member, gave its opinion, reported in 1993 MPLJ 786 : 1993(2) MPJR 20, Narendra Pal Singh v. M. P. Dugdh Mahasangh, Bhopal, wherein on formulation of questions in para 2 opinion Was expressed in para 31, we reproduce paras 2 and 31 thus :-

"2. Whether the two co-operative societies, registered u/s 9 of the Act, are, in essence, instrumentalities and agencies of the State and, consequently, amenable to writ jurisdiction of the High Court, is the question to be decided. If the answer to this question is in the negative, whether the High Court can issue an appropriate writ, direction or order against the co-operative society or its officers who act in violation of the Act or the rules or the bye-laws and/or fail to

discharge statutory public duty, is also the question, which we have been called upon to answer in this reference."

"31. In the result, we dispose of the reference made in the two petitions by giving our answer to question No. 1 in negative. However, we answer question No. 2 as follows :-

Even if the respondents/societies cannot be characterised as "State" within the meaning of Article 12 of the Constitution and, as such, are not amenable to writ jurisdiction, if the society or its officers act in violation of statutory provisions and/or fail to discharge statutory public duty, a writ would lie for enforcement of statutory obligations and public duty".

The Full Bench returned the records of two cases to this Court for deciding the two petitions in the light of opinion referred to* above.

Shri H. N. Upadhyay and Shri Arun Mishra, learned counsel for the petitioners, and Shri R. D. Jain, learned counsel for the respondents, advanced their contentions and cited catena of decisions of the Supreme Court and of this Court, relevant of which, we would refer at the appropriate place elsewhere.

Before we deal with the contentions raised by the learned counsel for the petitioners, we have to first deal with the contention of Shri Jain, learned counsel for the respondents, that the Service Rules are not statutory as are not framed u/s 55(1) of the Act. The Rules so framed by the society are no more than "Articles of Association". The Rules, in fact, are bye-laws framed u/s 7 by the society and approved by the Registrar u/s 9 of the Act, which are meant for internal management of the society, which cannot be statutory. Reliance was placed on the decisions of the Supreme Court in the cases of *The Praga Tools Corporation Vs. Shri C.A. Imanuel and Others*, ; *Co-operative Central Bank Ltd. and Others Vs. Additional Industrial Tribunal and Others*, ; *Babaji Kondaji Garad Vs. Nasik Merchants Co-operative Bank Ltd., Nasik and Others*, and a decision of this Court in the case of *Ishaq Mohammad Ashiq Mohammad v. Bunkar Sahkari Samiti Maryadit* 1979 MPLJ 691 . Alternatively it was submitted that the Rules are to be framed by the Registrar. u/s 95(I)(ii) of the Act, framing of the Rules by the society and approval of the same by the Registrar is not permissible u/s 55 of the Act. Such delegation of the rule-making power is not permissible under the Act. Rules made after self abdication of legislative function are to be ignored and at any rate, it would not have a statutory flavour and, therefore, the approval is of no avail. Learned counsel while drawing our attention to Section 95 of the Act and Sections 24A and 25 of the M. P. General Clauses Act, 1957, also placed reliance on decisions of the Supreme Court in the cases of *Hukam Chand etc. Vs. Union of India (UOI) and Others*, ; *The Municipal Corporation Bhopal, M.P. Vs. Misbahul Hasan and Others*, ; *Marathwada University Vs. Seshrao Balwant Rao Chavan*, and a decision of this Court in the case of *Hukamchand Mills Karamchari Paraspar Sahakari Sanstha Maryadit and Ors. v. State of M. P. and Ors.*, reported in 1988 RN 41.

In our opinion, the contention has no merit. We say so, because at first instance, respondents denied framing of the Service Rules u/s 55(1) of the Act, and contended that these are the bye-laws meant for internal management of the society, having no statutory force. After the close of hearing, the petitioners filed the photostat copy of the order dated 12-4-1985 of the Registrar of Co-operative Societies giving approval u/s 55(1) of the Act to the said Service Rules, in which the respondents sought amendments from time to time, which were also approved by the Registrar u/s 55(1) of the Act vide orders dated 4-10-1989, 5-1-1990 and 16-4-1990. Faced with this situation, the learned counsel, without controverting the said documents, made an attempt to contend that the powers of the Registrar to frame rules suffer from excessive delegation and the rules so framed are in violation of Section 95(1), (2) and (3), as the procedure prescribed was not followed.

Here, it would be appropriate to refer to Section 55(1) of the Act, which reads thus :-

"55. Registrar's power to determine conditions of employment in societies.- (1) The Registrar may, from time to time, frame rules governing the terms and conditions of employment in a society or class of societies and the society or class of societies to which such terms and conditions of employment are applicable shall comply with the order that may be issued by the Registrar in this behalf.

(2) *** **

A bare reading of this provision shows that it permits the Registrar to frame rules from time to time governing the terms and conditions of employment in a society or class of societies. Similar contention was raised in case of Hemant Kumar Ganga Prasad Gupta v. President, District Co-operative Central Bank Ltd. 1983 MPLJ 461 , wherein the Division Bench of this Court, while rejecting the contention that the conferment on the Registrar's powers to make rules governing the terms and conditions of employment in a society or a class of societies is itself ultra vires and void as it suffers from excessive delegation, after referring to the provisions of Section 95(2)(x) and on relying on a decision of the Supreme Court in the case of M.K. Papiiah and Sons Vs. The Excise Commissioner and Another, observed in para 4 thus :-

"The Registrar is the highest in the hierarchy of officers appointed u/s 3 for administering the Act. He is expected to be well acquainted with the conditions prevailing in the Co-operative Societies and posted with the factual data necessary for formulating the terms and conditions of employment of employees of the societies. It is true that the rule making power does not oblige the Registrar to give any hearing to the employees and they have no right of appeal to any higher authority against the rules made by the Registrar. But from this alone, it cannot be said that the power conferred is arbitrary. We have already seen that the State Government has also been conferred power by Section 95(2)

(x) to prescribe qualifications for employees of a society or a class of societies and the conditions of service subject to which persons may be employed by the society. Now as the State Government holds a higher position than the Registrar who is appointed by the Government, the rules made by the Government u/s 95(2)(x) will prevail over the rules made by the Registrar u/s 55(1). The State Government, therefore, has adequate check over the powers of the Registrar by making rules u/s 95(2)(x), in case it finds that the rules made by the Registrar require any modification. The State Government has so far made no rules under this provision except saying that the bye-laws made by the society relating to their employees must conform to the rules made by the Registrar u/s 55(1). The fact that the State Government itself has not made any rules u/s 95(2)(x) only goes to show that in the opinion of the State Government the Registrar has not exercised his power arbitrarily and the rules made by him are reasonable. The second check on the power of the Registrar is furnished by laying requirement u/s 95(3). Although sub-sections (1) and (2) of Section 95 relates to the power of the State Government to make rules, sub-section (3) of Section 95 is made under the Act and requires them to be laid on the table of the Legislative Assembly. Sub-section (3), in our opinion, will cover the rules made by the Registrar u/s 55. A provision for laying the rules made under an Act is a method of control exercised by the Legislature over the rule making authority and if such a control is kept it has been held that the power to make rules cannot suffer from excessive delegation : *M. K. Papiiah and Sons v. Excise Commr.* We are clearly of opinion that the rule making power conferred on the Registrar by Section 55(1) does not suffer from excessive delegation".

It has not been pointed out by Shri Jain that the rules framed by the Registrar u/s 55(1) were not laid on the table of Legislative Assembly, therefore, in the absence of specific pleading and until an affirmative statement is not made in view of the fact that the rules were framed at the instance of the respondent society, it cannot be said that the mandatory requirement of sub-section (3) of Section 95, and Sections 21, 22 and 24A of the M. P. General Clauses Act, 1957, was not followed and, it say that the rules have not come into force.

A Full Bench of this Court in the case of *Sewaram Totaram Pargir v. Board of Revenue and Anr.* 1983 MPLJ 645, after relying on a decision of the Supreme Court in the case of *The Co-operative Central Bank Ltd.* (supra) and considering the provision of Section 55 of the Act, said that when the rules framed are approved u/s 55(1) by the Registrar relating to the terms of the employment and working conditions of workers, such rules are statutory rules and cannot be equated with bye-laws framed for internal management and working of the society. It is well-settled that where a statute authorises either a Government or any other authority to frame rules and rules are so framed, the rules will have the force of statute. They will be deemed to have been incorporated as part of the statute. The rules framed u/s 55(1) of the Act will, therefore, be statutory.

This Court in cases of *Sohanlal v. Guna Central Co-operative Bank Ltd. and Ors.*,

reported in 1992 RN 258; and Kashi Prasad v. District Central Co-operatives Bank Ltd. Tikamgarh and Ors., reported in 1992(1) MPJR 362, following the decision of the Full Bench in Sewaram Totaram Pargir's case (supra), restated the view that the rules framed u/s 55(1) of the Act by the Registrar have a statutory force.

The question, therefore, having been dealt with by this Court while construing the provisions of Sections 55 and 95 of the Act, and having been settled in the aforesaid decisions, in our opinion, the submissions made by Shri Jain have no merit. In fact, it was not proper for the respondents to state that the Service Rules were not framed u/s 55(1), nor it was fair on their part to state that the Service Rules are the bye-laws made for internal management of the society, which are not statutory. It is only after the close of the arguments when the petitioners placed the documents with the copies of the orders of the Registrar to demonstrate that the rules are framed u/s 55(1) of the Act, the respondents came out with an alternative case of the rules stating that the rules have not been framed after following the procedure prescribed, without pointing out the violation of any provision for framing of the rules. In fact, this plea is not available to the respondents, as the rules were framed u/s 55(1) at the instance of the respondent society and for the society, which are in vogue since 1985 and were also amended from time to time at the instance of the society. If the society is of the view that the mandatory procedure was not followed, which, according to us, is not correct; the respondent society ought to have taken steps for framing of the rules according to the procedure prescribed under the Act. Merely because the two petitioners have challenged the order of transfer, placing reliance on the Service Rules, they cannot be allowed to take a shifting stand, as the Service Rules are not only binding on the employees but also on the society employer as well.

According to the petitioners, the transfer order is in breach of the Service Rules, as there is no power of transfer because they hold non-managerial post. Even for argument's sake, if the transfer is an incidence of service, sending on deputation is not contemplated without the consent of the petitioners. Hence, the transfer order is in breach of statutory terms and conditions of service, therefore, the petitioners are aggrieved and can very well invoke writ jurisdiction for the enforcement of their legal right created in their favour by virtue of the provisions of the Statutory Service Rules, directing the respondent societies to act in a particular manner.

To appreciate the contention, a look to Rule 16, which relates to "transfer" is necessary, which reads thus :-

16- LFkkukarj.k & egkla/k dk izca/kd oxZ ds vius deZpkjh dks Hkkjr esa dgha Hkh egkla/k dk;kZy;ksa ;k mldh lgk;d ;k laca/k laLFkkvkksa esa ;k muds dk;kZy;ksa esa ?varfjr? LFkkukarfjr djus dk vf/kdkj gksxkA**

A bare reading to Rule 16 shows that the power in the Service Rules has been given of transfer only in relation to the employees who are in managerial class,

while this rule does not apply to those who are not in that class. According to the petitioners, they neither are in managerial class nor are in selection grade. To meet this, the respondents contended that the petitioners are also performing supervisory and managerial functions, but, the law is well-settled that the nomenclature of a post is not enough to determine the status of an employee. It is the primary and main duty which determines the status whether an employee is of labour force or is of management force. To discharge some duties of supervisory or of managerial nature even along with his prime duty will not make an employee as of management force. If any authority is needed for this, see, S.K. Verma Vs. Mahesh Chandra and Another,

True, that the respondents have been entrusted with the implementation of the Scheme which is a public duty, but, under the Service Rules, there is no provision for sending an employee on inter-district transfer at a long distance of over 1,000 kms. or so on deputation without the consent of the employee concerned and that is why the respondents issued an advertisement for inviting the applications for opting to work in the Scheme. A clear averment to that effect is made in the petition. It is also averred in the petition and the rejoinder that juniors to petitioners opted and consented, who then were sent by giving them promotion and higher pay scale in selection grade. Therefore, the petitioners' grievance, in our opinion, is well merited that the society has discriminated between the two equals. If in reality the society, to discharge the public duties, wanted to transfer the petitioners, at least their consent ought to have been taken, even if consent was not necessary, as to take up the work at appropriate place is a managerial function, in that case too, at least the petitioners ought to have been offered the promotion and the selection grade which was offered to their juniors. Even before this Court, respondents have not made a statement, either in the return or in additional return, that the petitioners shall also be placed in the same pay scale, which is being granted to others. Therefore, there is no equality in treatment. Naturally, in such circumstances, the petitioners will be lowered down in their status from their juniors and will get lesser pay, which certainly give rise to humiliation, affecting mental peace which will hamper them in discharge of their duties, and they will not be able to work and perform their duties in a dignified manner.

Besides, as the project is of the State Government, the transfer of the petitioners to the project under the State Government will certainly amount to change of the employer, from one employer to another. It is well-settled that in such cases, transfer of an employee from one employer to another cannot be made without the consent of the employee. If any authority is needed, see, a decision of the Supreme Court in the case of Jawaharlal Nehru University v. Dr. K. S. Jawatkar and Ors., Jawaharlal Nehru University Vs. Dr. K.S. Jawatkar and Others,

It is trite law that a transfer order can be challenged if it is passed in violation of statutory provisions or is mala fide. It is also well known that to prove malice it may not be always possible to establish malice, in fact, in straight cut manner. In

an appropriate case, it is possible to draw reasonable inference of mala fide action from the pleadings and antecedent facts and circumstances. But, for such inference, there must be firm foundation of fact pleaded and established. Such inference cannot be drawn on the basis of insinuations and vague suggestion. See, Rajendra Roy Vs. Union of India (UOI) and Another,

In the present case, in our opinion, the transfer order is not only in breach of the statutory service conditions, but on the facts of the case pleaded and material placed before us, as the two petitioners are the office bearers of the Trade Union, even without going into the question, as it is disputed that the petitioners are "protected workmen" and the transfer is in breach of settlement between the Union and the respondent No. 2, we find that the transfer order smells malice.

In the result, the order of transfer, dated 30-9-1992 (Annexure P/1) is quashed. Petitions are allowed with costs. Respondents to pay the costs of the two petitions. Counsel's fee, Rs. 500/- in each petition if pre-certified.