
(1994) 12 MP CK 0029

In the Madhya Pradesh High Court

Case No : Writ Petition No. 3678 of 1994

Harichand Budhram

APPELLANT

Vs

Union of India (UOI) and Others

RESPONDENT

Date of Decision : 16-12-1994

Acts Referred:

Constitution of India, 1950 — Article 12, 226, 309, 311

Council of Forestry Research and Education Rules — Rule 39

Citation : (1994) ILR (MP) 359 : (1995) JLJ 663 : (1996) MPLJ 53

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

Bench : Single Bench

Advocate : Rohit Arya, for the Appellant; S.S. Jha and Tannu Tandon, for the Respondent

Final Decision : Allowed

Judgement

S.K. Dubey, J.

By this petition under Articles 226/227 of the Constitution of India, the petitioner seeks a writ of mandamus or any other suitable writ, direction or order for quashing of the order of transfer dated 5-10-1993 from Jabalpur to Jorhat (Document No. 6) and the order dated 21-10-1994 (Document No. 11) rejecting his representation dated 21-10-1994 and the relieving order dated 25-10-1994 (Document No. 12).

Brief facts giving rise to this petition are these:

The petitioner was initially appointed as an adhoc Clerk in the State Forest Research Institute and College, Dehradun. On his representation, he was transferred to Jabalpur in the Tropical Forest Research Institute, Jabalpur vide order dated 27-12-1988 (Document No. 2). The petitioner joined at Jabalpur on 25-1-1989 where his services were regularised vide order dated 11-7-1989 (Document No. 3) as the petitioner was working on the vacant post of Head Clerk in the institute at Jabalpur. Then, he was confirmed vide order dated 13-8-1991.

According to his seniority at the institute level at Jabalpur, he was due for promotion in the year 1993, but so far the petitioner has not been granted promotion because of the alleged hostile treatment of the, respondent No. 3 i.e., the Director of the Institute. On the other hand, it is alleged by the petitioner that he is being victimised for no fault of his and has been punished vide order dated 6-9-1993. The said order is under challenge before this Court in a writ petition filed by the petitioner which is pending for its final disposal. It is averred that the respondent No. 3 after the knowledge of the filing of the petition got the petitioner transferred from Jabalpur to the Institute of Rain and Moist Deciduous Forest Research, Jorhat Assam by order dated 5-10-1993 (Document No. 6). The petitioner challenged the said order by another petition wherein operation of the order dated 5-10-1993 was stayed. The said petition was finally disposed of on 19-9-1994 with a direction to the petitioner to make a representation to the competent authority for taking a decision in accordance with law within the time specified in the order, till then the status-quo, as directed by this court, was ordered to be maintained. The petitioner vide document No. 9 dated 27-9-1994 made a detailed representation running into 18 typed pages annexing therewith 26 documents. That representation was rejected by the respondent No. 2 by a non speaking order vide its order dated 21-10-1994 (Document No. 11). As a consequence of that, the respondent No. 3 issued the relieving order dated 25-10-1994 (Document No. 12). Therefore, the petitioner had to approach again by this petition, wherein, this court on 28-10-1994 directed to maintain the status-quo.

Shri Rohit Arya, counsel for the petitioner and S. S. Jha with Ku. Tannu Tandon, counsel for respondents Nos. 2 and 3 heard.

The respondents raised a preliminary objection about the maintainability of the petition on the ground that the Indian Council of Forestry Research and Education (ICFRE) is a registered society under the Societies Registration Act, 21 of 1860, having its registered office at Dehradun, therefore, is not a "State" within the meaning of Article 12 of the Constitution of India and as such is not amenable to the writ jurisdiction. To demonstrate, the respondents placed before this court a compendium of Rules and regulations" of ICFRE which contains the memorandum of association, rules of ICFRE, bye-laws and other rules governing the conditions as service of the employees. Learned counsel for. the respondents took this Court through the aims and objects for which the society is established, its area of activities, constitution of the Board of Governors, governing the society to whom the management and its affairs are entrusted, and demonstrated that except the supervisory control of the Government of India, neither there is any control of the internal management of the society and its business nor the society is fully financed by the Government of India. Its activities and programmes are connected with coordination, "research and training which are not wholly related to the Governmental functions, Government supervision of control, is not conclusive, which is confined only to proper utilisation of Government grant which is only one of the sources of income.

Therefore, as said by the Supreme Court, in case of Chander Mohan Khanna Vs. The National Council of Educational Research and Training and other[OVERRULED], Article 12 of the Constitution of India cannot be stretched so as to bring in every autonomous body which has some nexus with the Government within the sweep of expression "State". Hence, in the light of the law laid down by the Supreme Court in the aforesaid case, and the aims and objects of NCERT which are exactly similar to that of ICFRE, it was submitted that Article 12 of the Constitution cannot be stretched to bring ICFRE the society within the sweep of the expression "State". A Full Bench decision of this Court in case of Dinesh Kumar Sharma v. M. P. Dugdha Maha. Sangh Sahkari Maryadit and Anr. 1993 MPLJ 786 was also pressed into service.

To determine whether a society registered under the Societies Registration Act is an Authority falling within the expression of "State" under Article 12 of the Constitution it would be proper to refer the judgment of the Supreme Court in the case of Ajay Hasia and Others Vs. Khalid Mujib Sehravardi and Others, which culled out six authoritative tests from its earlier judgment in Ramana Dayaram Shetty Vs. International Airport Authority of India and Others, for determining whether a corporation or society is an instrumentality or agency of the Government, and for that it was observed that it is immaterial whether a corporation or society is created by a statute or under a statute. It would be relevant to extract paras 9 and 11 of the judgment which I quote :

"9. The test for determining as to when a corporation can be said to be an instrumentality or agency of Government may now be culled out from the judgment in the International Airport Authority's case (supra). These tests are not conclusive or clinching, but they are merely indicative indicia which have to be used with care and caution, because while stressing the necessity of a wide meaning to be placed on the expression "other authorities", it must be realised that it should not be stretched so far as to bring in every autonomous body which has some nexus with the Government with the sweep of the expression. A wide enlargement of the meaning must be tempered by a wise limitation. We may summarise the relevant test gathered from the decision in the International Airport Authority's case as follows:

- (1) "One thing is clear that if the entire share capital of the corporation is held by Government it would go a long way towards indicating that the corporation is an instrumentality or agency of Government."
- (2) "Where the financial assistance of the State is so much as to meet almost entire expenditure of the corporation, it would afford some indication of the corporation being impregnated with governmental Character."
- (3) "It may also be relevant factor... whether the corporation enjoys monopoly status which is the State conferred or State protected."
- (4) "Existence of deep and pervasive State control may afford an indication that the Corporation is a State agency or instrumentality."

(5) "If the functions of the corporation of public importance and closely related to governmental functions, it would be a relevant factor in classifying the corporation as an instrumentality or agency of Government."

(6) "Specifically, if a department of Government is transferred to a corporation, it would be a strong factor supportive of this inference of the corporation being an instrumentality or agency of Government".

If on a consideration of these relevant factors it is found that the corporation is an instrumentality or agency of government, it would, as pointed out in the International Airport Authority's case, be an "authority" and, therefore, "State" within the meaning of the expression in Article 12.

"11. We may point out that it is immaterial for this purpose whether the corporation is created by a statute or under a statute. The test is whether it is an instrumentality or agency of the Government and not as to how it is created. The inquiry has to be not as to how the juristic person is born but why it has been brought into existence. The corporation may be a statutory corporation created by a statute or it may be a Government company or a company formed under the Companies Act, 1956 or it may be a society registered under the Societies Registration Act, 1860 or any other similar statute. Whatever be its genetical origin, it would be an "authority" within the meaning of Article 12 if it is an instrumentality or agency of the Government and that would have to be decided on a proper assessment of the facts in the light of the relevant factors. The concept of instrumentality or agency of the Government is not limited to a corporation created by a statute but is equally applicable to a company or society and in a given case it would have to be decided, on a consideration of the relevant factors, whether the company or society is an instrumentality or agency of the Government so as to come within the meaning of the expression "authority" in Article 12."

In case of *Som Prakash Rekhi v. Union of India*, : AIR 1981 SC 212, the criteria for determining whether a statutory corporation or body or other authority is an instrumentality or the agency of the Government were also laid down and it was observed that if a statutory corporation, body or other authority is the instrumentality or agency of the Government, it would be an "authority" and is, therefore, "State" within the meaning of expression in Article 12 of the Constitution and is subject to the same constitutional limitations as the Government. The preponderant consideration for pronouncing an entity as State agency or the instrumentality are; (i) financial resources of the State being the chief funding source, (ii) functional character being governmental in essence, (iii) plenary control residing in Government, (iv) prior history of the same activity having been carried on by Government and made over to the new body, and (v) some element of authority or command. Whether the legal person is a corporation created by a statute, as distinguished from under a statute, is not an important criterion although it may be an indicium.

Then, again the question came up for consideration in the case of P.K. Ramachandra Iyer and Others Vs. Union of India (UOI) and Others, wherein the Supreme Court, after examining the historical background of the Indian Council of Agricultural Research (ICAR) which was a society registered under the Societies Registration Act, observed that substantially when it was set up was an adjunct of the Government of India and had not undergone any noteworthy change. It was wholly financed by the Government of India. Its budget was voted upon a part of expenditure incurred by the Ministry of Agriculture. Even when its status underwent a change, it was declared as an attached office of the Government of India and the control of the Government of India was continuous and persistent, although all its activities and its functions and research institutes set up by the Government were transferred. In other words, to make it financially viable, State is relieved of it and, therefore, having found the feature and the relevant rules of the ICAR and applying the criteria laid down in *Ajay Hasia* "s case, the Supreme Court held that the ICAR is a society set up by the State and is an instrumentality or an agency of the State covered under Article 12 of the Constitution of India and amenable under Article 32 thereof.

In case of *Tekraj Vasandi alias K.L. Basandhi Vs. Union of India (UOI) and Others*, which is a case of Institute of Constitutional and Parliamentary Studies registered under the Societies Registration Act, which, after examining its aims and objects was not held to be a "State", within Article 12, the Supreme Court observed that the tests formulated by several cases of the Supreme Court to find out whether" an institution is a "State", there cannot indeed be a strait-jacket formula. It is not necessary that all tests should be satisfied for reaching the conclusion either for or against holding an institution to be "State". In a given case some of the features may emerge so boldly and prominently that a second view may not be possible. There may yet be other cases where the matter would be on border line and it would be difficult to take one view or the other outright.

In the case of *Chander Mohan Khanna (supra)* relied is by the respondents which is a case of National Council of Educational Research and Training (NCERT) which was a newly established society. The Supreme Court after referring to its earlier decisions observed in para 2 that there are only general principles but not an exhaustive test to determine whether the body is instrumentality or agency or the Government. Even in general principle, there is no cut and dried formula which would provide the correct division of body into those which are instrumentality or agency of the Government and those which are not. Power, function, finance and control of the Government of India are some of the indicating factors to answer the question whether a body is a "State" or not. Each case should be handled with care and caution. Where the financial assistance is so much as to meet almost the entire expenditure of the institution or the share capital of the corporation is completely held by the Government, it would ever give some indication of the body being impregnated with the Governmental character. It may be a relevant factor which a Governmental institution enjoys the monopoly status which a State conferred or State

protected. Existence of deep and pervasive State control may afford an indication. If the functions of the institution are of public importance and related to Governmental function, it would also be relevant factor. These are merely indicative of indicia and by no means conclusive or clinching in any case. The Supreme Court further observed that Article 12 should not be stretched so as to bring in every autonomous body which has some nexus with the Government within the sweep of expression "State". A wide enlargement of meaning must be tempered by wise limitation.

In the light of the law laid down by the Supreme Court to determine whether it is the instrumentality of the State or not, it could be appropriate to look at the back history of the ICFRE which is not much in controversy.

Forest Research Institute was established in the year 1978 as a chemical laboratory attached to the Forestry School, known as Imperial Forest Research Institute and College. After independence the institute was taken over by the Government of India, Ministry of Food and Agriculture known as the Forest Research Institute and College. Later on this department was transferred to the Ministry of Environment and Forest and Wild Life in the year 1984. In order to oversee the activities relating to forestry research and education in the country and co-ordinate the efforts of all the institutions the Government of India decided to establish ICFRE. It was decided that the Forest Research Institute, Dehradun will be the "National Centre of Excellence", it was further decided to set up 5 more institutes of ICFRE at Bangalore, Coimbatore, Jodhpur and Jorhat, Jabalpur, which were set up by the Government of India, Ministry of Environment and Forest in the year 1988. Thereafter the Ministry of Environment and Forest of the Government of India to give an autonomous status to ICFRE which was its department treating it to be as its subordinate office, vide resolution dated 20th June, 1990, resolved that ICFRE be registered as a society under the Societies Registration Act, 1860 which was registered as such vide registration No. 696/1990-91 dated 12-3-1991. After registration of the Society Government of India passed a resolution dated 30th May, 1991 to transfer w.e.f. 1-6-1991 the office of the ICFRE Dehradun together with all its institutions to the society, of which the aims and objects are mentioned in the Memorandum of Association and since then the ICFRE is enjoying its autonomous status. Prior to the transfer of the institute, its employees were the civil servants of the Central Government till their absorption in the ICFRE who opted for it, the petitioner is one of them who gave his option on 10-4-1992. The terms and conditions of the service of the members of staff and employees now are governed by the service conditions of ICFRE society.

The aims and objects of the society are given in the Memorandum of Association in Article No. 3 which are not reproduced here to burden this order. However, it is relevant to state that the society has to raise money for all or any purpose of the society consistent with the aims and object. Rule 39 of ICFRE speaks of funds which lays down that the funds of the society consist of lump sum and recurring

grant made by the Government of India, contributions from other sources and income from investments and other sources. A cursory look to the Memorandum of Association shows that the Central Government has a deep and pervasive control on the society, which would be evident from a bare reading of clauses of Articles of Association, Rules, "Bye-laws". Some of them are 3(xviii), 6 of the Memorandum of Association, Rules 14, 22(a)(vii) (viii), 24, 36, 41, 42, 44, 45, 46 of the Rules of ICFRE, clauses 4, 5, 6, 34, 35, 55(a) of the Bye-laws of the Society. Society had its Board of Governors which has to function under the directives of the Central Government as per clause 6, of the Memorandum of Association which provides that the Central Government may issue such directives to the Council of the Board of Governors, as it may consider if necessary, for furtherance of the objects of the council and ensuring proper and effective functioning and the council or the Board of Governors shall comply with such directives. Constitution of the Board of Governors consists of the Secretary, Ministry of Environment and Forest, Secretary of Ministry of Science and Technology, Inspector General of Forest, Ministry of Environment and Forest, Principal Chief Conservator of Forest, U. P., Principal Chief Conservator of Forests, Karnataka, Director, Indian Institute of Forest Management, Joint Director and Financial Advisor, Ministry of Environment and Forest, Director, Wild Life Institute of India, Forest Services of India, Vice Chancellor, Director or Director General of Forest Institutes. Rule 14 deals with the powers of the Society subject in such restrictions as the Government of India may impose and to such guidelines as the Government of India may issue from time to time, in this behalf to perform all acts and issue directions as may be considered necessary, incidental or conducive to the attainment of the object enunciated in the Memorandum of Association of the society. Expenditure is to be incurred subject to such limitations as the Government of India from time to time may enforce under Rule 22(a).

From the historical background that the activities of the society were being carried out by the Government of India and were made over to the society and a reading of the Articles of Association rules, bye-laws, it is amply clear that the ICFRE enjoys the monopoly status which is the State conferred and the State protected, the functions carried by the institutions of the society are of public importance which relate to environment which is the need of the day, plenary control still resides in the Government of India, hence, it cannot be denied that the functions or it is not a Governmental activity. The aims and object clearly demonstrate that the society has been established for carrying on the obligatory functions of the State which are closely related to Governmental functions, besides the fact that initially the institutes of the society were the institutes of Government of India which were transferred to the society. Therefore, the respondent cannot contend that ICFRE is not "State" within the meaning of Article 12 and is not amenable to writ jurisdiction. In view of the facts stated above the decisions relied by the respondents are of no help and are distinguishable on facts.

Coming to the merits, it is well-settled that in the matter of transfer of an employee, it is the appropriate authority which has to decide as to who should be transferred and where. Unless the order of transfer is vitiated by mala fide or is made in violation of the statutory provision, the Court cannot interfere with it. While ordering transfer, there is no doubt, that the authority must keep in mind the guidelines issued from time to time on the subject. Similarly, if a person makes any representation with respect to his transfer, the appropriate authority must consider the same having regard to the exigency of administration. However, the order of transfer of an employee, made without following the guidelines cannot be challenged, unless it is vitiated by mala fide or is made in violation of the statutory provisions. See; *Union of India and Others Vs. S.L. Abbas, , Venkatesh Vs. State of Tamil Nadu*, and a decision of Division Bench of this Court in the case of *Pooran Singh v. Union of India*, 1994 MPLJ 296.

To prove the mala fides the petitioner has made number of allegations, stating therein that the order of transfer is to punish the petitioner for his legitimate grievances and to establish he filed a lengthy representation annexing therewith a number of documents, which was rejected by a non-speaking order based on the comments of the respondent No. 3. However, the fact remains that the seniority of the employee of the Forest Institute is maintained at the institute level, and not at the Central level. According to the petitioner, he is due from 1991 for promotion for the post of Office Superintendent in accordance to his seniority. But he is being deprived of that by his transfer from Jabalpur to Jorhat. In the institute at Jabalpur, there are two Head Clerks out of which the petitioner is senior while at Jorhat, there is only one. In place of the petitioner, no one has been posted and the post is being kept vacant for the reasons best known to the respondent. The order of transfer also does not reflect that it is in exigency and requirement of work and administration and is in public interest. See the decision of Supreme Court in case of *Ramadhar Pandey Vs. State of U.P. and Others*, Besides the fact that the order of transfer will cause a lot of difficulties and dislocation of the family set up of the petitioner, which is a consideration for the employer, as the transfer is the normal incidence of service, but without taking into consideration all the above factors, the fact cannot be lost sight of that the seniority of the petitioner is likely to be affected, as the seniority is not maintained at the Central level, he will lose his chance for consideration of his case for promotion.

It is well-settled that the transfer is normally resorted in the same cadre without adversely affecting the conditions of service so that any person entering the service may feel secure of equality in continuance, promotion etc. Any executive action violating it cannot be upheld. Seniority is an incidence of service which cannot be eroded or curtailed by a rule which operates discriminately. Seniority of a Government servant with consequent loss of promotional prospects of higher pay and emoluments is a matter of serious consequence to him. See the decisions of Supreme Court in the case of *K. Narayanan and others Vs. State of Karnataka and others*, and *Arun Kumar Chatterjee Vs. South Eastern Railway and*

Others, It is also well settled that promotion increases efficiency of a public servant while stagnation reduces efficiency and makes the service ineffective as the promotion is a normal incidence of service. See Supreme Court decision in case of Dr. M.S.O.Z. Hussain v. Union of India, (1990) 60 Indian Factories and Labour Reports p. 74.

Recently, a Division Bench of this Court in case of Suresh Kumar Sharma v. Municipal Council, Ambah 1994 JLJ 479, which is a case of transfer of Municipal employee to another, where also the seniority is maintained Municipal Committee wise and not at State level, relying the decisions of the Supreme Court referred in para 16 has observed that in such a situation the transfer to a different Municipality which is likely to affect seniority and right to be considered for promotion, which are conditions of service, which cannot be adversely affected. Therefore, in the opinion of this Court the order of transfer of the petitioner is mala fide.

In view of the above, without going into various allegations of malice and the attack on order of rejection of representation of the petitioner, I am of the opinion that the order of transfer cannot be sustained and is hereby quashed.

In the result, the petition is allowed with no order as to costs.