

(1991) 05 MP CK 0024
In the Madhya Pradesh High Court
Case No : M.P. No. 4503 of 1989

Jamuna Prasad Pandoria

APPELLANT

Vs

Director, Nagar Prashashan and Another

RESPONDENT

Date of Decision : 09-05-1991

Acts Referred:

Madhya Pradesh Municipalities Act, 1961 — Section 94(7)

Citation : (1991) 2 MPJR 234 : (1991) 36 MPLJ 930 : (1991) MPLJ 930

Hon'ble Judges : P.N.S. Chouhan, J;K.M. Agarwal, J

Bench : Division Bench

Advocate : Jagdish Tiwari, Vinod Mehta, for the Appellant; T.S. Ruprah, for the Respondent

Final Decision : Allowed

Judgement

K.M. Agarwal, J.

By this petition under Article 226 of the Constitution, the petitioner is challenging his transfer order dated 31-7-1989 (Annexure A-1) from Gotegaon Municipality to Kaymore Municipality as a Lower Division Clerk, (in short, the "L.D.C"), and makes a prayer for allowing him to work as L.D.C. in Gotegaon Municipality.

The petitioner was appointed as an L.D.C. in Municipal Council, Gotegaon by order dated 19-8-1968 (Annexure A-2) in the time scale of Rs. 80-160 plus Rs. 35/- as dearness allowance and ever since the date of his appointment, he has been working there as an L.D.C. By the impugned order he was transferred to Municipal Council, Kaymore in the same capacity. The petitioner contends that the post of L.D.C. is not transferable and, therefore, the impugned order is bad. The respondent No. 2 has filed his return and has tried to justify the order of transfer by referring to Section 94(7) of the M. P. Municipalities Act, 1961, (in short, the "Act").

Having heard the learned counsel for the parties, we are of the view that looking to the post held by the petitioner, the transfer order cannot be justified u/s 94(7)

of the Act, which reads as follows : -

"94(7). The State Government may transfer any officer or servant of a Council mentioned in sub-sections (1) and (2) and in receipt of total emoluments exceeding one hundred rupees to any other Council."

These provisions were substituted in place of old provisions by Section 5 of M. P. Act No. 32 of 1967, published in M. P. Rajpatra (Asadharan) dated 23-12-1967. Sub-sections (1) and (2) of Section 94 read as follows : -

"94(1) Every Council having an annual income of five lakhs of rupees or more shall, subject to rules framed u/s 95, appoint a Revenue Officer and an Accounts Officer and may appoint such other officers and servants as may be necessary and proper for the efficient discharge of its duties.

"(2) Every Council not falling under Sub-section (1) shall, subject to rules framed u/s 95, appoint a Sanitary Inspector, a Sub-Engineer, a Revenue Inspector and an Accountant and may appoint such other officers and servants as may be necessary and proper for the efficient discharge of its duties :

"Provided that such Council may appoint a part-time Health Officer or an Engineer on such terms and conditions as the State Government may approve in this behalf."

Before transfer of any officer or servant of a Council u/s 94(7), it is necessary to be seen that:

(i) such officer or servant is mentioned in Sub-section (1) and Sub-section (2) of Section 94; and

(ii) such officer or servant is in receipt of total emoluments exceeding one hundred rupees.

It is not in dispute that the post of a L.D.C. is covered both under Sub-section (1) and Sub-section (2) of Section 94 of the Act. The first condition is, therefore, satisfied. So far as the second condition is concerned, the learned counsel for the petitioner contended that the petitioner was not getting the dearness allowance of Rs. 35/- per month. According to him, as per the appointment letter, the dearness allowance of Rs. 35/- was to be received by the petitioner only after reaching the last stage of his pay scale. As against this, the learned counsel for the respondent No. 2 submitted that the "total emoluments" mentioned in Section 94(7) included pay and dearness allowance and as the petitioner was getting a sum of Rs. 115/- by way of pay and dearness allowance as per his appointment letter, the second condition laid down in Section 94(7) was also fulfilled and, therefore, the transfer order was quite legal. Reliance was placed in State of Madhya Pradesh Vs. Shankar Lal and Ors, and Vasant v. State of M. P. 1986 MPLJ 295.

We are of the view that the learned counsel for both the parties are not correct in their said contentions. The appointment letter (Annexure A-2) is plain enough to

indicate that the petitioner was entitled to a dearness allowance of Rs. 35/- per month in addition to the amount of his pay, irrespective of the fact that he was in the initial stage of his pay scale. Accordingly he must be held to be drawing an amount of Rs. 115/- per month by way of his pay and dearness allowance as per his appointment letter. Now the word "emoluments" has not been defined in the Act. In Rule 2(3) of the M. P. Municipal Services (Scale of Pay and Allowances) Rules, 1967, (in short, the "Pay Rules"), the meaning of "emoluments for fixing pay" is indicated, but the word "emoluments" simpliciter is not defined. Rule 19 of the Pay Rules makes a provision for dearness allowance in respect of present scales, whereas Rule 20 thereof makes provision for dearness allowance relating to new scale. Sub-rule (1) of Rule 20 says :

"20(1). The rate of dearness allowance admissible to those whose pay would be fixed or would be deemed to have been fixed in the new scale will be as follows :

"On pay upto including Rs. 150 p.m.... Rs. 15/- per mensem.

These Pay Rules were published in M. P. Rajpatra (Asadharan) dated 29-9-1967, whereas the existing provisions in Section 94(7) were brought into force from 23-12-1967 as aforesaid. Accordingly the "total emoluments" mentioned in Section 94(7) must be read in reference to the total emoluments that an employee was to receive in accordance with the Pay Rules, and not in reference to the emoluments he is presently drawing or in reference to the emoluments he has to receive in accordance with the letter of his appointment. As per actual classification made Under Rule 4 of the Pay Rules, Gotegaon is shown at S.No. 15 in class "C" of Schedule I and the pay scale of a Lower Division Clerk of class "C" Municipality as mentioned at S. No. 8 of Schedule III to the said Pay Rules is Rs. 80-160/-, which is the scale mentioned in the appointment letter (Annexure A-2). In the light of this pay scale and the dearness allowance of Rs. 15/- mentioned in Rule 20, it must be held that the "total emoluments" of an L.D.C. of class "C" Municipality did not exceed Rs. 100/- for the purpose of Section 94(7) of the Act, even if both the dearness allowance and the pay were included within the meaning of the words "total emoluments" used in the section. We are, therefore, of the view that the second condition laid down for exercise of the powers given u/s 94(7) was not fulfilled in the present case. Accordingly the impugned order of transfer from one Municipality to another Municipality could not be passed against the petitioner.

In State of M. P. v. Shankar Lal (supra), it was held that the words "any officer or servant of a Council mentioned in sub-sections (1) and (2)" occurring in Sub-section (7) of Section 94, did not restrict the operation of Section 94(7) in respect of officers and servants mentioned in sub-sections (1) and (2) of Section 94. We have also not restricted its operation in regard to the officers and servants mentioned in sub-sections (1) and (2) and, therefore, this case is of no help to the respondent No. 2. The other case Vasant v. State of M. P. (supra), relied on by the learned counsel for the respondent No. 2 is also of no help to him, because it deals with the transfer of an Assistant Health Officer, whose

salary was admittedly above Rs. 100/- per month. His case was squarely covered by Section 94(7) and, therefore, the petition was dismissed by holding that transfer is a necessary incidence of service.

The learned counsel for the petitioner also argued that separate gradation lists of L.D.C. were maintained by different Municipalities, which gave an indication that L.D.C. could not be transferred. Further, the petitioner was likely to suffer his seniority in Kaymore Municipality, where he was transferred, because of separate gradation lists. However, this point need not be discussed, as the petition is succeeding on the first point.

For the foregoing reasons, this petition succeeds and it is hereby allowed. The impugned transfer order dated 31-7-1989 (Annexure A-1) is quashed and the respondents are directed to allow the petitioner to work as L.D.C. in the office of the respondent No. 2. In the circumstances of the case, we make no order as to costs of these proceedings.