

(2023) 10 OHC CK 0139
In the Orissa High Court
Case No : Writ Petition (C) No. 31043 Of 2023

Manoranjan Hota & Others

APPELLANT

Vs

State Of Odisha And Another

RESPONDENT

Date of Decision : 18-10-2023

Acts Referred:

Constitution of India, 1950 — Article 226, 227, 309

Citation : (2023) 10 OHC CK 0139

Hon'ble Judges : Sashikanta Mishra, J

Bench : Single Bench

Advocate : Dr. J.K. Lenka, P.K. Behera, L. Tripathy, I. Mohanty

Final Decision : Allowed

Judgement

Sashikanta Mishra, J

1. The petitioners have filed this writ application with the following prayer:

"In view of the above stated fact and circumstances, this Hon'ble Court may graciously be pleased to admit the Writ application, issue rule NISI calling upon the Opp. Parties to show cause as to why the order of transfer of the Petitioners vide Office order dated 14.07.2023 at

Annexure-7 and the order of rejection dated 14.09.2023 at Annexure-12, directing immediate relief of the petitioners should not be quashed.

And if the Opp.Party failed to show cause or sufficient cause, the rule be made absolute.

And further be pleased to issue any other appropriate writ/writs, rule/rules or order/orders, direction/directions as may be deemed fit and proper in the interest of justice.

And for which act of kindness, the Petitioners as in duty bound shall ever pray."

2. The facts of the case are that Govt. of Odisha in the Department of Panchayati

Raj created the post of Asst. Project Manager (Finance) in District Rural Development Agency (DRDA) by order dated 18.11.1996 as per staffing pattern meant for Class-II officers of the State Govt. with regular scale of pay of Rs.2000-3500/-. The petitioners applied for the said posts pursuant to an open advertisement and after undergoing a selection process, were appointed against such posts. Their pay scale was subsequently revised in the pay band of Rs.9300 – 34800/- with grade pay of Rs. 4600/-. Because of lack of promotional avenues, the petitioners approached this Court in W.P.(C) No.32335 of 2011 for a direction to the authorities to create promotional avenues for them or in the alternative, to grant higher scale of pay at par with Class-I officers of the State Govt. During pendency of the said writ petition the Govt. vide letter dated 10.12.2014 took a decision to fill up the posts of Addl. Project Director (Finance) in DRDAs by officers from the Odisha Finance Service on deputation ignoring the case of the petitioners. As such, they again approached this Court in W.P.(C) No. 24678 of 2014 with prayer to quash the letter dated 10.12.2014 and to direct the Govt. to fill up the posts by the petitioners. This Court, by order dated 19.12.2014 directed as an interim measure that any appointment made shall abide by the result of the writ petition. However, the claim of the petitioners for promotion was rejected by order dated 12.05.2020. The petitioners therefore, filed a contempt petition being CONTC No. 2110 of 2010. During pendency of the contempt petition the Govt. decided to abolish the DRDAs in the state by merging them with the Zilla Parishads. The post of Asst. Project Manager (Finance) was merged with the newly created post of Senior Programme Manager (Finance) carrying same pay scale. The six petitioners herein have been continuing in 6 out of 7 such posts newly created. The higher post of Addl. Project Manager (Finance) was merged with the newly created post of Addl. Executive Officer (Finance). At this stage and during pendency of the aforementioned two writ petitions the Govt. by notification dated 16.02.2015 transferred the petitioners to different DRDAs. Said notification was challenged by one of the petitioners namely, Deepak Kumar Biswal in W.P.(C) No. 2953 of 2015. By order dated 24.07.2015, this Court quashed the order of transfer in respect of the said petitioner as it was passed without complying with the provisions contained in Regulation 15 of the Odisha District Rural Development Agency Employees (Recruitment and Conditions of Service) Regulations, 1989 (for short, 'DRDA Regulations 1989'). However, the Director, Panchayati Raj vide order dated 14.07.2023 transferred the petitioners to different Zilla Parishads (Copy enclosed as Annexure-7). The petitioners again approached this Court in W.P.(C) No. 22459 of 2023, which was disposed of by order dated 19.07.2023 by keeping the impugned order in abeyance and granting liberty to them to submit a fresh representation before the Director with further direction to the Director to consider the same as per Regulation 15 of the DRDA Regulation 1989. The petitioners submitted their representations but the same has been rejected by the Director vide order dated 14.09.2023 on the ground that after framing of the Odisha Zilla Parishad Employees Service (Recruitment and Conditions of Service) Rules, 2023 (for short, 'Zilla Parishad Rules, 2023') the petitioners are of the

state cadre. Said order is enclosed as Annexure-12 to the writ petition.

3. The opposite parties have not filed any counter to the writ petition but the state counsel preferred to make oral submissions as it was felt that the matter could be finally disposed of at the sage of admission since the facts are not disputed and only a point of law is involved.

4. Heard Dr. J.K. Lenka, learned counsel for the petitioners and Mr. I Mohanty, learned Addl. Standing Counsel for the State.

5. Dr. Lenka assails the impugned orders under Annexures- 7 and 12 by contending that the Govt. has acted with malafides in transferring the petitioners to different Zilla Parishads purportedly treating them as belonging to a state cadre which is in violation of the DRDA Regulations, 1989, which still holds the field. Further, the reliance placed by the Director on the Zilla Parishad Rules, 2023 is entirely misconceived and contrary to law because said Rules have actually not come into force as yet. The draft Rules can have no legal force. It is further argued that all the petitioners have rendered service for more than two decades without having any promotional avenues. So, only because they legitimately claimed promotion or higher scale of pay, they are sought to be punished by transferring them

6. Mr. I. Mohanty argues that transfer is an incidence of service and no employee has a right to remain posted at any particular place of his choice. In the instant case, the petitioners were transferred on administrative grounds and in the larger interest of the functioning of the Zilla Parishads which are engaged in developmental works. Mr. Mohanty however, fairly concedes that the Zilla Parishad Rules, 2023 is still at the draft stage and has not been finally brought into force as yet.

7. As evident from the foregoing narration, much has been pleaded and argued as regards the promotional avenues or the lack of it of the petitioners. But this Court finds that the present lis revolves around the correctness and/or legality of the notification under Annexure-7 and the order of rejection under Annexure-12. Moreover, the claim of the petitioners regarding promotional avenues is the subject matter of the previous writ petitions and therefore, this Court shall not render any finding in such regard.

8. Having regard to the rival contentions it is apparent that the sole question that falls for determination in this case is, whether the provisions of a draft Rules can be invoked by the authorities for taking any action.

9. Reference has been made by the parties to the Zilla Parishad Rules, 2023, copy enclosed as Annexure- 10 to the writ petition. Said draft Rules was published in the Odisha Gazette on 11.08.2023. Its introduction reads as follows:

"No.17546-PR-DRDA-MISC-0049/2014/PR & DW.- In exercise of the power conferred under section 51 of Odisha Zilla Parishad Act, 1991 (Odisha Act 17 of 1991) is hereby published as required by sub-section (1) of the said section for

the information of all persons likely to be affected thereby and notice is hereby given that the said draft will be taken into consideration after the expiry of a period of thirty days from the date of publication of this notification in the Odisha Gazette,

Any objection and suggestion which may be received from any person in respect of the said draft before the expiry of the period so specified above will be considered by the State Government."

10. We need not dwell upon the provisions of the Rules, for the question is, are these Rules deemed to have come into force automatically. The law in this regard was examined by the Supreme Court in the case of Vimal Kumari vs. State of Haryana and others reported in (1998) 4 SCC 114 and it was observed as follows:

"6. The Draft Rules were prepared in 1983 and since then they have not been enforced. It is, no doubt, open to the Government to regulate the service conditions of the employees for whom the Rules are made by those Rules even in their "draft stage" provided there is clear intention on the part of the Government to enforce those Rules in the near future. Recourse to such Draft Rules is permissible only for the interregnum to meet any emergent situation. But if the intention was not to enforce or notify the Rules at all, as is evident in the instant case, recourse to "Draft Rules" cannot be taken. Such Draft Rules cannot be treated to be Rules made under Article 309 of the Constitution and cannot legally exclude the operation of any existing executive or administrative instruction on the subjects covered by the Draft Rules nor can such Draft Rules exclude the jurisdiction of the Government, or for that matter, any other authority, including the appointing authority, from issuing the executive instructions for regulating the conditions of service of the employees working under them."

11. Vimal Kumari (Supra) was also relied upon by the Supreme Court in the case of Chandigarh Administration v. Usha Kheterpal Waie, reported in (2011) 9 SCC 645; (2011) 9 SCC 645 in the following words:

"17. In Abraham Jacob v. Union of India [(1998) 4 SCC 65 : 1998 SCC (L&S) 995] this Court held that where draft rules have been made, an administrative decision taken to make promotions in accordance with the draft rules which were to be finalised later on, was valid. In Vimal Kumari v. State of Haryana [(1998) 4 SCC 114 : 1998 SCC (L&S) 1018] this Court held that it is open to the Government to regulate the service conditions of the employees for whom the rules were made, even if they were in their draft stage, provided there is a clear intention on the part of the Government to enforce those Rules in the near future."

12. Thus, the position that emerges is, even a Draft Rule can be invoked provided there is a clear intention on the part of the State to enforce it in the near future to meet an emergent situation but it cannot legally exclude the operation of any existing executive instruction, Rule etc.. Turning to the facts of

the case, admittedly, the draft Rules were published in the Gazette on 11.08.2023 with the stipulation that they shall will be taken into consideration thirty days after such publication. Obviously, the intention was to invite objections/suggestions as to its provisions. Nothing has been stated on behalf of the State as to if any suggestions/objections were received and the steps taken in that regard. So, the Rules must be held to have remained in a nascent stage and not attained finality because there is nothing to show that after a particular period of time, the draft Rules would automatically become final. Therefore, invocation of the Draft Rules by the authorities as on 13. 09.2023 when the same had not actually come into force is unconscionable in law. Consequently, the rejection of the representation of the petitioner as per order under Annexure-12 is rendered unsustainable in law.

13. It would be significant to note that as against the Draft Rules, there is an existing Regulation namely, the DRDA Regulations 1989 occupying the field. As held in Vimal Kumari (supra) the draft Rules cannot exclude the operation of any existing executive or administrative instructions on the subject covered by it. The DRDA Regulations 1989 does exist and is in force. As long as the Regulations have not been expressly or impliedly repealed, its provisions have to be followed.

14. In this context, reference may be had to the relevant provisions of the DRDA Regulations 1989. Regulation 15 reads as follows:

"No employee shall be transferred from one agency to another. However, the Director(SP) of C.D. & R.R. Department may transfer an-employee from one Agency to another with the willingness of the concerned employees and consent of both Agencies. In the event of such a transfer, the seniority of the employee transferred from one Agency to another shall be determined as per his date of joining in the present post in the gradation list of the cadre of the Agency to which the employee is transferred."

15. It is needless to mention that the impugned order of transfer as at Annexure-7 runs contrary to Regulation 15.

16. Thus on a conspectus of the discussion made on the facts and law as above, it is evident that the impugned orders under Annexures -7 and 12 being unsustainable in the eye of law warrant interference by this Court.

17. In the result, the writ petition is allowed. The impugned orders under Annexures-7 and 12 are hereby quashed. The petitioners shall be permitted to continue in their places of posting prior to issuance of Annexure-7.

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