

**(2019) 11 MP CK 0109**

**In the Madhya Pradesh High Court**

**Case No : Writ Petition No. 18588 Of 2019**

O.P. Shrivastava And Others

APPELLANT

Vs

State Of Madhya Pradesh And Others

RESPONDENT

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**Date of Decision : 14-11-2019**

**Acts Referred:**

Constitution Of India, 1950 — Article 16, 311

Central Civil Services (Classification, Control And Appeal) Rules, 1965 — Rule 2(4)

**Citation : (2019) 11 MP CK 0109**

**Hon'ble Judges : Sanjay Dwivedi, J**

**Bench : Single Bench**

**Advocate : Shobha Menon, Rahul Choubey, H.K. Upadhyay, Swapnil Ganguly**

**Final Decision : Allowed**

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## **Judgement**

Since, pleadings are complete, with the consent of the learned counsel for the parties, the matter is heard finally.

1. By the instant petition, the petitioners have questioned the legality, validity and propriety of the orders impugned dated 29.08.2019 (Annexure-P-9) and 30.08.2019 (Annexure-P-10), whereby the petitioners have been transferred from one place to another and consequently they have been relieved.

2. The sole contention of the challenge has been made by the petitioners that they being the contract employees cannot be subjected to transfer until and unless the term and condition specifically provides so. In support of their contention, they relied upon Full Bench decision of this Court passed in case of Ashok Tiwari vs. M.P. Text Book Corporation and another reported in [2010 (2) M.P.L.J. 662],

3. As per the facts of the case, the petitioners were appointed on contract basis by the respondents and contracts were executed in the year 1996. Those are available on record. There is no enabling provision available in the said contract empowering the respondents to transfer the petitioners from one unit to another.

As per the petitioners, some of the similarly situated employees have been regularized after completing two years, whereas the services of the petitioners have not been regularized and they have given step motherly treatment.

4. It is stated in the petition that merely because the petitioners have approached this Court, therefore, their services have not been regularized, whereas other similarly situated persons have been regularized. It is also stated by them that there are vacancies available, despite that no order of regularization has been passed. However, as per the relief claimed, it is not a case, in which, the petitioners are claiming direction for their regularization, but they are simply challenging the order of their transfer mainly on the ground that in the terms of appointment, there is no provision, under which, they can be transferred from one unit to another.

5. The learned counsel for the respondents have filed their reply stating therein that in the contract executed between the petitioners and the respondents, the term provided of service was over, then new contract was executed. It is also stated by the respondents that the petitioners in their contract have admitted that they would not claim any regularization in service and, therefore, their claim for regularization is absolutely illegal. In the reply it is stated by the respondents that the petitioners have completed sufficient years of service in Bhopal and, therefore, they are being transferred, but they have approached this Court claiming that they cannot be transferred. It is also stated by the respondents that some of the petitioners have transferred and adjusted within Bhopal District, but still they do not want to go on transfer. It is also stated by the respondents that on earlier occasion some of the petitioners have got transferred from one place to other, they have complied the order and joined at the transferred place. It indicates that whenever the petitioners have suited the order, they comply the same, but now they are objecting their transfer because their shifting is not as per their choice. The learned counsel for the respondents submitted that the case on which the petitioners are relying upon, is not applicable as the transfer is an incidence of service and after completion of contract they can be transferred. The counsel for the respondents has placed reliance upon a decision passed in Appeal (civil) 933 of 2006 parties being Union Public Service Commission Vs. Girish Jayanti Lal Baghela & others.

6. As per the contention raised by the learned counsel for the petitioners that in view of the law laid down by the Full Bench of this Court in Case of Ashok Tiwari (supra), the contract employee cannot be transferred. It is further contended by the learned counsel for the petitioners that in the contract executed between the petitioners and the respondents, there is no provision which empowers the respondent/employer to transfer the petitioners. The contract agreement is available on record as Annexure-P-2A onwards. Clause-7 of the agreement especially deals with the situation, in which, it is mentioned that during the period of contract, the petitioners would work under respondent No.3. By the orders impugned, the petitioners are being transferred from one unit to another

like petitioner No.1 is being sent to Harda from Bhopal. The petitioners have relied upon the observation made by the Full Bench of this Court in case of Ashok Tiwari (supra). The said observation is quoted hereinbelow:-

"22. From the aforesaid principle it would be clear that a person, who is appointed on contract basis or on daily wage basis and who is not appointed to a service or a post, as per the recruitment rules, is not subjected to normal rules governing suspension, transfer etc. The concept of appointment to a service or post and the rights available to an employee appointed on daily wage basis to claim absorption or regularization has been considered by the Supreme Court in the case of Upendra Narayan Singh (supra), and it has been held that such persons who are engaged on contract basis or only daily wage basis without following the normal rules regarding recruitment do not hold service in the Government or post till their appointment is regulated by the normal recruitment rules."

In view of the clause contained in the agreement, it is clear that the petitioners have to work under the employer with whom agreement has been executed, but in absence of any provision for transferring the petitioners, they cannot be transferred.

7. In view of the Full Bench decision of this Court, the services of the contract employees do not govern with any specific rules and, therefore, transfer is not permissible. The High Court has very categorically observed in case of Ashok Tiwari (supra), that the daily wagers cannot be transferred from one place to another, therefore, I am of the opinion that the transfer of the petitioners from one place to another, is not permissible.

8. The learned counsel for the respondents has placed reliance upon a case reported in AIR 1978 SC 17 parties being Dinesh Chandra vs. State of Assam. The relevant provision has been quoted and reproduced in a judgment of Union Public Service Commission (supra), but the said case is not applicable in the facts and circumstances of the present case because the Supreme Court in the said case has observed that there is a special provision which deals with a special situation where a contract is entered into between the Government and a person appointed under the Constitution to hold civil post. However, in the Full Bench decision, it is very categorically observed that the contract employee is not a civil post holder as they have not appointed after following normal rules regarding recruitment and in the present case also it is not the case of the respondents that the petitioners are not the contract employee and even though, if they are the contract employees, they are not the civil post holder, therefore, the analogy relied by the Supreme Court in case of Dinesh Chandra (supra) is not applicable in the present case. The Full Bench has also dealt with the issue whether the person appointed on the contract basis can be considered to be a Government servant or not. Taking note of the said fact, paragraph 21 of the Full Bench is required to be quoted hereinbelow:-

"21. Finally, the principle laid down by the Supreme Court in the case of Union Public Service Commission v. Girish Jayanti Bai Vaghela (supra), may be taken note of. The case pertains to the rights available to a person appointed on contract basis and the question is as to whether such a person can be called a Government servant. After considering the meaning of the word 'Government servant' as appearing in Rule 2(4) of the Central Civil Services (Classification, Control and Appeal) Rules so also judgments of the Supreme Court in various other cases, it has been held that a person appointed on a contract basis for a specific period and when the appointment is without following the normal rules of recruitment either on contract basis or on daily wage basis, such a person cannot have any right to the post until and unless they are duly selected or appointed to the post as per the recruitment rules. Finally, in Paragraph 17, the Supreme Court has crystallized the principle in the following manner as under:-

"17. It is neither pleaded nor there is any material to show that the appointment of respondent No. 1 had been made after issuing public advertisement or the body authorized under the relevant rules governing the conditions of service of Drug Inspectors in the Union Territory of Daman and Diu had selected him. His contractual appointment for six months was de hors the rules. The appointment was not made in a manner which could even remotely be said to be complaint of Article 16 of the Constitution. The appointment being purely contractual, the stage of acquiring the status of a Government servant had not arrived. While working as a contractual employee respondent No. 1 was not governed by the relevant service rules applicable to Drug Inspector. He did not enjoy the privilege of availing casual or earned leave. He was not entitled to avail the benefit of General Provident Fund nor was entitled to any pension which are normal incidents of a Government service. Similarly, he could neither be placed under suspension entitling him to a suspension allowance nor he could be transferred. Some of the minor penalties which can be inflicted on a Government servant while they continue to be in Government service could not be imposed upon him nor he was entitled to any protection under Article 311 of the Constitution. In view of these features it is not possible to hold that respondent No. 1 was a Government servant." (Emphasis supplied)

9. Since in the said case, there was no written agreement unlike the present one, the services of the present petitioners shall be governed with the terms of the contract, therefore, in view of the observation made by the Full Bench in case of Ashok Tiwari (supra), it is appropriate that the orders impugned in the present case transferring the petitioners are not liable to be sustained and accordingly, set aside.

10. Here in this case, no claim in respect of regularization of the petitioners can be considered as no such relief is claimed by the petitioners.

Petition is accordingly, allowed.