

(2021) 03 DEL CK 0140

In the Delhi High Court

Case No : Civil Writ Petition No. 451 Of 2021

Rajkumar

APPELLANT

Vs

National Human Rights Commission

RESPONDENT

Date of Decision : 12-03-2021

Acts Referred:

Constitution Of India, 1950 — Article 310(1)
Protection Of Human Rights Act, 1993 — Section 3, 3(4), 7
General Clauses Act, 1897 — Section 16

Citation : (2021) 03 DEL CK 0140

Hon'ble Judges : V. Kameswar Rao, J

Bench : Single Bench

Advocate : V.K. Garg, Nilansh Gaur, Mohit Paul

Final Decision : Allowed

Judgement

V. Kameswar Rao, J

1. This petition has been filed by the petitioner with the following prayers:

"In view of the submissions made above, it is most respectfully prayed that this Hon'ble Court may graciously be pleased to issue appropriate writ / direction to:

a) Call for the records of the case and quash and set aside the impugned order dated 05.01.2021 at (Annexure P-1).

b) Direct the respondent to continue the petitioner on deputation till the expiry of this remaining tenure as extended by the Competent Authority with all consequential benefits; and

c) Any order or further relief which this Hon'ble Court deems fit, just and proper in the peculiar circumstances of the case in the interest of justice may also please be awarded.

2. The facts as noted from the writ petition and so highlighted by Mr. V.K. Garg, learned Senior Counsel appearing for the petitioner are that the petitioner is a

Judicial Officer of Rajasthan Higher Judicial Service (District & Sessions Judge). On April 3, 2018, the respondent, National Human Rights Commission ('NHRC', for short), issued an advertisement inviting the applications for appointment to the post of Presenting Officer ('PO', for short) in the respondent / NHRC by deputation failing which by re-employment / contract.

3. On August 2, 2019, the petitioner being found eligible for deputation was shortlisted for the interview. On October 7, 2019, the petitioner was appointed to the post of PO on deputation initially for a period of one year. His appointment was to be governed by the terms of DoP&T OM dated June 17, 2010. The petitioner joined the post on October 01, 2019. The period of one year had expired on September 30, 2020. On September 25, 2020, the petitioner gave his willingness for extension of his tenure for one more year. According to Mr. Garg, on October 29, 2020 even the parent department (Rajasthan High Court) of the petitioner gave its concurrence for extension of deputation term of the petitioner for a further period of one year w.e.f October 1, 2020 till September 30, 2021 to the respondent / NHRC. Accordingly, on November 18, 2020, the tenure of deputation of the petitioner was extended for a further period of one year pursuant to the approval of the competent authority and the same was conveyed to his parent department.

4. It is the submission of Mr. Garg that on January 5, 2021, the petitioner was prematurely repatriated under the order of an Officer, bearing F. No. A-19011/10/2020-Estt. ('Impugned Order', for short), not competent in the absence of the Chairperson, by directing the petitioner to report to his parent department. He submitted that immediately thereafter, the petitioner had made representations to the respondent as well as to his parent department with a request that the impugned order be withdrawn by the respondent / NHRC.

5. Mr. Garg has made three-fold submissions. Firstly, the impugned order dated January 5, 2021, whereby the petitioner is prematurely repatriated to his parent department is in violation of Para 9 of the DoP&T OM dated June 17, 2010 without following the principles of natural justice inasmuch as no advance notice of three months was given to the petitioner and his parent department, i.e., Rajasthan High Court. In this regard, he has drawn my attention to Annexure P6 at Page 54 wherein Para 9 reads as under:

"9. Premature reversion of deputationist to parent cadre "Normally, when an employee is appointed on deputation / foreign service, his services are placed at the disposal of the parent Ministry / Department at the end of the tenure. However, as and when a situation arises for premature reversion to the parent cadre of the deputationist, his services could be so returned after given an advance notice of at least three months to the lending Ministry / Department and the employee concerned."

6. Secondly, the Impugned Order has been passed by an authority who is not competent to pass / take such a decision inasmuch as per rules, the appointing

authority for making appointment to various posts including the post of PO is the Chairperson of the respondent / NHRC and in fact the initial deputation of the petitioner to the respondent / NHRC was also pursuant to the orders of the then Chairperson. Even the extension of deputation for a further period of one year was pursuant to the order of the Chairperson of the respondent / NHRC. The Chairperson having demitted the Office on December 02, 2020 and no notification having been issued by the President in terms of Section 7 of the Protection of Human Rights Act, 1993 ('Act of 1993' for short) authorizing a Member to discharge the functions of the Chairperson, the power of repatriation (by issuing the Impugned Order) exercised by the Secretary General of the Commission is in violation of Section 3 (4) of Act of 1993, and also National Human Rights Commission (Salaries, Allowances and Conditions of Service of Officers and other staff) Rule 2020 ('Rules of 2020', for short). In support of his submission Mr. Garg has drawn my attention to the provisions of the Act of 1993 more specifically Section 3 (4), which stipulates that the Secretary General, who shall be the Chief Executive Officer of the Commission shall exercise administrative / financial powers subject to the control of the Chairperson. He states, if this provision, on which reliance has been placed by the respondent / NHRC is read in conjunction with the provisions of the Rules of 2020, it is clear that the Authority to appoint the PO being the Chairperson, National Human Rights Commission, the Secretary General could not have exercised the power of repatriating the petitioner to his parent department in his individual capacity.

7. Thirdly, on the stand of the respondent / NHRC that the petitioner was repatriated because of the unsatisfactory work is also untenable. According to Mr. Garg, this stand of the respondent / NHRC is immediately within one month of the extension of the deputation of the petitioner, which pre-supposes the satisfaction that the competent authority (the Chairperson of the respondent / NHRC) and could not have been arrived at, that too by an authority not competent, who was appointed only on October 8, 2020 i.e., approximately 3 months before him passing the Impugned Order. He stated, it is only immediately on the Chairperson demitting the Office that the performance of the petitioner has become unsatisfactory for his pre-mature repatriation. Mr. Garg submitted that at no point of time, any advisory was issued to the petitioner commenting about his unsatisfactory performance. In any case, it is only the Chairperson who can assess the performance of the petitioner and take a decision with regard to the continuance of the petitioner in the respondent / NHRC. In the absence of the Chairperson, the petitioner should necessarily be allowed to complete the deputation as per the order dated November 18, 2020, which was issued with the approval of the competent authority, i.e., the Chairperson of the respondent / NHRC, who was in Office on that date. Mr. Garg would rely upon the Judgment of the Supreme Court in the case of *P. Venugopal v. Union of India*, (2008) 5 SCC 1 and that of this Court in *Union of India v. J.P. Verma and Anr.*, 2002 (4) Labour Law Note 743, in support of his submissions that the petitioner's premature repatriation in terms of the Impugned Order

which is stigmatic, could not be effected in violation of the principles of natural justice.

8. On the other hand, Mr. Mohit Paul, learned counsel appearing for the respondent / NHRC would justify the Impugned Order passed inasmuch as the petitioner was appointed as PO on deputation in the respondent / NHRC initially for a period of one year, on foreign service basis after being relieved as an Officer of the District Judge cadre by High Court of Rajasthan, Jodhpur, and he assumed the charge of the post w.e.f October 1, 2019. He was relieved of his duties on January 5, 2021 and directed to report to his parent department, Registrar (Administration), Rajasthan High Court, Jodhpur. Since he has joined back on duties, the Rajasthan High Court being the parent department becomes a proper and necessary party. In the absence of Rajasthan High Court being a party, no relief can be granted to the petitioner. That apart, he stated that the petitioner has approached this Court with unclean hands and has concealed material facts from this Court inasmuch as after the passing of the Impugned Order and before the filing of the writ petition on January 11, 2021, the petitioner was served with an order dated January 8, 2021 whereby, post repatriation from the respondent / NHRC, petitioner has been appointed / posted as Special Judge, NDPS Court, Sri Ganganagar, Rajasthan, which fact has been concealed from this Court during the hearing before this Court on January 13, 2021. That apart, he stated that the order dated January 5, 2021 has been passed validly and there is no violation of Para 9 of the DoP&T OM dated June 17, 2010.

9. It is the case of the respondent and contended by Mr. Paul that the petitioner has not successfully discharged his duties, on the post of PO to the satisfaction of the Chairperson. The PO is required to assist the Member when the Member takes up the case assigned to him / her for final disposal. It shall be duty of the PO to study and present the case and render such other assistance as may be required for consideration and disposal of the case. For this purpose, PO is required to prepare synopsis for final disposal of the case. Vide circular dated March 20, 2013, the respondent had laid down the duties and responsibilities of the Officers working in the law division of the respondent / NHRC and for the Presenting Officers the grading of performance is reproduced below: -

1)

Below 8 proceedings per day

Poor

2)

8-10 proceedings per day

Just Adequate

3)

11-12 proceedings per day

Adequate

4)

13 proceedings per day

Good

5)

14 proceedings per day

Very Good

6)

15 & above proceedings per day

Excellent

10. According to him, in the case of the petitioner, the performance from January, 2020 till December, 2020 indicates the following: -

1

January

196

2

February

291

3

March

186

4

April

012

5

May

040

6

June

168

7

July

238

8

August

256

9

September

158

10

October

180

11

November

098

12

December

067

11. In accordance with the laid down criterion, a very good performance requires a disposal of 308 proceedings and a good performance requires disposal of 286 proceedings. It is noted that in most of the months during the last one-year, the petitioner's performance could not be assessed as even good. The petitioner during various meetings with the Registrar and the Secretary General impressed upon to improve his performance but in vain. So according to Mr. Paul, the claim of the petitioner that he was discharging his duties to the utmost satisfaction of the higher authorities is incorrect.

12. In so far as the plea of Mr. Garg that the repatriation vide the Impugned Order is in violation of the DoP&T OM dated June 17, 2010 is concerned, he submits that the petitioner was constantly guided and advised to show improvement in his performance, which he failed to achieve and there was no alternative with the authority concerned other than to repatriate the petitioner back to his parent department and in fact the petitioner has joined back his parent department. That apart, Mr. Paul, by conceding to the fact that there is no order issued under Section 7 of the Act of 1993, submitted in terms of Section 3 (4) of the Act of 1993 that the Secretary General shall exercise all administrative

and financial powers subject to control of the Chairperson and as such the Secretary General is competent to repatriate the petitioner. That apart, he laid stress on the fact that the petitioner has not made any submission on his inability to achieve the targets of disposal and on the date of his repatriation, he had left unattended 222 files given to him during the period November and December, 2020. He also stated that the petitioner was an unwilling Officer who totally lacked punctuality, did not adhere to the office timings and deliberately did not get himself enrolled for a biometric attendance ever since his joining. He made attempts to form clout with other Presenting Officers for raising unnecessary and uncalled for demands with little focus on the work assigned. Mr. Paul has also referred to the order dated January 8, 2021 issued by the Rajasthan High Court stating the petitioner has joined his parent department to contend that the petition has become infructuous.

13. Having considered the pleas urged by learned counsels for the parties, the issue which arises for consideration is whether the respondent could have issued the order of repatriation of the petitioner / Impugned Order before the date of expiry of his tenure in terms of order dated November 18, 2020. Before I answer the issue which falls for consideration, I may at the outset deal with the objection taken by Mr. Paul that in the absence of Rajasthan High Court being a party respondent, the petition is not maintainable and hence liable to be dismissed. I am not in agreement with this submission made by Mr. Paul for the simple reason that the Impugned Order has been issued by the respondent / NHRC and it is not the case of the respondent / NHRC that the same was issued after taking concurrence from Rajasthan High Court. That apart, while issuing notice I recorded the statement of Mr. Garg that the petitioner without prejudice to his rights and contentions shall join the parent department. Surely, the order protects the interest of the petitioner to come back to respondent / NHRC and work as PO, if he succeeds in the writ petition.

14. On the issue which falls for consideration is concerned, vide order dated November 18, 2020 the petitioner's tenure of deputation as the PO in the respondent NHRC was extended for a period of one year w.e.f October 1, 2020 till September 30, 2021. Concedingly, the Impugned Order by which the petitioner was repatriated to his parent department is passed much before the expiry of the actual date of tenure in terms of order dated November 18, 2020. The pleas of Mr. V.K. Garg may be summed in the following manner (i) the same is in violation of DoP&T OM dated June 17, 2010, (ii) same has been issued pursuant to the orders of the Secretary General, who is not the competent authority to issue order of repatriation, (iii) the plea of petitioner's service being unsatisfactory is totally untenable and does not borne from the record.

15. In so far as the first plea of Mr. V.K. Garg is concerned, Mr. Garg has drawn my attention to the DoP&T OM dated June 17, 2010, Para 9 thereof has already been reproduced above.

16. Para 9 contemplates, normally when an employee is appointed on deputation

basis and an issue arises for pre-mature reversion to the parent cadre of the deputationist, his services could be returned only after giving an advance notice of at least three months to the lending Ministry / Department and the employee concerned. The purpose of this Para is, when a deputationist is sought to be prematurely repatriated, the lending authority, i.e., the parent department must have a sufficient notice of the officer coming back to the parent department, to ensure that a post is available in the parent department to accommodate the officer. To that extent the OM may not have any relevance / applicability in the case in hand inasmuch as his parent department, i.e., Rajasthan High Court has not expressed any reservation on the repatriation of the petitioner without any prior notice. In fact, Rajasthan High Court has given a posting to the petitioner vide office order dated January 8, 2021 on his repatriation. Insofar as the stipulation in the said OM that the employee also need to be notified is concerned, suffice to state the office order dated October 07, 2019, clearly stipulates that the deputation of the petitioner shall be governed by the terms and conditions contained in the said OM. Para 9 of the said OM, which is under the heading premature reversion of deputationist to parent cadre, also stipulates giving three months' notice to the employee concerned, and which notice has not been given to the petitioner herein, though he has been prematurely repatriated. Mr. Garg is justified in his submission that premature repatriation of the petitioner is in violation of OM dated June 17, 2010. The issue can also be seen from the perspective that when an Officer is sought to be prematurely repatriated, the borrowing authority is required to follow the principles of natural justice as held by the Supreme Court in the case of P. Venugopal (supra) wherein in para 39 the Supreme Court inter alia held curtailment of time of five years can only be made for justifiable reasons and in compliance with principle of natural justice. No doubt, the case of the respondent in the counter affidavit is that the petitioner was being constantly guided and advised to improve his performance which he failed to improve and there was no alternative with the authority concerned, to repatriate the petitioner back to his parent department which depicts the compliance of principles of natural justice, is not appealing. There is nothing on record to show such an action / procedure was followed up by the respondent / NHRC and for that matter, the petitioner was put to notice if he does not improve his performance he shall be repatriated back after three months. Hence, on this ground as well, the premature repatriation of the petitioner shall be in violation of OM dated June 17, 2010, which clearly stipulates three months' notice to the petitioner.

17. In so far as the submission of Mr. Garg that the repatriation of the petitioner has been prematurely made by an authority not competent to repatriate is concerned, there is no dispute under the Rules of 2020 notified by Ministry of Home Affairs, which relates to recruitment to the post of PO, Clause 9 thereof defines appointing authority as under:

"9. Appointing Authority:- (1) All appointments to the posts mentioned from serial number 1 to serial number 23 of column (1) of the said Schedule, shall be

made by the Chairperson, National Human Rights Commission." Note. Sr. No. 4 of the Schedule depicts the post of Presenting Officer / PO. So the appointing authority in so far as PO is concerned, is the Chairperson of the respondent / NHRC.

18. There is no dispute and it is conceded by Mr. Paul that the appointment of the petitioner as PO on deputation vide letter dated October 7, 2019 was made pursuant to the approval of the Chairperson of the respondent / NHRC. Even the order of extension of the petitioner on deputation for a period of one year vide Office Order dated November 18, 2020 was with the approval of the Chairperson, respondent / NHRC.

19. It is a conceded position that the Chairperson of the respondent / NHRC had demitted the office on December 2, 2020. Thereafter no new Chairperson has been appointed, nor the powers of Chairperson have been delegated to any Member under Section 7 of the Act of 1993, which provision I reproduce as under:

"7. Member to act as Chairperson or to discharge his functions in certain circumstances.- (1) In the event of the occurrence of any vacancy in the office of the Chairperson by reason of his death, resignation or otherwise, the President may, by notification, authorise one of the Members to act as the Chairperson until the appointment of a new Chairperson to fill such vacancy.

(2) When the Chairperson is unable to discharge his functions owing to absence on leave or otherwise, such one of the Members as the President may, by notification, authorise in this behalf, shall discharge the functions of the Chairperson until the date on which the Chairperson resumes his duties."

20. The power of appointment includes the power to terminate (Ref: Section 16 of General Clauses Act, 1897). The repatriation is akin to termination of deputation and it was conceded by Mr. Paul that the decision to prematurely repatriate the petitioner back to his parent department, was by Secretary General. Though, he relied upon the provisions of Section 3 (4) of the Act of 1993 to contend that the Secretary General being the Chief Executive Officer, can exercise all administrative and financial powers and hence competent to prematurely repatriate the petitioner. This submission of Mr. Paul is not appealing for the simple reason that Section 3 (4) contemplates that the Secretary General shall be the Chief Executive Officer who shall exercise all administrative and financial powers subject to the control of the Chairperson. In other words, all administrative decisions though taken by the Secretary General must be subject to the approval of the Chairperson. There being no Chairperson, no approval is forthcoming. In any case when the Rules of 2020 stipulates the Chairperson to be the appointing authority of PO, the Secretary General cannot exercise the power which is not contemplated under the Rules of 2020. In this regard, I may refer to the Judgment of the Supreme Court in the case of Union of India v. Gurbux Singh and Anr. (1975) 3 SCC 638. The relevant portion reads as under:

"9.....It is now a well settled rule of interpretation that a power to appoint ordinarily implies a power to determine the employment. That was pointed out by this Court in S.R. Tiwari v. District Board, Agra [AIR 1964 SC 1680 : (1964) 3 SCR 55 : (1964) 1 Lab LJ 1] :

"Power to appoint ordinarily carries with it the power to determine appointment, and a power to terminate may in the absence of restrictions express or implied be exercised, subject to the conditions prescribed in that behalf, by the authority competent to appoint."

This rule is also found incorporated in Section 16 of the General Clauses Act, 1897. It is, therefore, clear that the Central Government, which is given the power to make appointment to the post of Assistant Settlement Commissioner under Section 3, would also have the power to determine the appointment. The Central Government would also be entitled to terminate the appointment, since the post of Assistant Settlement Commissioner is a post under the Union of India and the person appointed to it would hold it during the pleasure of the President. There is no provision under which the Government of Punjab could have the power to determine the appointment as Assistant Settlement Commissioner made by the Central Government under Section 3. The Central Government alone could terminate the appointment, both as the appointing authority as also under Article 310(1) of the Constitution. The High Court was, therefore, right in taking the view that the order of the Punjab Government dated April 17, 1956 was ineffectual and invalid and the service of the first respondent as Assistant Settlement Commissioner was validly terminated only on February 10, 1959 when the Central Government, by its memorandum dated January 10, 1959, gave notice terminating the service of the first respondent. There was no dispute before us that if the service of the first respondent came to an end on February 10, 1959, and not earlier on April 17, 1956, the first respondent would be entitled to a sum of Rs 22,927.34 p. as decreed by the High Court."

21. Having said that, it cannot mean that the petitioner can continue to be on deputation for indefinite period. He can at the most continue till the time the extension of deputation for one year comes to an end, as the decision for extension was taken by the then Chairperson. On expiry of the said period, i.e., on September 30, 2021, the order of extension of the deputation of the petitioner shall come to an end by efflux of time.

22. Accordingly, without going into the third submission of Mr.Garg, in view of my conclusion on the first two issues / submissions the writ petition is allowed. The order dated January 5, 2021 is set aside. No costs.