

(1993) 03 AHC CK 0037

In the Allahabad High Court

Case No : C.M.W.P. No's. 1360 and 2307 of 1993

Ram Naresh Singh Parihar and Others

APPELLANT

Vs

U.P. State Sugar Corporation Ltd. and Others

RESPONDENT

Date of Decision : 15-03-1993

Acts Referred:

Companies Act, 1956 — Section 291

Uttar Pradesh Industrial Disputes Act, 1947 — Section 2

Citation : (1994) 1 LLJ 422 : (1993) 3 UPLBEC 2126

Hon'ble Judges : S.R. Singh, J

Bench : Single Bench

Advocate : Bhoopendra Nath Singh and Shekhar Kumar Yadav, for the Appellant; Rishi Ram, for the Respondent

Final Decision : Dismissed

Judgement

S.R. Singh, J.—Both these writ petitions are directed against the transfer orders and, being based on common questions of law and fact, were heard together for being disposed of by a common order.

2. Petitioner Ram Naresh Singh was initially appointed on the post of Fitter-II in 1987 but vide order dated July 4, 1992 he was granted pay scale in Supervisor Grade-B together with one increment. By the impugned order dated November 12, 1992 (Annexure-1 to Writ Petition No. 1360 of 1993) he was transferred in the same capacity and in the same pay scale from Ghatampur Sugar Mills, Ghatampur to Jarwal Road, Bahraich, a unit of the U.P. State Sugar Corporation Ltd. and pursuant to the said order of transfer he was relieved with immediate effect from the post of Workshop Foreman in Ghatampur Sugar Mills vide order dated November 26, 1992. The orders dated November 12, 1992 and November 26, 1992 are impugned and sought to be quashed in Writ Petition No. 1360 of 1993. Similarly Vipin Kumar Misra, the petitioner in Writ Petition No. 2307, a Cashier in the Ghatampur Sugar Mills, Ghatampur, Kanpur Dehat has been transferred in the same capacity and same pay scale to another unit of the State

Sugar Corporation Ltd, situated at Pipraich in the district of Gorakhpur by order dated December 15, 1992, pursuant to which he was relieved of his duties vide order dated December 19, 1992. The orders dated December 15, 1992 and December 19, 1992 (Annexures-1 and 2 respectively to Writ Petition No. 2307 of 1992) are impugned and are sought to be quashed in the said Writ Petition. The Writ Petition No. 1360 of 1993, Ram Naresh Singh Parihar v. U.P. State Sugar Corporation Ltd. and Anr. shall be treated as leading file.

3. I have heard Sri. V.K.S. Chaudhary, learned Senior Advocate and Sri. B.N. Singh, learned counsel for the petitioners and Sri Rishi Ram, learned Senior Advocate appearing for the respondents.

4. The impugned orders have been assailed on the grounds, inter alia, (1) that the concerned units of the U.P. State Sugar Corporation Ltd. (in short the Corporation), to which the petitioners have been transferred, are registered under the Factories Act, 1948 and they are altogether different from the Ghatampur Sugar Company which is a company registered under the provisions of the Indian Companies Act, 1956 independently of the Corporation and, therefore, the Managing Director of the Corporation had no authority in law to transfer the petitioners from Ghatampur Sugar Company to any other unit of the Corporation and (2) that the petitioners are "workmen" within the meaning of the term as defined in Section 2(z) of the U.P. Industrial Disputes Act, 1947, (in short the Act) and their services are governed by the terms and conditions specified in the Standing Orders, 1988 issued by the State Government vide Notification dated September 27, 1988 u/s 3(b) of the U.P. Industrial Disputes Act, 1947 in supersession of the provisions of Standing Order issued vide notification dated October 31, 1958 and the Notification No. 556 (HI)/XXXVI-2-115 (HI)-89, dated Lucknow January 31, 1991 issued by the State Government in exercise of its powers under Sub-clause (b) of Section 3 of the Act implementing the recommendations of Third Wage Board constituted by the Government of India and since the Standing Orders, 1988 and the notification dated January 31, 1991 governing the service conditions of the petitioners, do not visualise their transfer from one unit/company to another unit/company of the U.P. State Sugar Corporation Ltd. the impugned orders are illegal and void.

5. Sri Rishi Ram, learned Senior Advocate appearing for the respondents urged in support of the impugned orders that none of the petitioners comes within the purview of the term "workman" as defined in Section 2(z) of the Act; that the Ghatampur Sugar Company, Kanpur Dehat is a subsidiary company of the Corporation and the employees of the company are in fact the employees of the Corporation and their services are governed by the Rules known as U.P. State Sugar Corporation Ltd. General Service Rules, 1988, according to which the petitioners' services were transferable from one company/unit of the Corporation to its other company or unit; and that even according to the terms and conditions of appointments, the petitioner's services were transferable from one unit/company of the Corporation to another.

6. The fate of the writ petitions depends upon answer to the question as to whether the petitioners are workmen within the meaning of the term as defined in Section 2(z) of the Act and to the question as to whether the U.P. State Sugar Corporation Ltd. General Service Rules, 1988 would prevail over the Standing Orders, 1988.

7. The Parliament has enacted Industrial Employment (Standing Orders) Act, 1946 with a view to require the employers of Industrial Establishment formally to define conditions of employment under them. The Act applies to every industrial establishment wherein one hundred or more workmen are employed or were employed at any day of the preceding twelve months; provided that the appropriate Government may, after giving not less than two months' notice of its intention so to do, by notification in the official gazette, apply the provisions of this Act to any Industrial Establishment employing such number of persons less than one hundred as may be specified in the notification. Section 2(e) of the said Act defines "Industrial Establishment" to mean-

(i) an industrial establishment as defined in Clause (ii) of Section 2 of the Payment of Wages Act, 1936, or

(ii) a factory as defined in Clause (m) of Section 2 of the Indian Factories Act, 1948, or

(iii) a railway as defined in Clause (4) of Section 2 of the Indian Railways Act, 1890; or

(iv) the establishment of a person who, for the purpose of fulfilling a contract with the owner of any industrial establishment, employs workmen."

Admittedly the respondent Company is an industrial establishment and the above Act applies to it. The term "Standing Orders" as defined in Section 2(g) of the said Act means Rules relating to matters set out in the Schedule. A perusal of the Schedule to the Act would indicate that the matter regarding transfer of workman from one factory to another is not set out therein. Section 15 of the said Act, however, empowers the appropriate Government to make rules which may, inter alia, prescribe additional matters to be included in the Schedule. In exercise of the said power the Central Government has made Rules known as Industrial Employment (Standing Orders) Service Rules, 1946 and by Rule 2-A of the said Rules certain additional matters including matter relating to transfer in relation to all Industrial Establishments have been inserted in the Schedule as item No. 10-B. The "appropriate Government" in relation to the Corporation means the State Government by reason of the fact that the Corporation is said to be a U.P. Government undertaking and no rule made by the State Government as the one made by the Central Govt. adding transfer matter in the Schedule was brought to my notice.

8. It was admitted at the Bar that the Standing Orders, 1988 and the Notification referred to above as also the Industrial Employment (Standing Order) Act, 1946

are intended to lay down service conditions of the workman as defined in Section 2(z) of the U.P. Industrial Disputes Act, 1947.

9. The term "workman" has been defined in Section 2(z) of the U.P. Industrial Disputes Act, 1947 as below:-

"2(z) "workman" means any person (including an apprentice) employed in any industry to do any skilled manual, supervisory, technical or clerical work for hire or regard, whether the terms of employment be express or implied, and for the purposes of any proceeding under this Act in relation to an industrial dispute, includes any such person who has been dismissed, discharged, or retrenched in connection with, or as a consequence of, that dispute, or whose dismissal, discharge or retrenchment has led to that dispute, but does not include any such person-

(i) who is subject to the Army Act, 1950 or the Air Force Act, 1950 or the Navy (Discipline) Act, 1934; or

(ii) who is employed mainly in a managerial or administrative capacity; or

(iv) who being employed in a supervisory capacity, draws wages exceeding five hundred rupees per mensem, or exercises, either by the nature of the duties attached to the office or by reason of the powers vested in him, functions mainly of a managerial nature."

10. In S.B. Kulkarni Vs. Indian Red Cross Society and others, Division Bench of Bombay High Court consisting of P. B. Sawant and V.V. Vaze, JJ. has held that it is not the designation but the nature of the duties performed by the employee or allocated to the post held by him which have to be examined to find out whether the work is that of a supervisory character.

11. According to Appendix-I to the Notification dated January 31, 1991 issued by the State Government u/s 3(b) of the U.P. Industrial Disputes Act with a view to implementing the recommendations of the Third Wage Board, duties assigned to the post of Foreman (Mechanical Supervisory-C) and Cashier (Clerical Grade-I) may be set out as below:

Foreman (Mechanical Supervisory -C)

Supervising and controlling the work and maintenance of workshop and doing works incidental thereto or to assist the Asst. Engineer (Mech.), in carrying out his duties while supervising the work of the entire shift under the guidance and instructions of the Asst. Engineer (Mech), including supervision of work of the Head Fitter, etc."

xxxxxx

xxxxxxxxxx xxxxxxxxxxxx

"Cashier (Clerical Gr. I)

Keeping of cash entrusted to him, making payments and maintaining accounts of receipts and disbursements and doing works incidental thereto."

12. According to Sub-clause (iv) of Section 2(z) of the U.P. Industrial Disputes Act, 1947 as stands amended up-to-date, the term "workman" does not include any person who, being employed in supervisory capacity draws wages exceeding sixteen hundred rupees per mensem or exercises, either by nature of the duties attached to the office or by reason of the powers vested in him, functions mainly of managerial or supervisory nature. It is evident that the duties assigned to the post of Foreman (Mechanical Supervisory-C) are of supervisory nature while those attached to the post of Cashier (Clerical Grade-I) are ministerial in nature. The petitioners Ram Naresh Singh Parihar and Vipin Kumar Misra are admittedly drawing salary/ wages exceeding sixteen hundred rupees per month. In view of the nature of the duties and functions attached to the post of Foreman (Mechanical Supervisory-C) I have no manner of doubt that so far Ram Naresh Singh Parihar is concerned, he is covered by Sub-clause (iv) of Section 2(z) of the U.P. Industrial Disputes Act, 1947 and is, therefore, excluded from the purview of the term "workman" as defined in the section. The averments made in paragraphs 12 and 13 of the counter affidavit filed in Writ Petition No. 1360 of 1993, Ram Naresh Singh Parihar v. U.P. State Sugar Corporation Ltd. and Anr., to the effect that Ram Naresh Singh Parihar is an employee in the supervisory capacity finds support from the classification of workmen and specification of their duties as given in the notification dated January 31, 1991 and are, therefore, believable. But so far as Vipin Kumar Misra is concerned, the averments made in the counter-affidavit filed in his writ petition stating that he too is an employee in supervisory capacity, cannot be accepted in view of the fact that the post of Cashier (Clerical Grade-I) has been classified in para 4 of the order issued by the State Government vide Notification dated January 31, 1991 into the category of clerks and not into the category of Supervisory-C. The nature of the duties attached to the post also does not indicate that he has been performing any supervisory duties. It is evident from the said Notification that the job of Cashier (Clerical Grade-I) is to keep the cash entrusted to him, make payments and maintain accounts of receipts and disbursement and to do works incidental thereto. In this view of the matter the stand taken in the counter affidavit that Vipin Kumar Misra comes under Supervisory-C so as to be covered by Sub-clause (iv) of Section 2(z) of the Act cannot be accepted.

13. Having come to the conclusion that while Ram Naresh Singh Parihar is not a workman within the meaning of the term as defined in Section 2(z) of the U.P. Industrial Disputes Act while the other petitioner Vipin Kumar Misra does come within the purview of the term "workman", it is to be seen whether the petitioners' services were transferable from Ghatampur Sugar Company, Ghatampur, Kanpur to any other unit of the Corporation. It may be pertinent to mention here that although it has been asserted in the writ petition that the 2nd respondent Ghatampur Sugar Company Ltd. is a company different from the U.P. State Sugar Corporation Ltd. which too is a company registered under the

provisions of the Indian Companies Act, 1956, but I have no reason to disbelieve the stand taken in the counter-affidavit and the supplementary affidavit filed on behalf of the respondents that Ghatampur Sugar Company is a State Government owned company and it is controlled and managed by the U.P. State Sugar Corporation Ltd. In fact as stated in the counter-affidavit, five sugar companies including Ghatampur Sugar Company were established by the State Government and after the establishment of the U.P. State Sugar Corporation, a Government undertaking, the affairs of the sugar companies are controlled and managed by the Corporation. I have no reason to doubt the averments made in the counter-affidavit that there is only one Board of Directors for all the sugar companies and sugar units owned and controlled by the Government through the Corporation, but nevertheless the Sugar Companies and various units of the Corporation are Industrial Establishments within the meaning of the term as defined in the Industrial Employment (Standing Orders) Act, 1946 and therefore, it is to be examined whether the respondents have authority in law to transfer the petitioners from Ghatampur Sugar Company to another unit of the Corporation.

14. In *Air Gases Mazdoor Sangh Vs. Indian Air Gases Ltd. and Others*, Division Bench of this Court has held that the matter relating to transfer of a workman from one unit is not included in the Schedule to the Industrial Employment (Standing Orders) Act, 1946 and since the U.P. Government has not added any such item to the Schedule, it is not open to the employer to transfer workman from one unit to another. That being so, services of Vipin Kumar Misra, whom I have held, in the earlier part of this judgment, to be a workman, were not transferable. It was conceded by the learned counsel for the petitioner that the Division Bench authority referred to above does not apply to an employee who is not a "workman". That being so, so far as the petitioner Ram Naresh Singh Parihar is concerned, the Division Bench authority referred to above is of no avail to him.

15. Mr. Rishi Ram, learned counsel appearing for the respondents, however, urged that the services of the petitioners were transferable in terms of the provisions contained in the Rules known as U.P. State Sugar Corporation Ltd. General Service Rules, 1988 which, according to the learned counsel, were framed by the Board of Directors of the Corporation in exercise of their powers u/s 291 of the Companies Act. It was also urged by Sri Rishi Ram that in case of Ram Naresh Singh Parihar even the initial appointment order dated October 31, 1987/ December 23, 1987 (Annexure C.A. 3 to the counter affidavit) visualises that his services were transferable to any other unit/subsidiary company of the Corporation. Sri Rishi Ram placed reliance upon Clauses 8 and 12 of the said appointment order, which may be quoted below:

"8. "Ap ki Sewaen Rajya Chini Nigam Ki Anya Ikaiyon/Sahayak Kampaniyon Athawa Kisi Aisi Mill Me Jo Nigam Ke Prabandh Me Ho. Asthananatarit Ki Ja Sakti Hain Jiske Nie Ap Ko Koi Apatti Nahin Hogi."

"12. Ap Ko Kampany Ke Samast Sewa Niyam Upniyam Manya Hoge."

16. In support of his submission Sri Rishi Ram, learned counsel for the respondents, has placed reliance upon the following clauses of the U.P. State Sugar Corporation Ltd. General Service Rules, 1988, which may be quoted below:

"2 (1) These rules shall apply to all whole-time employees of the Corporation except those-

(i) who are subject to the Industrial or Labour laws and the rules, regulations or standing orders made pursuant to any enactment on the subject of such laws.

(ii) who are working on deputation from the State Government or Central Government or any other public organisation. The staff under this category will be governed by service rules of their parent department/organisation as well as the terms of deputation.

(iii) whose service conditions are regulated by a contract entered into by them with the Corporation. The service of such employees will be regulated by the terms and conditions contained in the contract.

Provided that where the Industrial or Labour laws and the rules, regulations, or standing orders made pursuant to any enactment on the subject of such laws by which the service conditions of employees mentioned in Clause (i) or the service rules of the parent department/organisation or the terms of deputation of the employees mentioned in Clause (ii) or terms of the contract governing the service conditions of the employees mentioned in Clause (iii) are silent on any matter for which provision has been made in these General Service Rules, the provisions of these General Service Rules shall apply to such extent to the employees mentioned in Clauses (i), (ii) and (iii) also."

XX XX XX

"27. Transfer.-. An employee may be posted or transferred to any place in India. When an employee is transferred or promoted from one post to the other involving a change of head quarters, he will be entitled to joining time, transfer allowance etc. as may be determined by the Board. Provided that the Board may, in special circumstances, relax the provisions of this rule and permit such allowances etc. as it may consider necessary in any particular case. Provided further that when an employee is transferred at his own request, he shall not be entitled to any transfer allowances in respect of such transfer."

XXX XXXX XXX

"31. Employee's whole time at Corporation's disposal:- Unless otherwise distinctly provided, the whole time of an employee shall be at the disposal of the Corporation and he may be employed in any manner required by the competent authority without claim to additional remuneration or advantage. He shall serve the Corporation in such capacity and at such place like Head Office establishment, units, factories or sites, as he may be directed from time to time

subject to the condition that no employee shall, without his consent, be transferred to a post carrying lower emoluments than those which he is drawing as a permanent measure."

XXX XXX XXXX

"73. Scope of Service: (1) Every employee shall devote himself exclusively to the duties assigned to him. He shall personally attend to them at all times during the usual working hours as well as beyond them if the exigencies of the situation at any given time so demand. Unless otherwise distinctly provided, the whole time of an employee shall be at the disposal of the Corporation and he shall serve the Corporation in such capacity and at such place as he may be directed from time to time."

XX XX XXX

"133. Joining Time: (1) Joining time means the time allowed to an employee in which to join a new post or to travel to, or from, a station to which he is posted.

(2) Where an employee is transferred from one station to another station, the joining time shall be regulated as follows:

(a) six clear working days for preparation plus (b) a reasonable period to cover the journey.

NOTE: Normally a day for every 400 kms. or part thereof, will be treated as a reasonable period

(3) Where in case of emergency an employee is required to report at the new station earlier, the difference between the entitled joining time/journey time and the actual time taken on account of these can be availed of by him at any time within six months of his arrival to the new station. This joining time cannot be combined with any kind of leave and shall lapse after 6 months.

(4) No joining time shall be admissible in case of transfer to a post in the same station."

17. The submission made by Sri. Rishi Ram is not acceptable to me. The Division Bench in the case of Air Gases Majdoor Sangh (supra) has settled the controversy, as would be evident from the following observations made in the report Air Gases Mazdoor Sangh Vs. Indian Air Gases Ltd. and Others, :

"Normally, the general law of master and servant contemplates inherent right in the employers to transfer its employees from one place to the other, but this rule is not an absolute one. The matters relating to transfer of Government servants are generally regulated by statutory rules and orders, but in case of an employee or a private servant it is open to the employer to transfer its employee to any of its office or factory or to lay down any condition of service which it may think proper. Prior to the enactment of the Industrial Employment (Standing Orders) Act, an industrial employer was free to lay down service conditions of its

employees without there being any legislative or statutory restriction as a result of which it was found that unscrupulous employers exploited the workmen and harassed them in various ways. The Central Legislature therefore considered it necessary to enact law regulating the framing of service conditions by means of Standing Orders defining conditions of recruitment, discharge, disciplinary action, holiday or leave etc. This has gone a long way towards minimising a long friction in the management and the workmen of the industrial undertakings. The 1946 Act is a social legislation which placed restrictions on the right of a master to lay down conditions of service of its employees. Since the Act does not empower the employer to frame standing orders for the transfer of its workmen from one place to another place, the right of employers to that extent is taken away and therefore, the respondent-company has no inherent right to transfer the petitioners workman from Moghalsarai to Kanpur."

"It is true that ordinarily a mere order of transfer made by an employer is not amenable to challenge under Article 226 of the Constitution, but in the instant case the petitioners have challenged the validity of Clause 8(b) of the Standing Orders in pursuance of which they were transferred. If Clause 8 (b) is struck down any consequential orders issued under that clause is bound to fall and it is therefore open to the petitioners to maintain the petition to challenge the transfer orders also."

"But even assuming that if Clause 8(b) is valid, the employers have no right to transfer the petitioners-workmen from its factory in Moghalsarai to its factory at Kanpur. Clause 8(b) confers power on the employers and its manager to change the shifts of workmen or transfer them from one job to another and transfer them from one shift to another and from one factory to another. Thus even under Clause 8(b) a workman employed in the factory at Moghalsarai is not liable to be transferred to another factory of the employers. The petitioners Nos. 2 to 12 have, however, not been transferred from Moghalsarai to any other factory of employers, instead they have been transferred to the Head Office at Kanpur. Ex facie Clause 8(2) does not empower the employers to transfer any workman from the factory at Moghalsarai to its Head Office at Kanpur. The impugned transfers made by the employers were outside the scope of Clause 8(b) of the standing orders. The employers have failed to give any reasonable explanation for this transfer. In the circumstances, there is no escape from the conclusion that petitioners Nos. 2 to 11 were transferred to Kanpur on extraneous considerations with a view to victimise them."

18. It may also be pertinent to mention here that the U.P. State Sugar Corporation General Service Rules, 1988 do not appear to be statutory in character. The provisions of Section 291 of the Companies Act, reliance on which was placed by Sri Rishi Ram in justification of the Rules aforesaid, do not empower the Company to make Rules. The section only empowers the Board of Directors of the Company to exercise all such powers and to do all such acts and things as the Company is authorised to exercise. Sub-section (2) read with

second proviso to Sub-section (I) of Section 291 no doubt empowers the Company to make regulations in its general meeting, but Regulations are different from Rules. Rule-making powers in the Companies Act, 1956 are conferred upon the Central Government and the Supreme Court under Sections 642 and 643 respectively. Rule making power, in my opinion, is not comprehended within the ambit and scope of Section 291 of the Companies Act, which as stated above, no doubt empowers the Company to frame Regulations. Assuming that Section 291 of the Companies Act is of wide amplitude comprehending power in the Company to make Rules governing service conditions of its employees or assuming that the U.P. State Sugar: Corporation Ltd. General Service Rules, 1988 may be treated as Service Regulations, I am of the opinion that nothing contained in the Rules would override the provisions of the Industrial Employment (Standing Orders) Act, 1946 or any Standing Orders governing the service conditions of the workmen employed in the Corporation. These Rules may govern the service conditions of the employees other than the workman. The applicability of the Rules to those employees of the Corporation who come within the purview of the term "workman" as defined in Section 2(z) of the U.P. Industrial Disputes Act, 1947 is excluded and the transfer of a workman from one unit or subsidiary company of the Corporation to another by virtue of any power conferred upon the Managing Director under the U.P. State Sugar Corporation Ltd. General Service Rules, 1988 would be unauthorised and non est in view of the Division Bench decision in case of Air Gases Majdoor Sangh(supra) and the decision of the Supreme Court in case of U.P. State Electricity Board, v. H. S. Jain , In the latter case the Supreme Court has held that Regulations made u/s 79(c) of the Electricity Supply Act, 1948 in respect of the conditions of service would be subservient to the provisions of the Standing Orders and the Industrial Employment (Standing Orders) Act, 1946 which is a Special Act in respect of such matters.

19. In view of the above discussion the transfer order in relation to the petitioner Ram Naresh Singh Parihar is sustainable, but the one in relation to the petitioner Vipin Kumar Misra is not sustainable being unauthorised in law.

20. In the result the Writ Petition No. 1360 of 1993, Ram Naresh Singh Parihar v. U.P. State Sugar Corporation Ltd. and Anr. is dismissed and the other Writ Petition No. 2307 of 1993 filed by Vipin Kumar Misra succeeds and is allowed. The orders impugned therein are held ineffective, inoperative and non est. The petitioner Vipin Kumar Misra is, therefore, entitled to all consequential reliefs.

21. Parties to bear their own costs.