
(2008) 02 RAJ CK 0063
In the Rajasthan High Court

Ram Singh and Others

APPELLANT

Vs

State of Rajasthan and Others
 Khet Singh, Hardan
Janni and Bhagirath Ram Vs State of Rajasthan and Another

RESPONDENT

Date of Decision : 18-02-2008

Acts Referred:

Constitution of India, 1950 — Article 226, 227

Citation : (2008) 2 RLW 1750

Hon'ble Judges : Dinesh Maheshwari, J

Bench : Single Bench

Final Decision : Allowed

Judgement

Dinesh Maheshwari, J.—These writ petitions involving similar facts and an identical issue questioning the authority of the State Government to issue transfer order in relation to the petitioners from one place of posting to another within the same Panchayat Samiti, have been heard together and are taken up for disposal by this common order.

2. The factual aspects are not much in dispute and the issue involved is also a short one; hence, a brief narration of the background facts and grounds of challenge from the representative case would suffice. The petitioner in CWP No. 6108/2007, working as physical training instructor Gr.III and posted at Government Upper Primary School No. 1, Pokran within Panchayat Samiti Sakra, District Jaisalmer has been ordered to be transferred on administrative grounds by an order issued by the Deputy Secretary to the Government in its Panchayati Raj (Elementary Education) Department on 27.08.2007 (Annex.1) to Government Upper Primary School, Nodardi, Panchayat Samiti Sakra, District Jaisalmer. The petitioner has questioned the said transfer order essentially on the ground that the State Government has no authority under the Rajasthan Panchayati Raj Act, 1994 ("the Act of 1994") and the Rajasthan Panchayati Raj Rules, 1996 ("the Rules of 1996") to transfer him on administrative basis within the same Panchayat Samiti. It is contended with reference to a decision of this

Court in the case of *Nawab Beg v. State of Rajasthan* (1999) 1 RLW 186 that power to transfer the petitioner on administrative basis within the Panchayat Samiti lies only with the Chief Executive Officer of Zila Parishad as per sub-rule (26) of Rule 336 of the Rules of 1996. It is submitted with reference to the decision of this Court in the case of *Inder Singh and Anr. v. State of Rajasthan* (2007) 1 RLW 737, as affirmed on 24.01.2007 in D.B. Civil Special Appeal No. 871/2006 *Kishan Singh and Ors. Vs. State of Rajasthan*, that when the statutory provisions envisage the transfer of a Patwari to be ordered only by the Collector concerned, this Court has quashed such transfer order made at the instructions of the State Government and has disapproved abdication of powers of the Collector by the State Government. It is contended that the same principles do apply to the present case too; and the impugned transfer order being beyond the power and authority of the State Government deserves to be quashed.

3. Before proceeding further, it may be pointed out that the other writ petitions in this batch carry similar facts wherein the particular incumbent holding the post of teacher Gr.III or physical training instructor Gr.III has been transferred from one place of posting to another within the same Panchayat Samiti by similar nature order issued by the said Deputy Secretary to the Government in its Panchayati Raj (Elementary Education) Department; and the petitions are founded essentially on the same ground questioning the very competence of the State Government to issue such transfer order, transferring the employee within the same Panchayat Samiti. For an eye-view of the facts, the relevant particulars in relation to the each of the petitioners from the impugned transfer orders have been delineated in the Schedule appended to this order. It may also be pointed out that most of the petitions have directly been filed to this Court under Article 226 of the Constitution of India, as referred in Part-I of the said Schedule. However, a few of the similarly circumstanced petitioners, having been transferred within the same Panchayat Samiti, approached the Rajasthan Civil Services Appellate Tribunal (the Tribunal) challenging such kind of transfer orders and the Tribunal has proceeded to reject their appeals and thereafter they have approached this Court by way of the writ petition under Article 226/227 of the Constitution of India. The relevant particulars in relation to such petitioners have been delineated in Part-II of the said Schedule appended to this order. The petitioner of CWP No. 7802/2007 has preferred the writ petition with the submissions that she had filed an appeal with the Tribunal but the same was not taken up for consideration for non-sitting of the Bench of the Tribunal.

4. It may also be pointed out that in some of these petitions, the writ petitioners have also suggested some other grounds with reference to their personal difficulties; however, in relation to such grounds suffice is to point out that interference in a transfer order is considered by the courts only when the same is challenged on the ground of mala fide or violation of any statutory requirement and the present petitions have been entertained essentially because the transfer orders have been challenged on the ground of violation of the requirements of the the Act of 1994 and the Rules of 1996. Consideration in this order is,

therefore, confined to such aspects of statutory requirements only.

5. The contesting respondents have filed reply in a few of the petitions. Objections have been taken in relation to the petition directly filed to this Court that the petitioner has alternative remedy of filing appeal before the Tribunal and for availability of such alternative remedy, the petition is not competent. It has also been contended that the scope of interference in the transfer order remains limited and unless there be a case of mala fide exercise of powers or violation of statutory rules, the order of transfer made in administrative exigency, being of an incident of service, calls for no interference.

6. While justifying issuance of the impugned transfer order by the State Government, it has been contended with reference to 73rd Amendment to the Constitution of India that the elementary education has been placed under the control of Panchayati Raj Department with a view to strengthen the Panchayati Raj institutions and, therefore, according to the respondents, the transfer of the teachers working in elementary schools has rightly been effected by the Deputy Secretary in Panchayati Raj (Elementary Education) Department. It is further the stand of the respondents that the State Government is clothed with powers to make transfers in administrative exigencies; that the powers of the State Government u/s 89 (8-A) of the Act of 1994 are of wide range and amplitude and the State Government is very much authorized to effect such transfers. It has also been contended that the provisions of Sub-section (8-A) of Section 89 of the Act of 1994 starting with a non-obstante clause have to be harmoniously construed; and the powers of the State Government to issue transfer orders over and above the powers of other functionaries is required to be given full effect; and likewise, even under Rule 289 (3) of the Rules of 1996, the State Government has ample competence to effect transfers within Panchayati Samiti/District. It is contended that the petitioners hold transferable posts and cannot insist on sticking to the same place of posting. The learned Government Counsel, while opposing the writ petitions, has referred to and relied upon a decision of this Court in the case of Mahendra Kumar Yadav v. State of Rajasthan (2001) 1 WLC 328.

7. Before embarking on the core question involved in the matter, it appears appropriate to dispose of the preliminary objection regarding availability of alternative remedy. Availability of an alternative remedy is not of absolute bar on exercise of writ jurisdiction by this Court; and then, in the matters of the present nature questioning the transfer orders specifically on the ground of violation of statute, there appears no reason to relegate the petitioners to the alternative remedy of appeal before the Tribunal. Noteworthy it is that at least two petitions in this batch have been filed after the concerned petitioner had approached the Tribunal and the appeal has been dismissed. In the overall view, the objection regarding alternative remedy in these matters deserves to be, and is, overruled.

8. The short question calling for determination is as to whether the impugned transfer orders suffer from violation of any statutory requirement; or, more

appropriately, as to whether the impugned transfer orders issued by the State Government transferring the petitioners from one place to another within the same Panchayat Samiti remain unauthorized and beyond the powers conferred by the statute? The answer, in the opinion of this Court, remains in the affirmative. The impugned transfer orders suffer fundamentally from want of authority.

9. It is the stand of the respondents that the State Government is clothed with powers to make transfers in administrative exigencies; that the powers u/s 89 (8-A) of the Act of 1994 are of wide amplitude and thereby the State Government is authorized to effect such transfers. It has also been contended that Sub-section (8-A) of Section 89 of the Act of 1994 starting with a non-obstante clause provides for the powers of the State Government to issue transfer orders over and above the powers of other functionaries; and that under Rule 289 (3) of the Rules of 1996, the State Government has competence to effect transfers within Panchayati Samiti too. A bare look at the relevant statutory provisions is sufficient to find that such contentions remain hollow and spineless; and that the impugned transfer orders of the employees like the petitioners within the same Panchayat Samiti suffer from want of authority with the State Government.

10. The constitution of the Rajasthan Panchayat Samiti and Zila Parishad Service is brought about u/s 89 of the Act of 1994; such service is divided into difference categories, and each category into different grades [per Sub-section (2) of Section 89] that includes Primary and Upper Primary School teachers, like the present petitioners. Appointments to the posts in service are made by direct recruitment, or by promotion, or by transfer [per Sub-section (5) of Section 89]. Appointments by promotion and by transfer are governed by Sub-section (8) of Section 89; but Sub-section (8-A) of Section 89 authorizes the State Government to transfer any member of service from one Panchayati Raj institution to another. Sub-sections (8) and (8-A) of Section 89 of the Act of 1994, being directly relevant for the present purpose, are reproduced hereunder:

(8) Appointments by

(i) promotion shall be made by the Panchayat Samiti or the Zila Parishad, as the case may be, in the prescribed manner from amongst the persons whose name have been entered in the list prepared by the District Establishment Committee; and

(ii) transfer shall be made after consultation with the Pradhans or the Pramukhs, as the case may be, of the Panchayat Samitis or the Zila Parishads from and to which such transfer is proposed to be made.

(8-A) Notwithstanding anything contained in Sub-section (8), the State Government may transfer any member of the service from one Panchayat Samiti to another Panchayat Samiti, whether within the same district or outside it, from one Zila Parishad to another Zila Parishad, or from Panchayat Samiti to Zila Parishad or from a Zila Parishad to a Panchayat Samiti and may also stay the

operation of, or cancel, any order of transfer made under Sub-section (8), or the rules made thereunder:

Rules 289 and 290 of the Rules of 1996, dealing with the matters of transfer, read as under:

Rule 289. Transfer within the district.-(1) The name of the employee desiring transfer or desired to be transferred within the district shall be communicated to the district Establishment Committee by the Panchayat Samiti.

(2) Posting by transfer of such an employee shall be made by the Panchayat Samiti or Zila Parishad concerned on the recommendation of the district Establishment Committee.

(3) State Government may issue orders regarding transfers from time to time. In case District Establishment Committee/Standing Committee of Panchayat Samiti does not agree, Chief Executive Officer/Vikas Adhikari as the case may be, shall carry out orders of the State Government.

(4) On transfer of the employee, his confidential roll and service record will be transmitted, without avoidable delay, to the Panchayat Samiti/Zila Parishad to whom his services have been transferred.

Rule 290. Transfer outside the district.-(1) The name of the employee desiring transfer or desired to be transferred from one district to another shall be communicated to the Director by the Panchayat Samiti or the Zila Parishad, as the case may be.

(2) Posting by transfer of such an employee shall be made by the Panchayat Samiti or the Zila Parishad concerned on the recommendation of the State Government against the vacant posts existing at such time. The State Government may transfer any member of service from one Panchayat Samiti to another Panchayat Samiti within the same district or outside it, from one Zila Parishad to another Zila Parishad, or from Panchayat Samiti to Zila Parishad or from a Zila Parishad to Panchayat Samiti and may also stay the operation of, or cancel, any order of transfer made under these rules. Chief Executive Officer or Vikas Adhikari concerned shall carry out such orders.

(3) On transfer of an employee, his confidential roll and service record will be transmitted without avoidable delay to the Panchayat Samiti/Zila Parishad to whom his services have been transferred.

11. A comprehension of the provisions aforesaid makes it clear that even while clothing the State Government with powers to issue transfer orders in relation to the employees of Panchayati Raj institutions from one institution to another, and with further powers to stay the operation of, or cancel, any order of transfer made by other functionary, the legislature has consciously omitted to invest the State Government with any power to issue transfer order within the same Panchayat Samiti. The Government has, of course, been given powers, and

rather over-riding powers, under Sub-section (8-A) of Section 89, to transfer any member of service:

(i) from one Panchayat Samiti to another Panchayat Samiti, within the same district or outside it;

(ii) from one Zila Parishad to another Zila Parishad; (iii) from Panchayati Samiti to Zila Parishad; and (iv) from Zila Parishad to Panchayat Samiti; and further, the State Government has been given powers to stay operation of, or cancel, any order of transfer made under Sub-section (8) yet and however, the power to transfer a member of Panchayati Raj Service from one place to another within the same Panchayat Samiti is not available with the State Government under Sub-section (8-A) of Section 89 of the Act of 1994.

12. No such authority to issue the orders of the present nature being available with the State Government in the parent statute, the respondents have attempted to suggest that such authority exists by virtue of sub-rule (3) of Rule 289 of the Rules of 1996. The submission is not well founded. The Rules of 1996 could only be read as providing the methods to implement the provisions contained in the main statute; and cannot be read overriding the substantive provisions contained in the principal enactment i.e., the Act of 1994. When specific provision has been made in the statute for the purpose of investing the State Government with some powers to deal with the matters of transfer of the employees of the Panchayati Raj institutions, operation of the Rules would obviously remain confined to such provisions of the Act of 1994. When the power to transfer a member of Panchayati Raj Service from one place to another within the same Panchayat Samiti has specifically been omitted from mention in Sub-section (8-A) of Section 89 of the Act of 1994, the State Government cannot be considered having separately been conferred such powers by Rule 289(3) of the Rule of 1996. There is no such indication in the scheme of the enactment that independent of the provisions contained in the Act of 1994, any power relating to the employees of Panchayat Raj service could be provided by the Rules. The orders envisaged by Rule 289(3) of the Rules of 1996 would obviously be such as could be issued u/s 89(8-A) of the Act of 1994; and not beyond. Viewed from any angle, the State Government does not carry power or authority to transfer a member of Panchayati Raj Service from one place to another within the same Panchayat Samiti. The impugned orders purporting to transfer the petitioners within the same Panchayat Samiti, thus, cannot be sustained.

13. This Court in the case of Inder Singh (supra) dealt with the case where the statutory provision required that the transfer of a Patwari could be ordered only by the Collector concerned; and this Court quashed the transfer order of Patwari when made at the instructions of the State Government while disapproving such abduction of powers of the Collector by the State Government. The decision in Inder Singh came to be affirmed by the Division Bench in Kishan Singh (supra); and the Hon'ble Division explained the position of law in no uncertain terms thus:

14. Under the Rules, power to transfer patwaries have been conferred specifically on Collector of District, where transfers are to be made from one Patwar Circle to another within the District. The circumstances and manner in which a patwari is to be transferred have also been prescribed by the rules. The importance of continuity of patwari at the place in the interest of maintenance of land records is too obviously reflected in provision that even when he is transferred to other circle, the transfer orders does not become effective until the concerned patwari has completed the record in hand.

15. Where a statute provides the authority who has to act on conditions under which he has to act, such action can be taken only by such authority and on fulfillment of conditions under which he has been authorised to act, is a principle so well ingrained in system that it needs hardly any elaboration.

16. We are, therefore, of the opinion that it is not a case of merely allowing the restoration of illegality but allowing the illegal action taken by the Collector at the behest of Ministry of Revenue which had no business to act in derogation of law. If the rule of law prevails in respect of citizen, it also governs the action of the Government authorities and the persons in power. No one is above law howsoever high he may be. The law does not permits any other authority than prescribed under the Rules to usurp that power and subject the statutory authority to act under their dictates.

17. It is true that the transfer is an ordinary incident of service but then, it could be brought about only by the authority competent to do so. The corollary of the principles as pointed out in *Kishan Singh (supra)* directly applies to the present case.

18. When the statute has not conferred any power upon the State Government to transfer a member of Panchayati Raj service within the same Panchayat Samiti, the transfer order so made by the State Government remains wholly unauthorized and cannot be approved.

19. It may be pointed out that this Court, after examining the scheme of the aforesaid provisions of the Act of 1994 and the Rules of 1996 has dismissed the writ petitions involving the cases where the incumbents were transferred by the State Government from one Panchayat Samiti to another; and this Court pointed out in the case of *Meena Sharma v. State of Rajasthan and Ors.* 2007(3) CDR 2665 that, A look at the Rules aforesaid and the source of wide powers of the State Government that is, Sub-section (8-A) of Section 89 of the Act of 1994, makes it clear that it is within the competence of the State Government, inter alia, to transfer an employee like the petitioner from one Panchayat Samiti to another Panchayat Samiti within the same District or outside the District. The submissions as made by Learned Counsel for the petitioner that the State Government could only lay down a policy and else posting by transfer is envisaged to be made only by Panchayat Samiti or Zila Parishad concerned by virtue of Rule 289(2) and further submission that if Rule 289(3) and other

provisions are read providing independent power to the State Government to issue orders of transfer, the same might render redundant Rule 289(2) is, in the considered opinion of this Court, not a correct reading of the said provisions nor a correct comprehension of their scheme.

20. As noticed, wide powers of the State Government flowing from Sub-section (8-A) of Section 89 have their overriding effect and are not whittled down by any other provision in the Act nor could be read circumscribed by any provision in the Rules. Contrary to the suggestion as made by the learned Counsel, Sub-rule (3) of the Rule 289 not only operates to give effect to such powers of the State Government but makes them emphatically clear while providing that in case District Establishment Committee or Standing Committee does not agree, the Chief Executive Officer or Vikas Adhikari, as the case may be, should carry out the orders of the State Government. Similarly, Rule 290 of the Rules of 1996, though its Sub-rule (1) refers to the transfer outside a district, but incorporates the aforementioned powers of the State Government in the comprehensively framed Sub-rule (2) and again, Chief Executive Officer or Vikas Adhikari concerned is required to carry out the orders of transfer. The powers of the State Government being untrammelled and unaffected by any other power with any other authority to issue transfer order, this Court is clearly of opinion that the transfer order of the present nature as issued by the State Government, transferring an employee from one Panchayat Samiti to another Panchayat Samiti, does not suffer from want of authority nor could be said to have been issued in violation of any statutory condition or requirement.

21. Therefore, it is clear that transfer orders made by the State Government from one Panchayati Raj institution like Panchayat Samiti or Zila Parishad to another such institution have not been interfered by this Court for such powers with the State Government being available under Sub-section (8-A) of Section 89 of the Act of 1994. However, the present one are the cases where the State Government has, with impunity and without having regard to the scheme of the aforesaid statutory provisions, proceeded to issue transfer orders even within the same Panchayat Samiti without any power or authority in that regard. No such power being available with the state Government to effect transfers within Panchayat Samiti also, the impugned transfer orders remain unauthorised.

22. The decision of this Court in Mahendra Kumar Yadav (supra) does not lend any support to the impugned transfer orders. Therein, the petitioners challenged the policy decision taken by the Government on 27.08.2000 whereby the transfer orders issued to the teachers who had not completed five years of service upto 31.07.2000 at the initial place of posting stood cancelled. The policy decision of the Government was challenged as being arbitrary, capricious and discriminatory inasmuch as the same was made applicable only to particular districts and it was also submitted that once the order of transfer had been issued, it would be presumed that the authorities had reached to the conclusion that the transfer of the teachers is in public interest and such transfer cannot be rescinded. This Court

has referred to the powers of the State Government discernible from Sub-section (8-A) of Section 89 of the Act of 1994 that includes the powers, apart from making transfers also of staying operation of, or cancelling any order of transfer made under Subsection (8) or the Rules thereunder. This Court found power existing in the State Government to cancel the orders and rejected the contention that the Government has no power to cancel the order of transfer once issued. This Court did not find any arbitrariness in the policy of not transferring the teachers for five years nor found anything wrong in application of the policy to particular districts for the reason that the policy might have to be applied by stages because of administrative compulsions. Mahendra Kumar Yadav's case cannot be read as an authority for the proposition that the Government can issue transfer order within same Panchayat Samiti also. No such power exists in the State Government under Sub-section (8-A) of Section 89 of the Act of 1994.

23. The respondents have taken the stand in the replies filed in some of the petitions with reference to the 73rd Amendment to the Constitution of India that the elementary education has been placed under the control of Panchayati Raj Department with a view to strengthen the Panchayati Raj Institutions and, therefore, according to the respondents, the transfer of the teachers working in elementary schools has rightly been ordered by the Deputy Secretary in Panchayati Raj (Elementary Education) Department. The stand of the respondents is fundamentally incorrect and is rather incongruous. The scheme of 73rd amendment to the Constitution, if of any indication, has been to confer constitutional status to the Panchayat Raj Institutions; and to make them effective units of self-governance. When the Panchayat Samiti concerned is to perform the functions and exercise powers specified in Second Schedule to the Act of 1994 [per Section 51], and running of the primary education is fundamentally the task to be undertaken by the Panchayat Samiti concerned, of course subject to the conditions as may be specified by the State Government from time to time, the role of the Government is essentially that of general superintendence and cannot in any case be of thorough interference. The interference by the State Government even to the extent of ordering transfer of an employee within Panchayat Samiti would not be in conformity with the constitutional scheme, and would rather be an antithesis to the constitutional mandate. However, other aspects of the matter in this regard need no dilatation herein because the relevant statutory provision, of Sub-section (8-A) of Section 89, itself makes it clear that the powers have been assigned to the State Government to effect transfers from one institution to another but not within. The State Government has of course been given further powers to stay or cancel any order made under Sub-section (8) but has yet not been extended such powers as to issue all kind of orders that could be made under Sub-section (8) of Section 89 of the Act of 1994. For specific omission in Sub-section (8-A), where the State Government has not been authorized to effect transfers within Panchayat Samiti, the impugned transfer orders made only for the purpose of transfers within the same

Panchayat Samiti are required to be declared unauthorized and are, thus, required to be quashed. For the same reasons, the orders as made by the Tribunal, rejecting the appeals filed by the petitioners in writ petition No. 6697/2007 and 7781/2007, deserve to be set aside.

24. It may be pointed out that in some of the petitions like CWP Nos. 6129/2007, 6130/2007, 6135/2007, 6138/2007, 6201/2007, 6909/2007, 7745/2007 the impugned transfer order states the petitioner having been transferred on request, and the concerned petitioner alleges having not made such a request. However, such an aspect loses its relevance once it is found that the State Government had no authority to order any transfer within the same Panchayat Samiti. When the State Government has no authority to order any transfer within the same Panchayat Samiti, it cannot do so whether at request or otherwise.

25. As a result of the aforesaid, these writ petitions deserve to be succeed. However, it is required to be and hence is made clear that the petitioners otherwise hold transferable posts and the impugned transfer orders are disapproved only for the reason that the State Government does not have authority to issue such transfer orders within same Panchayat Samiti; and else, this Court has not pronounced on any other aspect of the matter. The concerned competent authorities are obviously free to pass appropriate transfer orders, if so expedient, but strictly in accordance with law; and, at the same time, it is also clarified that these observations shall not prejudice any other right of either of the parties.

26. With the observations aforesaid, these writ petitions succeed and are allowed; the transfer order issued in relation to each of the petitioner is declared unauthorized, and is quashed; the order as made by the Tribunal in relation to the petitioner who had filed appeal is also set aside. In the circumstances of the case, there shall be no order as to costs.