
(1998) 11 OHC CK 0026

In the Orissa High Court

Case No : Original Jurisdiction Case No's. 15396 and 15397 of 1997

Santosh Kumar Mallia and Others and Prafulla Chandra
Mangaraj and Others

APPELLANT

Vs

State of Orissa and Others

RESPONDENT

Date of Decision : 06-11-1998

Acts Referred:

Orissa Municipal Act, 1950 — Section 3(17), 81

Citation : (1999) 1 OLR 89

Hon'ble Judges : S.N. Phukan, C.J;P.K. Tripathy, J

Bench : Division Bench

Advocate : Sanjit Mohanty, S.C. Samantaray, N.C. Sahoo, S.P. Panda and P.K. Patnaik, for the Appellant; A. Mohapatra, Additional Government Advocate, for the Respondent

Final Decision : Allowed

Judgement

S.N. Phukan, C.J.—By this common judgment and order, we dispose of the aforesaid two writ petitions. We may state here that at the admission stage, we heard at length on the merit of both the writ petitions. Though no counter has been filed, as stated at the Bar, the petitions can be disposed of on the points involving law.

2. All the writ petitioners, who are working under the Bhubaneswar Municipal Corporation, have been transferred to other Municipalities/ Notified Area Councils (for short "N.A.C.") of the State of Orissa and the same has been challenged in these writ petitions. The transfer order has been passed by the Director of Municipal Administration-cum-Ex- Officio Additional Secretary to the Government. The petitioners have challenged the constitutional validity of Rule 10 of the Orissa Local Fund Service Rules, 1975 (for short "the Rules") and also the order of their transfer to other Municipalities/N.A.Cs. We may state here that the Orissa Local Fund Service Rules, 1975 were framed under Sub- sec. (2) of Sec. 81 of the Orissa Municipal Act, 1950 (for short, "the Act"). The Rules came

into force with effect from 18th August, 1975.

3. The main contention of the petitioners is that though in the Act as amended, Sub-section (17-b) of Sec. 3 defines "Municipality" to mean "a Notified Area Council or a Municipal Council or a Municipal Corporation", no such amendment was made in the Rules. A reference has also been made to an agreement between the management and the workmen vide Annexure-1 to the writ petitions wherein it was specifically agreed that employees may be transferred within the District except that transfer is on account of promotion (vide No. 5 of the agreement at Annexure-1).

4. He may refer to Sub-section (17-b) of Sec. 3 of the Act, which runs as follows :

"Municipality means a Notified Area Council or a Municipal Council or a Municipal Corporation :

We may also refer to Secs. 81, 81-A, 81 -B and 81-C of the Act. Sec. 81 runs as follows :

"81. Power of State Government to create a Local Fund Service- (1) Notwithstanding anything contained in this Act, but subject to the provisions of Secs. 81-A, 81-B and 81-C, the State Government may, by notification, constitute any class of officers or servants of Municipal areas into a Local Fund Service for the State of Orissa.

Provided that no notification shall be issued under this sub- section unless the Municipal areas concerned have been consulted in respect thereof.

(2) The State Government shall, subject to the provisions of Sec. 392, have power to make rules to regulate the classification, methods of recruitment, conditions of service, pay and allowances, discipline and conduct of the officers and servants belonging to the Local Fund Service and such rules may vest jurisdiction in relation to such service in the State Govt. or in such other authority or authorities as may be prescribed therein : Provided that the terms and conditions of service prescribed under such rules in respect of the officers and servants, who, on the constitution of the Local Fund Service have been absorbed therein, shall not in any way be less favourable than the terms and conditions which were applicable to them immediately prior to such constitution.

(3) The State Government shall have power to transfer any officer or servant of the Local Fund Service working under a Municipal area to the service of any Municipal area.

(4) The State Government shall have power to issue such general or special directions as they may think necessary for the purpose of giving due effect to transfer made under Sub-section (3)."

Sec. 81-A of the Act reads as below :

"81 -A. Exercise of option by officers and servants of Municipal Area -

(1) Before the constitution of the Local Fund Service the State Government or, if empowered in that behalf, the concerned Municipality shall furnish detailed information in respect of the conditions of service prescribed for such service to every officer or servant belonging to any class in respect of which such service is to be constituted with a notice requiring him to exercise his 1999 (I) OLR 92 option within such period not being less than thirty days, as may be specified therein for not being absorbed in such service.

(2) Any such officer or servant who fails to exercise his option within the aforesaid period shall be deemed to have opted for being absorbed in the service.

(3) Where any such officer or servant exercised his option for not being absorbed in such service within the said period, his service shall stand terminated with effect from the date of constitution of the service."

Sec. 81-B of the Act runs as follows :

"81 -B. Municipality bound to employ and pay the dues of members of the Local Fund Service -Whenever any officer or servant belonging to the Local Fund Service is posted or transferred to any Municipal area, the concerned Municipalities shall be bound to employ him in its services and to pay all amounts due to such employee on account of his pay, allowances and other dues from out of the Municipal fund."

Sec. 81-C of the Act reads as under :

"81-C. Consequence of termination of service -(1) Where the services of any person have been terminated under Sub-section (3) of Sec. 81-A, he shall, without prejudice to his claims to any leave, provident fund, gratuity or other benefits, if any, as an officer or servant of a Municipal area to which he may be entitled to his retirement or termination of service had the Local Fund Service not been constituted, be paid by the Municipality under which he last served an amount determined in the following manner :

1. In the case of a permanent employee :

Amount to be paid (a) Where the continuous Pay for the remaining service rendered by him period of service or by the date of termination exceeds ten years or is less. (b) Where such service does not exceed ten years period of service or for three months whichever is less. 2. In the case of a Pay for one month temporary employee

Explanation - For the purposes of this sub-section, "pay" shall include clearness allowance and other ad hoc additions to pay by way of interim relief that may be admissible.

(2) For the purpose of calculating gratuity, if any, payable to any permanent employee whose services have been terminated under Sub-section (3) of Sec. 81 -A, the period of qualifying service of such employee shall be increased by the period calculated on the basis provided hereunder :

Period to be added. 1. Where the period of actual, qualifying service does One year not exceed five years 2. Where such period exceeds five years but does not Two years exceed ten years. 3. Where such period exceeds ten years but does not Three years exceed fifteen years. 4. Where such period exceeds Four Years" fifteen years.

5. Now, we may refer to Clause (iii) of Rule 2 and Rules 10 and 13 of the Rules.

"R. 2. Definition - In these rules unless there is anything repugnant in the subject or context -

(i) xxx xxx xxx (ii) xxx xxx xxx (iii) "Municipality" includes a Notified Area Council and the Orissa State Municipal Council's Union.

R. 10. The Director of Municipal Administration shall have power to transfer employees of the service from one Municipality to another and, for this purpose, he shall have power to call for necessary papers like Service Book and Confidential Character Rolls from concerned Municipality.

R. 13. (1) The pay and allowances and all other dues of an employee in the Service, posted or transferred to a Municipality, shall be paid from out of the funds of the concerned Municipality for the period the employee has worked under that Municipality.

(2) The leave allowances admissible to an employee shall be paid by the Municipality in which he served last before he proceeded on leave.

(3) The transit pay and travelling allowances at the rates admissible under the rules in force will be paid to an employee transferred from one Municipality to another by the Municipality in which he joins duty."

6. From the above provisions of law, the position is clear that in view of the amended Clause (17-b) of Sec. 3 of the Act, the word "Municipality" will also include a Municipal Corporation. Further, u/s 81, the State Government has been empowered to create Local Fund Service Rules. Such rules have been framed by the State Government in the year 1975.

7. We may state here that normally, in view of the settled position of law, writ Court does not interfere with the transfer of an employee as it is an incidence of service, unless, of course, the transfer is mala fide and/or contrary to any statutory provision.

8. In *Kishore Chandra Samal v. State of Orissa* : 74 (1992) CUT 649, a Full Bench of this Court considered the Act and the Rules vis-a-vis Cultack Municipality.

The Court noted that the expression "cadre" has not been defined in the Act. In absence of such a definition, the Court borrowed the definition of "cadre" from the Orissa Service Code, which means "the strength of a service or part of a service sanctioned as a separate unit". Accordingly, it was held that the

employer has the full authority to constitute a cadre, to abolish the same and to create a new cadre in accordance with the exigencies of service. The Court also considered Sec. 81 of the Act and held that the State Government by notification may constitute any class of officers or servants of Municipalities into a Local Fund Service for the State of Orissa. As per Sub-section (2) of Sec. 81, the State Government has power to make rules to regulate the classification, methods of recruitment, conditions of service, pay and allowances, discipline and conduct of the officers and servants belonging to the Local Fund Service, and such Rules may vest jurisdiction in relation to such service in the State Government or in such other authority or authorities as may be prescribed therein. Referring to the proviso to Sub-section (2) of Sec. 81 of the Act, it was also held that the terms and conditions of service prescribed under such Rules in respect of officers and servants, who, on constitution of the Local Fund Service, have been absorbed therein shall not be in any manner less favourable than the terms and conditions which were applicable to them immediately prior to such constitution.

Taking into consideration Sec. 81 of the Act and Rule 3 of the Rules, the Court held that it is absolutely clear that the State Government, while constituting the Local Fund Service under the Rules and while constituting a cadre of Municipal employees, must be guided by the limitations contained in Sub-rule (2) of Rule 3. We may state here that according to Sub-rule (2) of Rule 3, on the constitution of service under Sub-rule (1) of Rule 3, the posts with equal time scale having duties and degree of responsibility of the same nature in any Municipality shall form one cadre. The Full Bench held that if a cadre is constituted in contravention of Sub-rule (2) of Rule 3 of the Rules, then, notwithstanding the general power of the employer to constitute a cadre, the same will be held to be vitiated. It was also held that two necessary preconditions in Sub-rule (2) of Rule 3 are that posts brought together must be in the equal time scales and the duties and degree of responsibilities of those posts must be of the same nature. The Full Bench approved the ratio laid down in *K. Babu Rao Vs. Executive Officer, Berhampur Municipality and Others*, that the post of Octroi Inspector and the post of Lower Division Clerk cannot be brought within the cadre and such a grouping or constituting into a cadre will be contrary to the proviso to Sub-section (2) of Sec. 81 of the Act as well as Sub-rule (2) of Rule 3 of the Rules, and will also violate the provisions of Article 16 of the Constitution. It may be mentioned here that in one of the writ petitions before the Full Bench, an Octroi Inspector had been placed in the Accounts Section, not for any collection, but for maintenance of accounts. The Court held that such grouping into a cadre is illegal.

9. In the above Full Bench decision, this Court directed the State Government to reconsider the matter of constitution of cadre. The Court also directed to re-group the posts and constitute cadres in accordance with law bearing in mind the provisions contained in Sub-rule (2) of Rule 3 of the Rules as well as the law laid down by the Full Bench.

10. Coming to the present cases, apart from the agreement between the management and the employees, as at Annexure-1, we have been informed that the direction given by the Full Bench in Kishore Chandra SamaPs case (supra) have not yet been complied with. If that be so, we reiterate the above direction and also direct the concerned authorities to comply with the same immediately.

11. We have quoted above Rule 2 of the Rules, which defines "Municipality". According to the said definition, Municipality includes a Notified Area Council and the Orissa State Municipal Council's Union. But it does not include a Municipal Corporation, as, defined in the amended Clause (17-b) of Sec. 3 of the Act. The impugned orders are in respect of employees working in the Corporation. It has been urged that since in the above definition, Municipal Corporation has not been included, the Rules are not applicable to the employees of the Corporation.

12. On a plain reading of Clause (iii) of Rule 2 of the Rules, we are of the opinion that the definition of "Municipality" does not include Municipal Corporation. If we hold that it will apply to the Corporation, it will be against the common principle of interpretation. If the rule-makers wanted to include Corporation, it should have been done. Therefore, we hold that the Rules are not applicable to the employees of the Corporation. We, however, make it clear that in view of the definition of "Municipality" in the Act, the rule-makers have power to amend the rules to enlarge the definition of Municipality. But, while doing so, the ratio laid down in Kishore Chandra Samal's, case (supra) for constituting the cadre should be strictly followed.

13. For the reasons stated above, we allow both the writ petitions and quash the impugned orders of transfer as the same were passed without legal authority. No costs.

P.K. Tripathy, J.

14. I agree.