

(2005) 03 AHC CK 0138

In the Allahabad High Court

Case No : Writ Petition No.7014 (S/S) of 2004 (with Writ Petition Nos.6811 (SS)/04, 3051(SS)/04, 3073(SS)/04, 3077(SS)/04, 3076(SS)/04, 3049(SS)/04, 6878(SS)/04, 6763(SS)/04, 6808(SS)/04, 6809(SS)/04, 2339(SS)/04, 6917(SS)/04, 7529(SS)/04, 7067(SS)/04, 6791(SS)/04,

Shiv Pal Verma and Others

APPELLANT

Vs

State of U.P.and Others

RESPONDENT

Date of Decision : 29-03-2005

Acts Referred:

Citation : (2005) 03 AHC CK 0138

Hon'ble Judges : Devi Prasad Singh, J

Final Decision : Dismissed

Judgement

Devi Prasad Singh, J.—The controversy involved in the present writ petition relates to repatriation of the employees of Sharda Sahayak Command Project (in short hereinafter referred as the Project) to the Agricultural Department. The tricky question involved in the present bunch of writ petitions for adjudication is that whether the petitioners may be treated as employee of Agricultural Department of the Government of U.P. and accordingly they have no lien to claim for continuance in service in Sharda Sahayak Command Project and in consequence thereof they may be repatriated to their parent Agricultural Department. However, in case the petitioner may be treated as regular employee of the Project then they are not liable for repatriation to the Agricultural Department. In all these bunch of writ petitions common question of law and fact involves hence decide by common judgment.

2. The petitioners are holding the post of Assistant Soil Conservation Inspector, in the Project. By the impugned order they have been repatriated to the Agricultural Department on the ground that they are working on deputation or on account of transfer of service in the Project and in view of Government Order dated 24th July 2002 they have been repatriated to Agricultural Department to discharge duties relating to extension work in the field of agriculture. The

impugned order further provides that the reclamation work of land are being now done by Ziladar Sinch Paryavekshak, Sinch Pal and other class IV employees, in pursuance to circular of the Government of India. On account of compliance to circular issued by Government of India and coupled with financial crunch it shall not be possible to retain the petitioners in the Project. Accordingly, the impugned order reflects that the petitioners have been repatriated to their original department. After petitioner's repatriation to the Agricultural Department, the vacancies left over by the petitioners shall be filled up by surplus staff of the Project as well as other staffs. Accordingly all the Assistant Soil Conservation Inspector are being repatriated to their alleged parent Agricultural Department.

3. While assailing the impugned order, learned Senior Advocate Shri S.K. Kalia assisted by Priyavrat and Sameer Kalia submits that petitioners were straightway appointed in the Project and they had never been the employee of Agricultural Department. They were not working on deputation in the Project. Hence, the impugned order has been passed on unfounded grounds and not sustainable under law. The appointment letters do not disclose that petitioners have been appointed as employee of Agricultural Department. Similar proposition of law has been raised by Shri A.P. Singh, learned counsel for the petitioner in some writ petitions as well as other counsels of the connected petitions.

4. On the other hand, while defending the impugned action the learned standing counsel as well as the special counsel for the opposite parties, Smt. Tanuja Somwansi had submitted that the entire procedure for petitioners' appointment in the Project was completed by Agricultural Department of the Government of U.P. The petitioners' seniority list was circulated by Agricultural Department and petitioners have accepted their status as the employee of Agricultural Department while discharging duty in the Project. Some of the petitioners who were suspended, while challenging the order of suspension at the time of filing of writ petition had submitted and claimed themselves to be employee of Agricultural Department and pleaded that the officers of the Project do not have jurisdiction to suspend them. The further submission of the respondents' counsel is that when the Project was established sometime in the year 1976, the employees were borrowed from other departments also which includes Agricultural Department, Cooperative Department, Irrigation Department, Cane, Milk Federation, Horticultural, Panchayat Raj and Fisheries Department, etc. According to learned counsel for the respondents, several units of the Project have been abolished and accordingly no option left except to repatriate the petitioners to the Agricultural Department. A letter dated 9.12.2004 has been brought on record through an affidavit dated 18.1.2005 to indicate that out of 127 Assistant Soil Conservation Inspectors who have been repatriated by the impugned orders 23 have already joined in the Agricultural Department on a group III posts. Further submission is that the petitioners' status, work and emoluments have been neither lowered down nor changed. According to learned counsel for the respondents, the petitioners were appointed as Soil Conservation Inspector by the respective Soil Conservator Officers who were borrowed by the

Project from Agricultural Department. Almost all the Soil Conservation Officers have been repatriated to their parent Agricultural Department. Accordingly the repatriation of the petitioners to the Agricultural Department does not suffer from any impropriety or illegality.

5. In the State of U.P. the command areas have been notified on 23.11.1976 in pursuance to power contained in U.P. Area Development Act, 1976 (in short hereinafter referred as the Act). The statement object and reasons of the Act shows that it was enacted, to fulfill the need for maximum utilization of irrigation capacity available from major and medium irrigation Projects and for coordinated development of area covered by such Projects. Command area schemes have been launched in the Country. The command area Programme envisages ensuring proper land and water arrangement and also bringing out coordinated development through the regional planning.

Since the Project administrators were not equipped with necessary legal powers for enforcing the Programme, with intention to remove practical difficulty and to create the statutory authority known as Area Development Authority with necessary legal powers for various functions, command areas Programme has been provided by the Act, A copy of Act has been filed as Annexure 2 to the writ petition.

6. Section 3 of the Act provides that the State Government may establish a command area development authority by notification in official gazette as 'Area Development Authority'. Under Section 8, the authority may appoint such employees as is necessary on such terms and conditions as it thinks fit for the efficient performance of function. State Government has been given power to approve terms and conditions of such employees. Section 11 deals with the function of the authorities. Section 16 of the Act further provides that after notification the State Government may require any statutory body or any corporate body controlled by the State Government to follow the direction of the authority. All the departments associate with the related works shall execute the order of the authority.

For convenience, Section 3, Section 8, Section 11 and Section 16 of the Act are reproduced as under:

'Establishment of command area development authority

(1) The State Government may by notification establish an Area Development Authority for such area as may be notified:

Provided that for every command area of an irrigation Project, there shall be a separate Area Development Authority;

Provided further that the State Government may by notification extend the jurisdiction of an Authority referred in the preceding proviso to any area, specified in the notification, lying outside the command area for purpose of such of the provisions of this Act as may be notified.

(2) The area Development Authority shall be a body corporate, and be deemed for all purposes to be a local authority.

(3) The Authority shall have its Head Office at the place to be specified in the notification of its establishment.

8. Appointment of employees(1) The Authority may appoint such employees as it considered necessary and on such terms and conditions as it thinks fit for the efficient performance of its functions:

Provided that the appointment of such employees as the State Government may by general or special order specify shall be made and their terms and conditions shall be determined with the approval of the State Government.

(2) Subject to the general control and direction of the Chairman, the supervision and control over all employees of the Authority shall vest in the Secretary.

11. Functions of the authorityThe functions of the Authority shall be the following, namely

(1) To formulate plans for the integrated area and agricultural development of the territory within its area of operation;

(2) Treating the entire area under every outlet command as a single unit, to develop it according to topographical and hydrological requirements in the interest of efficient framing;

(3) To survey the land, water resources, agricultural production and the like as may be necessary for the formulation of such plans;

(4) To submit such plans showing their phasing, both areawise and workwise, to State Government for approval;

(5) To implement such plans after their approval by the State Government;

(6) To perform such other functions as may be prescribed or as may be entrusted to it by the State Government.

16. Consequences of notificationOn the approval of the plan or any phase thereof by the State Government under Section 15 (which in its approved form shall be called the approved plan) the following consequences shall ensue, namely

(a) the State Government may require any statutory body or any corporate body controlled by the State Government, functioning within the areas of the operation of the approved plan to follow the directions of the Authority, and such body shall thereupon follow such directions in respect of such matters as are specified in the approved plan;

(b) all the development plans relating to agricultural development drawn by any State Government department or any local authority or any statutory body or any corporation controlled by the State Government shall be intimated to the

authority and shall be executed with its approval and subject to such modification or changes, if any, as suggested by the Authority;

(c) the authority shall be deemed to be empowered to take all necessary action for implementation of the approved plan, including levy of betterment fee, cost of works and other charges and in particular, to give directions to any land holder with regard to the following matter, namely

(i) the manner in which cultivation is to be carried out;

(ii) the crops which are to be raised and the rotation of such crops;

(iii) the manner of carrying on any other agricultural production

(iv) the application and use of various inputs for agricultural production such as, seeds, pesticides, manure, fertilizers, fingerlings, fodder, poultry feed, and such other item as may be provided by regulations;

(v) provision for field channels for carrying water for purposes of irrigation;

(vi) provision for drainage;

(vii) location of wells, tubewells, pumps and other sources of irrigation;

(viii) erection and removal of fences over lands;

(ix) provision of pastures;

(x) submission of return within such time and in such manner as may be provided by regulations containing a true and accurate statement regarding the following matters, namely

(a) area of land cultivated by him, the classification of such land, his interest therein and encumbrances on such land, if any;

(b) the nature and quantity of agricultural production raised by him;

(c) any other matter which may be provided by regulations and

(xi) such other matter as may be provided by regulations;

(d) the State Government shall review the implementation of the approved plan periodically.?

7. In pursuance to provision contained in the Act in the State of U.P. three Projects were launched;

1. Ram Ganga Command Project

2. Gandak Command Project

3. Sharda Sahayak Command Project

8. According to respondents' counsel the Sharda Sahayak Command Project is a temporary Project established in pursuance to Government Order dated

21.1.1976, a copy of which has been filed as AnnexureCA1 to the counter affidavit authorized to work under Soil Conservation Programme to construct drainage under the Development Programme.

The circular dated 2.11.1976 filed as AnnexureCA1 shows that the Government had taken a decision to transfer 16 soil conservation units of the Agricultural Department to the Project in question alongwith its paraphernalia. The circular further shows that the entire staff and officers of the soil conservation unit were directed to discharge duty under the administrative control of the Project. The Director of Agricultural Department had issued two letters dated 6.1.1979 and 16th April, 1979 informing the Project Director that the selection of employees for the post of soil conservation Inspectors have been by Agricultural Department. A list was also sent by the Director of Agriculture with the request that the selectees may be appointed by the Soil Conservation Officers of the respective units whose services have been transferred to the project by the Government. Another letter dated 14.2.1978, a copy of which has been filed as Annexure CA4 to the counter affidavit sent by Administrator got a reference of letter dated 6.1.1979 sent by Director containing the name of selectees. As a follow up of action the Administrator of the Project in pursuance to letter of Director of Agricultural had directed all the soil conservation officers of the Project to issue appointment letters subject to certain conditions. In consequence thereof the petitioners were appointed by the soil conservation officers of the Project by various appointment letters issued from time to time. The appointment letters contain the reference of letters of Director of Agricultural as well as the letters of Administrator of the Project, which is evident from Annexure CA5 to the counter affidavit filed by Shri R.A. Gupta dated 14.12.2004. All the petitioners have been appointed on the post of Assistant Soil Conservation Inspector in similar manner through an appointment letter issued by soil conservation officer of the respective units of the Project. A letter dated 6.2.1996 filed as CA10 to the Counter Affidavit shows that tentative seniority list of cadre of Assistant Soil Conservation Inspector was circulated by the Agriculture Department inviting objections which includes the names of employees working in the Project holding the said post.

Another letter dated 1.4.2004 filed as Annexure CA12 to the writ petition shows that the list of Assistant Soil Conservation Inspector of Group 3 post was sent to the Project for appointment by the Agricultural Department on 22.10.1980 and in consequence thereof by letter dated 11.11.1980 appointments were done. Keeping in view these facts and circumstances of the case the Director of Agricultural had opined that petitioners who are holding the post of Assistant Soil Conservation Inspector are the employees of subordinate group III post of the agricultural services of the Agricultural Department and their names exists in the tentative seniority list prepared by the Agricultural Department. Accordingly by letter dated 24th July 2002 filed as AnnexureCA13 to the Counter Affidavit the Government had directed that 500 Assitant Soil Conservation Inspectors working in the Project be repatriated to their parent Agricultural Department. The letter

dated 31.7.2000 filed as Annexure CA14 to the counter affidavit shows that the Government had directed the Commissioner and Administrator of the Project to freeze the post which fell vacant on account of petitioners' repatriation to the Agricultural Department.

9. From the discussion made hereinabove, it is borne out that the petitioners were selected for the post in question by the Agriculture Department. The Director of Agriculture Department had directed the Project to appoint these persons on their respective post of Assistant Soil Conservation Inspector. Petitioners' seniority list was prepared by the Agricultural Department. There is nothing on record which may show that when the Soil Conservation Officers of the Project who are the petitioner's appointing authority have been repatriated to their parent Agricultural Department in consequence thereof, any objection was raised by any person against such repatriation. Now by the impugned orders petitioner's have been also repatriated to Agricultural Department.

10. A letter dated 14.2.1978, a copy of which has been filed as Annexure CA4 to the counter affidavit in Writ Petition No.6763/SS/of 2004 circulated by the Administrator, the office memorandum dated 4.4.1979, a copy of which has been filed as Annexure CA5 to the counter affidavit, another order filed as Annexure CA6 and letter dated 28.8.1980, a copy of which has been filed as Annexure CA7 to the counter affidavit, at the face of record shows that from time to time persons selected or holding the post of Subordinate Agricultural Service Group III of the Agricultural Department were sent to Project with the direction that they may be appointed on the post of Assistant Soil Conservation Inspector. The orders further shows that the Administrator of Project was further directed to forward a copy of appointment letter and other records to the Directorate of Agriculture so that the record of such appointees may be maintained there.

Another letter dated 8.8.1980 also indicates that some of the petitioners and several other alike persons were selected for appointment on the post of Group III Agricultural services and were directed to join in the Project by the Director of Agriculture.

11. There is nothing on record which may indicate that the services of petitioners were either confirmed or regularized in the Project. It appears that at no stretch of time the petitioner had claimed their lien in the Project, that is why when disciplinary action was taken against some employees they have come forward with the defence that they are the employee of agricultural department. There is nothing on record which may show that the petitioner had raised any objection against the tentative seniority list circulated by the Agricultural Department which includes their name, treating them as employee of Agricultural Department. The preparation of seniority list by the Agricultural Department coupled with the maintenance of service record in the Agricultural Department without any objection raised by the petitioners is an important ground which may be treated as a strong circumstances to declare the petitioner as the employees of Agricultural Department.

12. Under the above facts and circumstances of the case, whether petitioner should be treated as regular employee of Agricultural Department or of the Project is a crucial question on which the entire controversy hinges. In case petitioners may be treated as regular employee of Agricultural Department then there shall be no illegality in repatriating them to their parent department. However, in case they may be treated as regular employee of the Project then naturally they may not be repatriated to the Agricultural Department and they shall be entitled to continue in the Project itself with all consequential benefits.

13. Under what principles the petitioners can be treated as the employee of the Agricultural Department or the Project. Hon"ble Supreme Court in a leading case reported in 1958 AIR SC 36, Purushottam Lal Dhingra v. Union of India, had dealt with the question as to how the service cadres are created giving an employee, the status of regular government servant. It has been held by Hon"ble Supreme Court in P.L. Dhingra's case (supra) that in a department where the government servant are appointed shall possess a lien which shall create right for employees' continuance in service. Hon"ble Supreme Court further held that unless the lien is transferred to other department, the employees shall be deemed to continue in the department where their lien exists. For convenience, the relevant portion of Apex Court judgment in P.L. Dhingra's case is reproduced as under;

¶10. Re (a): Articles 310 and 311 are two of the Article which have been grouped under the heading 'Services' in Chapter 1 of Part XIV which deals with the 'services under the Union and the State'. It is well known that there are different species of Government services. In the absence of a contract to the contrary the terms of employment of persons in different services are governed by rules made by the appropriate authorities to which reference will hereafter be made. The strength of a service or a part of a service sanctioned as a separate unit is, in the fundamental Rules, S. III, Ch. II, R. 9(4), called the cadre. Each cadre consists of a certain number of posts. According to R. 9(22) of the Fundamental Rules, a permanent post means a post carrying a definite rate of pay sanctioned without limit of time. In each cadre there may be and often is a hierarchy of ranks. Due to rush of business or other exigencies some 'temporary posts' are often created. A temporary post is defined in R.9 (30) to mean a post carrying a definite rate of pay sanctioned for a limited time. These temporary posts are very often outside the cadre and are usually for one year and are renewed from year to year, although some of them may be created for a certain specified period. The conditions of service of a government servant appointed to a post, permanent or temporary are regulated by the terms of the contract of employment, express or implied, and subject thereto, by the rules applicable to the members of the particular service.

11. The appointment of a government servant to a permanent post may be substantive or on probation or on an officiating basis. A substantive appointment to a permanent post in public service confers normally on the servant so

appointed a substantive right to the post and he becomes entitled to hold a ?lien? on the post. This ?lien? is defined in Fundamental Rules S.III, Ch.II, R. 9(13) as the title of a government servant to hold substantively a permanent post, including a tenure post, to which he has been appointed substantively. The Government cannot terminate his services unless it is entitled to do so (1) by virtue of a special term of the contract of employment, e.g., by giving the requisite notice provided by the contract or (2) by the rules governing the conditions of his services, e.g. on attainment of the age of superannuation prescribed by the rules, or on the fulfillment of the conditions for compulsory retirement or, subject to certain safeguards on the abolition of the post or on being found guilty, after a proper enquiry on notice to him, of misconduct, negligence, inefficiency or any other disqualification. As appointment to a permanent post in Government person appointed by a private employer, that the servant so appointed is taken on trial. The period of probation may in some cases be for a fixed period e.g. for six months or for one year or it may be expressed simply as ?on probation? without any specification of any period. Such an employment on probation under the ordinary law of master and servant, comes to an end if during or at the end of the probation the servant so appointed on trial is found unsuitable and his service is terminated by a notice. An appointment to officiate in a permanent post is usually made when the incumbent substantively holding that post is on leave or when the permanent post is vacant and no substantive appointment has yet been made to that post. Such an officiating appointment comes to an end on the return of the incumbent substantively holding the post from leave in the former case or on a substantive appointment being made to that permanent post in the latter case or on the service of a notice of termination as agreed upon or as may be reasonable under the ordinary law. It is, therefore, quite clear that appointment to a permanent post in a government service, either on probation or on an officiating basis is, from the very nature of such employment, itself of a transitory character and, in the absence of any special contract or specific rule regulating the conditions of the service, the implied term of such appointment, under the ordinary law of master and servant, is that it is terminable at any time. In short, in the case of an appointment to a permanent post in a Government service on probation or on an officiating basis, the servant so appointed does not acquire any substantive right to the post and consequently cannot complain, any more than a private servant employed on probation or on an officiating basis can do, if his service is terminated at any time. Likewise an appointment to a temporary post in a Government service may be substantive or on probation or on an officiating basis. Here also, in the absence of; any special stipulation or any specific service rule, the servant so appointed acquires no right to the post and his service can be terminated at any time except in one case, namely, when the appointment to a temporary post is for a definite period. In such a case the servant so appointed acquires a right to his tenure for that period which can no be put an end to unless there is a special contract entitling the employer to do so on giving the requisite notice or the person so appointed is, on enquiry held on due notice to

the servant and after giving him a reasonable opportunity to defend himself, found guilty of misconduct, negligence, in efficiency or any other disqualification and is by way of punishment dismissed or removed from service or reduced in rank. The substantive appointment to a temporary post, under the rules, used to give the servant so appointed certain benefits regarding pay and leave, but was otherwise on the same footing a appointment to a temporary post on probation or on an officiating basis, that is to say, terminable by notice except where under the rules promulgated in 1949 to which reference will hereinafter be made his service had ripened into what is called a quasipermanent service.

12. The position may, therefore, be summarized as follows: In the absence of any special contract the substantive appointment to a permanent post gives the servant so appointed a right to hold the post until, under the rules, he attains the age of superannuation or is compulsorily retired after having put in the prescribed number of years" service cannot be terminated except by way of punishment for misconduct, negligence, inefficiency or any other disqualification found against him on proper enquiry after due notice to him. An appointment to a temporary post for a certain specified period also given the servant so appointed a right to hold the post for the entire period of his tenure and his tenure cannot be put an end to during that period unless he is, by way of punishment, dismissed or removed from the service. Except in these two cases the appointment to a post, permanent or temporary, on probation or on an officiating basis or a substantive appointment to a temporary post gives to the servant so appointed no right to the post and his service may be terminated unless his service has ripened into what is, in the service rules, called a quasipermanent service. The question for our consideration is whether the protections of Article 311 are available to each of these several categories of Government servants.?

14. According to WHARTON'S LAW LEXICON, FOURTEENTH EDITION page 591 ? LIEN? is a right in a man to retain that which is in his possession. To create a lien it is necessary that the person must have acquired the same either by express or implied assent of the party to whom it is asserted. A lien can be waived by a party. However, a lien cannot be transferred automatically but there must be some order to extinguish the lien of a person in a department by transferring it to other department. The relevant portion from Wharton's Law Lexicon is reproduced as under:

?Lien [answering To the tacita hypotheca of the Civil Law], a right in one man to retain that which is in his possession belonging to another, until certain demands of the person in possession are satisfied. It is neither a jus in re, nor a jus and rem i.e., it is not a right of property in the thing itself, or right of action to the thing itself.

It is either particular, as a right to retain a thing for some charge or claim growing out of, or connected with the identical thing; or general, as a right to retain a thing not only for such charges or claims, but also for a general balance

of accounts between the parties in respect to other dealings of the like nature.

General and particular liens may arise: (1) by an express contract; (2) by an implied contract, resulting from the usage of trade or the manner of dealing between parties. General liens are not favoured in law, but some judicially recognized general liens are bankers', solicitors'. Particular liens, on the other hand, are favoured by law and also arise by mere operation of law from the relation and acts of the parties, e.g. where the person claiming the lien was obliged by law to enter into the contract for service, e.g. common carriers, innkeepers, and a shipmaster's lien for freight.

The civil law derived its own liens, whether they were pledges or hypothecations, or simple privileges, from similar sources.

The following is an analysis of the mode in which the law on this subject has been treated.

(1) As to the manner and circumstances under which a lien may be acquired. To create a valid lien it is essential that the person through whom it is acquired should himself either have the absolute ownership of the property, or at least a right to vest it; for *nemo plus juris ad alium transferre potest, quam ipse habet*. There must also be an actual or constructive possession by the party asserting it, with the express or implied assent of the party against whom it is asserted. It must not be inconsistent with the express terms or the clear intent of the contract.

(3) How a lien may be waived or lost. It may be waived by an act or agreement between the parties, by which it is surrendered, or becomes inapplicable. It is said (see *Hartley v. Hitchcock*, (1861) Stark, 408; 18 R.r. 790) that a lien is lost by temporarily relinquishing possession, but see *Great Eastern Railway v. Lord's Trustee*, 1909, A. 109.

A lien on goods is not lost when the demand in respect of which it was acquired can no longer be enforced by an action, on account of the Statute of Limitations, for the statute does not put an end to the debt but only to the remedy by action.

(4) In what manner a lien may be enforced. There is but a mere right of retainer, which may be used as a defence to an action for the recovery of the property, or as a matter of title or special property, to reclaim the property, by action, if he have been unlawfully dispossessed of it. A lien does not import a right of sale. Sometimes a Court of Equity has decreed a sale as a matter of its own system of remedial justice; and courts of Admiralty have been constantly in the habit of decreeing a sale to satisfy maritime liens such as bottomry bonds, seamen's wages, repairs of foreign ships, salvage, and other claims of a kindred nature (see *Maritime lien*), and exceptions occur under statute, e.g. the *Innkeepers Act*, 1878 (41 & 42) Vict. C. 38, the *Railways Clauses Consolidation Act*, 1845 (8 and 9) Vict. C.20. the owner has a perfect right to dispose of the property, subject to the lien, and the person to whom he conveys it will have a perfect title to it upon

discharging the lien. Consult Smith's Merc. Law: Coote on Mortgages, 9th Ed., pp. 1375 et seq and 13956 et seq: Atkinson on sol. Lien.?

15. Keeping in view the facts and circumstance of the case it can be very well inferred that petitioners' lien was retained in the Agricultural Department. The factors which covers to decide the lien of an employee commence from the date of advertisement of vacancy, the selection procedure, the authority who had selected the employees and the order of appointment coupled with preparation of seniority list. In the present case, the material on record shows that petitioners were selected for the post of Grup III Agricultural services by the Agricultural Department. Thereafter, their services were transferred to Project with the direction that they may be appointed by the Soil Conservation Officers of the Project. The Director of Agricultural had further provided that the copy of appointment letters and another testimonial shall also be forwarded to the Agricultural Department. Though the petitioners were working in the Project but their tentative seniority list was released by the Agricultural Department. All these facts on record points out towards only on direction that petitioners lien were retained in the Agricultural Department, more so when the petitioners have not raised any objection to the procedure adopted from time to time by Agricultural Department relating to the petitioners appointment and issuance of tentative seniority list and retention of their service record.

16. Even otherwise also under the facts and circumstance of the case petitioners shall be deemed to be an employee of Agricultural Department and not of the Project. As settled by Division Bench of this Court in Special Appeal No.1005 of 2004 decided on 25th August, 2004, the Government employees may be directed to discharge duties in other department to meet out the exceigencies of services and while doing so the State has got power to revert them back to their parent departments. For convenience, relevant portion from the division Bench judgment of this Court in Gauri Shankar's case is reproduced as under:

?The words ?subject and condition that the petitioner shall not be compelled to discharge duty under the administrative and financial control of the Gram Panchayat? in effect nullifies that part of the Government Order dated 20.7.2004 in which it has been held that the employees posted at the Gram Panchayat level will work under the administrative and financial control of the Gram Panchayat. We do not agree with this condition placed by the learned Single Judge in his order dated 6.8.2004. It is always open to an employer to tell an employee under whose supervision and control the employee will work. For instance, if A appoints a servant and tells him to work in the house of B under the supervision and Control of B, that servant continues to be the servant of A because A appointed him, A pays him salary and A can terminate his service even if his servant is working under the supervision and control of B. B cannot terminate his service; he can only send him back to A. Hence since the appellants are the servants of the Government it is for the Government to decide under whose supervision and control they will work. The Government is the master and the

Government can send its servant to work under the control of the Gram Panchayat. We see nothing strange or arbitrary in this. However, we make it clear that the Gram Panchayat cannot terminate the service of the appellants.

It is no doubt true that the prima facie test of the employer-employees relationship is the supervision and control test. However, as held by the Supreme Court in *M/S Shining Tailors v. Industrial Tribunal*, AIR 1984 SC 23 (vide para 5), in recent times emphasis in the field has shifted from and no longer rests exclusively or strongly upon the question of control. A search for a formula in the nature of a single test will hence not serve any useful purpose, and several factors have to be considered. As held in *Ram Singh v. Union Territory* (2004) 1 SCC 126 (vide para 15) a multiple pragmatic approach has now to be adopted. As observed in *Indian Overseas Bank v. I.O.B. Staff Canteen Workers Union*, AIR 2000 SC 1508:

?It would be not only impossible but also not desirable to lay down abstract principles or rules to serve as a ready recipe for all situations and thereby attempt to compartmentalize and peg them into any pigeonhole formulae, to be insisted upon as proof of such relationship.?

Hence even though the transferred employees were working under the supervision and control of the Gram Panchayat that does not necessarily mean that such employees became employees of the Gram Panchayats.?

17. In a recent case reported in 2003 (11) SCC 632, *Ali M.K. and others v. State of U.P. and Others*. Hon'ble Supreme Court held that where an appointment is done to meet out the exigencies of services in other service or department such employees can be sent back to their parent department by the Government. It has been further held by Hon'ble Supreme Court that a person shall acquire lien on post only when he has been confirmed and made permanent and not earlier. In the present case, no material has been placed on record by the petitioner's counsel which may indicate that petitioner's service were confirmed or made permanent in the Project.

For convenience relevant portion from the Apex Court judgment in *Ali M.K. case* (supra) is reproduced as under: (Paras 13 and 18)

?13. So far as Rule 8 is concerned, the proviso referred to above operates in cases where even though the member of service is appointed in another service on the basis of his own application, the same is in the exigencies of public service. Therefore, the vital question is whether the appointment is made in the exigencies of public service. For that purpose, Note 1 assumes significance. It is, as noted above, a deeming provision. Such a provision creates a legal fiction. As was stated by James, L.J. in *Levy, Re Ex p Walton*.

?when a statute enacts that something shall be deemed to have been done, which in fact and in truth was not done, the Court is entitled and bound to ascertain for what purposes and between what persons the statutory fiction is to

be resorted to. After ascertaining the purpose full effect must be given to the statutory fiction and it should be carried to its logical conclusion and to that end it would be proper and even necessary to assume all those facts on which alone the fiction can be operate.?

(See *Hill v. East and West India Dock Co.*, *State of Travancore Cochin v. Shanmugha Vilas Cashewnut Factory*, *American Home Products Corp. v. Mac Laboratories (P) Ltd.* and *Parayankandiyal Eravath Kanapraavan Kalliani Amma v. K. Devi*) In an oftquoted passage, Lord Asquith stated: (All ER p.599 BD)

If your are bidden to treat an imaginary state of affairs as real you must surely, unless prohibited from doing so, also imagine as real the consequence and incidents which, if the putative state of affairs had, in fact, exdisted must inevitably have flowed from or accompanied it??The statute states that you must imagine a certain state of affairs, it does not say that having done so, you must cause or permit your imagination to boggle when it comes to the inevitable corollaries of that state of affairs.

(see *East End Dwellings co. Ltd. v. Finsbury Borough Council*)

?the word "deemed" is used a great deal in modern legislation. Sometimes it is used to impose for the purposes of a statute an artificial construction of a word or phrase that would not otherwise prevail. Sometime it is used to put beyond doubt a particular construction that might otherwise be uncertain. Sometimes it is used to give a comprehensive description that includes what is obvious, what is uncertain and what is, in the ordinary sense, impossible.?

(Per Lord Radcliffe in *St. Aubyn (L.M.) v. AttorneyGeneral (No.2)*, All ER p. 498 FG)

18. A faint attempt was made to submit that the nonofficial respondents had lost their lien as they were appointed to posts of substantive nature. Reference was made to Rule 28 to submit that on completion of probation and in case of promotion, it is to be presumed that there was substantive appointment. The Full Bench has recorded a factual finding that the nonofficial respondents have not been confirmed in the posts in the Cooperative Department. It has been specifically recorded that no material was placed to shows that any order has been passed by the cooperative department confirming the employees concerned in their posts. With reference to Rule 24 it was noted that mere completion of probation does not result in automatic confirmation. It is a settled position in law that a person can be said to acquire a lien on a post only when he has been confirmed and made permanent on that post and not earlier. (See *Triveni Shankar Saxena v. State of U.P.* and *Parshotm Lal Dhingra v. Union of India*).?

18. Sri A.P. Singh, learned counsel for the petitioner had relied upon the judgments reported in 1985 (2) SCC 110, *State of Mysore and another v. R.S. Kasi*, 1994 Supp. (3) SCC 204, *State of Tamil Nadu and others v. V.S. Balakrishna and others*, AIR 1979 SC 1912, *Krishna Kumar v. Divisional Asstt.*

Electrical Engineer and 2004 (1) SCC 612, Ahamdabad Education Society v. Gilbert. B. Shah and others and proceeded to submit that the transfer of Soil Conservation Officer to their parent agricultural department will not make any difference and it can not be a ground to repatriate the petitioner also to their agricultural department.

19. On the other hand, Smt. Tanuja Somwansi, learned counsel for the Project had relied upon the judgments reported in 1997 (8) SCC 372, State of Punjab and others v. Inder Singh and others, 1984 (2) LCD 205, S.A.R. Rizvi v. State of U.P. and Others, 2000 (5) SCC 362, Kunal Nandu v. Union of India and others, 2002(1) UPLBEC 475, Krishna Kant Tewari and another v. State of U.P. and Others, 2002 (2) UPLBEC 1952, Bharat Sanchar Nigam Ltd. v. Brij Mohan Srivastava and another and 1985 (1) SLR 471, State of Mysore v. R.S. Kashi and proceeded to submit that petitioners can at most be treated as deputationist in the Project and they have no right or lien to claim continuance in the said Project. Option is always open to the Government to repatriate them to the parent department. No legal or statutory right has been violated which may create a ground for interference by this Court.

20. In the State of Mysore (supra) the controversy was relating to certain employees working in the Agricultural Department. The entire scheme of the Agricultural Department alongwith its employee were transferred to Directorate of Horticulture accordingly Hon''ble Supreme Court held that since entire scheme alongwith employees were transferred to Horticulture such employees can not be repatriated back to their parent department.

However, facts and circumstance of the case is entirely different as discussed hereinabove and judgment of Apex Court does not seem to be applicable in the present case.

21. In the State of Tamilnadu (supra) also the posts were transferred alongwith incumbents treating them to be deputationist they were not repatriated for about more than 20 years. Accordingly, Apex Court held that even those employees were not given option to continue for 20 years shall deem to give option and they may not be repatriated. The employees shall deem to be absorbed as deputationist. Even those employees who have retired from services were held by Hon''ble Supreme Court shall deem to join the services of federation permanently for the purpose of terminal benefits. It has been further held by Hon''ble Supreme Court in the State of Tamil Nadu (supra) that the government servant can not be deprived of his status as civil servant without his consent. Under the special facts and circumstances of the case Hon''ble Supreme Court had held that the employees shall deem to opted federation where they have worked for more than 20 years.

The case of Krishna Kumar (supra) relates to a case where the employee was removed from service by authority subordinate to the appointing authority does not seems to applicable under the present case.

22. In the case of Ahamdabad Education Society (supra) Hon''ble Supreme Court had held that in the case of contractual assignment, the terms of contract will governs the service conditions of the employees. Accordingly, keeping in view the terms and conditions of the employment as contained in contract Hon''ble Supreme Court held that the employees of the said case were entitled to continue in service up to the age of 60 years. There is nothing on record to communicate that there was any contract between the parties for their continuance in the Project till age of superannuation.

23. In the State of Punjab and others (supra), S.R.A. Rizvi and Kunal Nandu (supra) Hon''ble Supreme Court held that the deputationist cannot assert or claim for their permanent absorption in the department where they had worked on deputation, unless their claim is based on statutory rules and regulations. In the case of Krishna Kant Tewari it has been held by this Division Bench of this Court that the deputationist can always be transferred back to their parent department.

In the case of Bharat Sanchar Nigam Ltd. (supra) it has been held that the executive orders laying down the service conditions ordinarily should not be disturbed on technical ground and in the absence of any statutory rules or regulations, the executive has got power to decide the service condition.

24. It is settled proposition of law that in the absence of any Rules or Regulations the service conditions of the employee can be governed by executive instruction. Petitioner counsel had not pointed out any statutory rules or regulations which may come to assist them to install their claim for continuance in the Project. In the absence of any statutory rules or regulations and under the facts and circumstances of the case discussed hereinabove the Government has got power to repatriate the petitioner''s to the agriculture department where their lien exit. There is nothing on record which may indicate that petitioners'' lien exist in the Project.

25. Under above facts and circumstances of the case the impugned order does not suffer from any impropriety or illegality. Petitioner shall deem to be the employees of Agricultural Department. Accordingly, they can very well be repatriated from Sharda Sahaik Command Project to the Agriculture Department. Some of the petitioners are continuing in the Project in pursuance to interim order passed by this Court. The petitioner''s who had not joined in the Agricultural Department on account of pendency of writ petition they may be permitted to join within two weeks failing which competent authority may proceed against them in accordance to law.

Subject to above, these bunch of writ petitions are devoid of merit. Dismissed. No order as to costs.

(Petitions dismissed)