

(2014) 02 CHH CK 0058
In the Chhattisgarh High Court
Case No : Writ Appeal No. 617 of 2013

S.K. Sharma

APPELLANT

Vs

State of Chhattisgarh and Others

RESPONDENT

Date of Decision : 18-02-2014

Acts Referred:

Madhya Pradesh Reorganisation Act, 2000 — Section 68 68(2) 72

Citation : (2014) 2 MPJR 46

Hon'ble Judges : Sunil Kumar Sinha, J; Inder Singh Uboweja, J

Bench : Division Bench

Advocate : Hemant Shrivastava and Mr. Saurabh Dangi, for the Appellant; A.S. Kachhawaha, Dy. Advocate General for State/Respondents 1 to 3 and Mr. Sunil Otواني, Advocate for respondent No. 4, Ms. Fouzia Mirza, Assistant Solicitor General for Respondent No. 6 and Mr. Amrito Das, Advocate for proposed intervener- U.S. Khare, for the Respondent

Final Decision : Allowed

Judgement

Sunil Kumar Sinha, J.

1. As an effect of coming into force the Madhya Pradesh Reorganisation Act, 2000 (the Act 2000), the two successor States i.e. State of Madhya Pradesh and Chhattisgarh were formed with effect from the appointed day i.e. 1st of November, 2000. At the relevant time, the appellant was working as an Assistant Engineer in Public Works Department (PWD). In tentative allocation list the appellant, who was posted in Umariya, M.P., was allocated to the State of Chhattisgarh. He joined as Assistant Engineer in the Office of Chief Engineer, Raipur Chhattisgarh on 21.12.2000. The appellant, thereafter, made an application before the concern authority for re-allocation/transfer on mutual basis with Mr. U.S. Khare (proposed intervener herein) for finally allocating/transferring him to the State of Madhya Pradesh. According to the appellant, the said application for allocation/transfer on mutual basis was withdrawn. However, in a final allocation list issued on 9.9.2002, the appellant was shown to be

allocated to the State of Madhya Pradesh. The appellant then filed W.P. No. 2216/2002 on 28.10.2002, wherein an interim protection was granted on 31.10.2002. This writ petition was disposed of on 28.4.2003 directing the authorities to take appropriate action on representation of the appellant.

2. On 1.5.2003, the Central Government issued a circular giving complete liberty to the State Government to consider the cases of mutual allocation. According to the appellant, on 2.5.2003 Mr. K.K. Pipri (respondent No. 4 herein) and the appellant again made a representation for their mutual transfer. This application was pending. Then the appellant again filed W.P. No. 1619/2004 on 11.5.2004 seeking directions to both the State Governments to take final decision in the matter of allocation of the appellant and Mr. Pipri in light of the representation. This writ petition was disposed of on 7.7.2004 directing the State Governments to take decision on the said mutual application in a month.

3. On 8.8.2005, the said application was allowed and the appellant was finally allocated to the State of Chhattisgarh and Mr. Pipri (respondent No. 4) was also finally allocated to the State of Madhya Pradesh. Pursuant to the final allocation order dated 8.8.2005, the appellant joined in the State of Chhattisgarh on 10.8.2005. The appellant thereafter on 3.10.2005 was promoted to the post of Executive Engineer.

4. According to the appellant, Mr. Pipri (respondent No. 4) then filed a representation against mutual allocation order dated 8.8.2005 which was rejected in the month of December 2005. Mr. Pipri (respondent No. 4) then filed W.P. No. 808/2006 before the High Court of Madhya Pradesh challenging the final allocation order dated 8.8.2005. The said writ petition came up for hearing before High Court of Madhya Pradesh on 18.1.2006 and notices were issued and an interim order was passed directing that "In the meanwhile, the operation of the impugned order dated 8-8-2005 shall remain stayed unless it has already been implemented." Since the appellant had already joined on 10.8.2005 in pursuance of final allocation order dated 8.8.2005, therefore, he was allowed to continue in Chhattisgarh even after the said order passed by the High Court of Madhya Pradesh. This writ petition is still pending. On 26.8.2009 the appellant was promoted to the post of Superintending Engineer. Thus he earned two promotions in the State of Chhattisgarh till 26.8.2009.

5. The Public Works Department (PWD) then sought clarification about retaining the appellant as also Mr. Pipri (respondent No. 4) in the State of Chhattisgarh and the matter was sent for opinion to the Law Department. The Law Department, gave its opinion on 2.2.2013 (Annexure P1) that the appellant may be relieved from the State of Chhattisgarh and Mr. Pipri may be retained here on account of the interim order granted in his favour from the High Court of Madhya Pradesh. Thereafter by order dated 14.2.2013 (Annexure P2), the Additional Secretary, General Administration Department (GAD), State of Chhattisgarh advised the Administration to act upon the opinion given by the Law Department, meaning thereby to relieve the appellant from the State of Chhattisgarh. The

appellant challenged the validity of these 2 orders (Annexures P1 & P2) by filing W.P. (S) No. 677/2013. In the said petition, an interim order dated 14.3.2013 was granted and it was directed that the appellant shall not be relieved from the State of Chhattisgarh till the next date of hearing. The above writ petition was finally heard and dismissed by order dated 20th of December, 2013.

6. The writ court held that the appellant was finally allocated to the State of Madhya Pradesh on his application for mutual allocation with Mr. U.S. Khare, therefore, his subsequent application for mutual allocation with Mr. Pipri was not maintainable as per circular issued by the State of Madhya Pradesh on 29.4.2005. Thus the State of Madhya Pradesh could not have passed any order like the one, which has been passed on 8.8.2005 allocating the appellant to the State of Chhattisgarh. Many other reasons for taking such view have been assigned in Para-33 of the impugned order.

7. Mr. Hemant Shrivastava, learned counsel appearing on behalf of the appellant, has mainly argued that the Sub-Committee of State of Madhya Pradesh, which passed the order dated 8.8.2005 finally allocating to the appellant to the State of Chhattisgarh, was formed by the Central Government and was having full authority to adjudicate the representation for allocation on mutual basis. The said order dated 8.8.2005 is still in force as the same has not been set-aside or quashed or declared null and void by any court of law as the writ petition filed against the said order is still pending in the High Court of Madhya Pradesh, therefore, the Law Department of State of Chhattisgarh was not competent to give an opinion that the appellant should be relieved for going to the State of Madhya Pradesh. So long the order dated 8.8.2005 is in force, it was not possible for any authority to take a decision for relieving the appellant from the State of Chhattisgarh.

8. On the contrary it was argued that as the appellant had availed second opportunity by filing an application on mutual basis with Mr. Pipri, therefore, in light of the provisions of the relevant instructions, his application was not maintainable and the order dated 8.8.2005 finally allocating the appellant to the State of Chhattisgarh was incorrect. Therefore, the learned single Judge has recorded a finding in Para-33 of the impugned order that the State of Madhya Pradesh could not have passed any order like the one, which was passed on 8.8.2005 and thus the earlier order regarding allocation of the appellant to the State of Madhya Pradesh will prevail and the opinion of the Law Department as also instructions regarding relieving him were fully justified.

9. Undoubtedly the power of allocation of an employee was vested in the Central Government u/S. 68(2) of the Act 2000. According to the said provision, the Central Government has already published the final allocation list, however on 1.5.2003 it granted liberty to the State Governments of the successor States to consider requests of mutual transfer based on broad consensus arrived between the State Governments, inter alia either defining the terms and conditions for such consideration or by framing suitable rules for this purpose. Thereafter, on

29.4.2005 requisite instructions were notified in the official gazette by the State Government of Madhya Pradesh regarding the guidelines relating to mutual transfer. It is under this authority the case of the appellant and Mr. Pipri was considered and order dated 8.8.2005 was passed by the State of Madhya Pradesh in consultation with the State of Chhattisgarh whereby the appellant was finally allocated to the State of Chhattisgarh and Mr. Pipri was finally allocated to the State of Madhya Pradesh.

10. PART-VIII of the Act 2000 deals with various provisions as to services, and the entire exercise of allocation and settlement etc. relating to the services of the employees of both the successor States was to be dealt with under this Part. Section 68 falls in Part VIII. Section 72 falling in the same Part gives power to the Central Government to give directions. It provides that the Central Government may, give such directions to the State Government of Madhya Pradesh and the State Government of Chhattisgarh as may appear to it to be necessary for the purpose of giving effect to the foregoing provisions of this Part and the State Governments shall comply with such directions. Thus the Central Government has full authority to delegate its power to the Governments of the successor States for the purposes of allocation etc. of the employees. It is under this provision, the Central Government had delegated its power to the State Government of Madhya Pradesh, by issuance of circular dated 1.5.2003, which ultimately considered the case of the appellant and took a final decision on 8.8.2005. Therefore, there can hardly be any doubt regarding jurisdiction and authority of the State of Madhya Pradesh to take decision on the mutual application submitted by the appellant and Mr. Pipri and the order of the State Government (delegatee) is to be treated, for all intents and purpose, as an order of principal itself (delegating authority) (See- State of Orissa and Others Vs. Commissioner of Land Records and Statement, Cuttack and Others,

11. It is, therefore, clear that order dated 8.8.2005 was passed by the State Government of Madhya Pradesh in the capacity of delegatee of the Central Government u/S. 68(2) read with Section 72 of the Act 2000 which was having full authority to pass an order on an application made for mutual allocation/transfer.

12. Mr. Shrivastava has contended that even if the said order dated 8.8.2005 was incorrect or it was wrong on merits, the same could not have been ignored by any authority or Government or the Law Department of State of Chhattisgarh while taking any decision in which the said order had an import. He cited the decision of Krishnadevi Malchand Kamathia and Others Vs. Bombay Environmental Action Group and Others, His argument appears to be correct in view of the said decisions in which the Supreme Court held in Paras-16 to 19 as under:-

16. It is settled legal proposition that even if an order is void, it requires to be so declared by a competent forum and it is not permissible for any person to ignore the same merely because in his opinion the order is void. In State of Kerala Vs.

M.K. Kunhikannan Nambiar Manjeri Manikoth, Naduvil (dead) and others, Tayabbhai M. Bagasarwalla and another Vs. Hind Rubber Industries Pvt. Ltd. etc., M. Meenakshi and Others Vs. Metadin Agarwal (D) by LRs. and Others, ; and Sneh Gupta Vs. Devi Sarup and Others, , this Court held that whether an order is valid or void, cannot be determined by the parties. For setting aside such an order, even if void, the party has to approach the appropriate forum.

17. In State of Punjab and Others Vs. Gurdev Singh, , this Court held that a party aggrieved by the invalidity of an order has to approach the court for relief of declaration that the order against him is inoperative and therefore, not binding upon him. While deciding the said case, this Court placed reliance upon the judgment in Smith v. East Elloe Rural District Council, (1956) 1 All ER 855 wherein Lord Radcliffe observed:-

...An order, even if not made in good faith, is still an act capable of legal consequences. It bears no brand of invalidity on its forehead. Unless the necessary proceedings are taken at law to establish the cause of invalidity and to get it quashed or otherwise upset, it will remain as effective for its ostensible purpose as the most impeccable or orders.

18. In Sultan Sadik Vs. Sanjay Raj Subba and Others, this Court took a similar view observing that once an order is declared non-est by the Court only then the judgment of nullity would operate erga omnes i.e. for and against everyone concerned. Such a declaration is permissible if the court comes to the conclusion that the author of the order lacks inherent jurisdiction/competence and therefore, it comes to the conclusion that the order suffers from patent and latent invalidity.

19. Thus, from the above it emerges that even if the order/notification is void/voidable, the party aggrieved by the same cannot decide that the said order/notification is not binding upon it. It has to approach the court for seeking such declaration. The order may be hypothetically a nullity and even if its invalidity is challenged before the court in a given circumstance, the court may refuse to quash the same on various grounds including the standing of the petitioner or on the ground of delay or on the doctrine of waiver or any other legal reason. The order may be void for one purpose or for one person, it may not be so for another purpose or another person.

13. In the instant case, as we have quoted above, and which has also not been disputed by the counsel for the respondents, the State Government of Madhya Pradesh was having full jurisdiction and authority to entertain an application for mutual transfer filed by an employee. Therefore, the authority to pass an order under the said provisions as delegatee of the Central Government was with the State Government of Madhya Pradesh and on this account the order dated 8.8.2005 cannot be assailed. Now even if we take that in the given facts and circumstances, particularly in light of the provisions in the instructions issued by the Madhya Pradesh Government, on merits, the case of the appellant was not to

be considered and allowed, and the order, as contended by counsel for the respondents, was void/voidable or even non-est, the party aggrieved was required to take a decision from the appropriate forum on this account, and not that they would simply ignore the order taking their own view that the order was non-est or void, voidable or illegal.

14. The Government of Chhattisgarh was also a party to the order dated 8.8.2005, as it has given no objection to the Government of Madhya Pradesh for passing the said order, that means for finally allocating the appellant to the State of Chhattisgarh. Thus the order dated 8.8.2005 was equally binding on the State Government of Chhattisgarh as was on any other person or authority. In fact, it was an order passed on behalf of the Central Government with the consent of Government of Chhattisgarh, therefore, the Law Department of Chhattisgarh could not have ignored the said order while giving the opinion regarding relieving the appellant from the State of Chhattisgarh.

15. The arguments were also advanced on the interim order passed in writ petition in the High Court of Madhya Pradesh. It is an admitted position that a writ petition is pending before the High Court of Madhya Pradesh in which the validity of the said order is under challenge. We note that in the said writ petition an interim order dated 18.1.2006 is there, that in the meanwhile the operation of the impugned order dated 8.8.2005 shall remain stayed unless it has already been implemented. Since this order dated 8.8.2005 was already implemented, so far as the appellant is concerned, the interim order has not affected the status of the appellant who was working in the State of Chhattisgarh in consequence of the order dated 8.8.2005 from 10.8.2005. We are of the opinion that so long the order dated 8.8.2005 is not set-aside or quashed or declared illegal or void, the same would carry its full force, and even after the said interim order granted in the writ petition the implementation of the order dated 8.8.2005 would continue.

16. It was argued by the counsel for the respondents that in the impugned order dated 20th of December, 2013, the writ court has observed in Para-33 that the State of Madhya Pradesh could not have passed any order like the one which has been passed on 8.8.2005 allocating to the appellant to the State of Chhattisgarh on certain grounds on merits. Therefore, in one sense, the order dated 8.8.2005 was declared incorrect. We can not accept the said argument because there is no decision of the writ court on this point. The writ court was not hearing a writ petition examining the validity of the order dated 8.8.2005. It was not an issue before the writ court. An independent writ petition in this regard is already pending between the same parties in the High Court of Madhya Pradesh. We must remember that in a collateral challenge the exercise is not the invalidation of a decision, but only to ascertain whether the decision "exists" in law at all and to rely upon incidents and effect of its "non-existence". Doctrine of collateral challenge will not apply to a decision which is valid ex-hypothesi and which has some presumptive existence, validity and effect in law. Such a decision can be invalidated by the right person in right proceedings brought at the right time. It

is only a nullity stemming from lack of inherent jurisdiction or a proceeding that wears the brand of invalidity on its forehead that might afford a defence even against enforcement (Vide- Sita Ram Vs. C. Bhondey and Others, . This can very well be understood by an example that a judgment and decree passed by a competent court may be having illegality on merits, but it cannot be declared so by applying the doctrine of collateral challenge because for that purpose a regular proceeding under the law would be required to be brought with a definite relief sought therein.

17. We may also remember the concept of sub silentio in this regard. In Delhi Airtech Services Pvt. Ltd. and Another Vs. State of U.P. and Another, it was held, Per Ganguly, J. that a finding which was not strictly in issue would be incidental and sub silentio finding and would not be treated as a decision. Such decision does not form a part of the ratio of the case. The principles discussed therein vide Paras-42 to 46 are important, which we quote:-

42. It has been held in the decision of this Court in Municipal Corporation of Delhi Vs. Gurnam Kaur, that when a point does not fall for decision of a court but incidentally arises for its consideration and is not necessary to be decided for the ultimate decision of the case, such a decision does not form a part of the ratio of the case but the same is treated as a decision passed sub silentio.

43. The concept of "sub silentio" has been explained by Salmond on Jurisprudence, 12th Edn. as follows: (Gurnam Kaur case, SCC pp. 110-11)

11."A decision passes sub silentio, in the technical sense that has come to be attached to that phrase, when the particular point of law involved in the decision is not perceived by the Court or present to its mind. The Court may consciously decide in favour of one party because of Point A, which it considers and pronounces upon. It may be shown, however, that logically the court should not have decided in favour of the particular party unless it also decided Point B in his favour; but Point B was not argued or considered by the Court. In such circumstances, although Point B was logically involved in the facts and although the case had a specific outcome, the decision is not an authority on Point B. Point B is said to pass sub silentio.

44. The aforesaid passage has been quoted with approval by the three-Judge Bench in Gurnam Kaur. This Court in Gurnam Kaur, in order to illustrate the aforesaid proposition further relied on the decision of the English Court in Gerard v. Worth of Paris Ltd., (1936) 2 All ER 905 (CA). In Gerard, the only point argued was on the question of priority of the claimant's debt. The Court found that no consideration was given to the question whether a garnishee order could be passed. Therefore, a point in respect of which no argument was advanced and no citation of authority was made is not binding and would not be followed This Court held that such decisions, which are treated having been passed sub silentio and without argument, are of no moment. The Court further explained the position by saying that one of the chief reasons behind the doctrine of precedent

is that once a matter is fully argued and decided the same should not be reopened and mere casual expressions carry no weight.

45. In Gurnam Kaur this Court conclusively held that: (SCC p. 111, para 12)

12.Not every passing expression of a Judge, however eminent, can be treated as an ex cathedra statement, having the weight of authority.

46. Similarly, it has also been held by the majority opinion in the Constitution Bench of this Court in H.H. Maharajadhiraja Madhav Rao Jivaji Rao Scindia Bahadur of Gwalior and Others Vs. Union of India and Another,

It is difficult to regard a word, a clause or a sentence occurring in a judgment of this Court, divorced from its context, as containing a full exposition of the law on a question when the question did not even fall to be answered in that judgment.

18. In light of the above facts and circumstances and the principles referred to above, we are of the opinion that the said observation would have no effect and unless the order dated 8.8.2005 by which the appellant was finally allocated to the State of Chhattisgarh by the State Government of Madhya Pradesh in the above manner, is set-aside or quashed or declared null and void or non-est, the same would have binding effect on all parties concerned, including the State of Chhattisgarh, and one cannot ignore the same.

19. For the foregoing reasons, the appeal is allowed. The impugned order passed by the writ court is set-aside. The writ petition filed by the appellant/petitioner stands allowed and the two orders dated 2.2.2013 & 14.2.2013 (Annexure-P1 & P2 filed in the writ petition) are quashed.

20. We make it clear that observations made in this order are only for the purpose of decision of this case and they shall have no effect on the decision to be taken by the High Court of Madhya Pradesh in the pending writ petition between the parties. No order as to cost.