
(2013) 01 PAT CK 0104
In the Patna High Court
Case No : C.W.J.C. No. 15851 of 2012

Umesh Sharma

APPELLANT

Vs

The State of Bihar

RESPONDENT

Date of Decision : 10-01-2013

Acts Referred:

Citation : (2014) 2 PLJR 503

Hon'ble Judges : Ravi Ranjan, J

Bench : Single Bench

Final Decision : Dismissed

Judgement

Dr. Ravi Ranjan, J.—I have heard learned counsel for the petitioner and the State at length and perused the records of this case. The petitioner, who claims to be a Clerk of Basic Grade in Patna Medical College and Hospital, Patna seeks quashing of the Memo No. 1250(4) dated 13.8.2012 (Annexure-1) by which he has been transferred from Patna Medical College and Hospital, Patna to Darbhanga Medical College and Hospital, Darbhanga on the ground that vigilance enquiry is going on with respect to certain illegalities committed in purchase of medicines, chemicals and regent during the year 2008-09 and 2009-2010.

2. Short facts which would be necessary for consideration of this case are summarized as under.

3. The petitioner claims to had been appointed vide Annexure-23 on 29.3.1974 on temporary basis against the post, which became vacant due to suspension of a Lower Division Clerk in the scale of Rs. 200-315/-, till the final decision, with regard to the fate of the suspended employee. However, vide letter as contained in Annexure-24 addressed to the Director, Health Services, Bihar the petitioner had requested to adjust him against a post which became vacant due to transfer of one Laxmi Narain Tiwari, Lower Division Clerk, who was working against a vacant post of Selection Grade, out of Patna Medical College and Hospital. It has been stated in the letter itself that, since against the aforesaid Selection Grade

post only Lower Division Clerk was to be posted, he could be adjusted as such. Vide letter dated 21.9.1974 the Deputy Director, Health Services had referred the matter to the Superintendent of the Patna Medical College and Hospital, Patna to take a decision in accordance with law. Ultimately the petitioner, vide Annexure-25 dated 31.12.1974, was adjusted against the aforesaid post with effect from 1.1.1975. The petitioner, thereafter, had worked on the same post all along. It has further been stated that the earlier orders of transfer of the petitioner issued in the year 1992 as well as on 28.6.2010 were subsequently recalled. However the impugned order as contained in Annexure-1 has been issued transferring him from Patna Medical College and Hospital to Darbhanga Medical College and Hospital on the ground that the State Government has decided to get the Irregularities mentioned above be investigated by the Vigilance Department.

4. Mr. Vinod Kumar Kanth, learned Senior Counsel appearing for the petitioner has raised several issues to impress upon this Court that the order of transfer as contained in Annexure-1 cannot be sustained in law and is fit to be quashed. It has been submitted on his behalf that the petitioner, being a Class-III employee of Basic Grade, is necessarily an employee of the particular Medical College cadre and, thus, he cannot be transferred to another Medical College. In support of his submission, he has placed reliance upon Annexure-29 dated 15.6.1992 which is an order passed by the Deputy Director, Health Services, Bihar, Patna staying the transfer of the petitioner on the basis that he is a Basic Grade Clerk. Learned counsel has placed strong reliance upon the Annexure-26, i.e., the Rules for the management of the Patna Medical College Hospital. It is contended that these Rules were framed for the management of Patna Medical College Hospital prior to independence and it has been clearly laid down in Rule 13 of Section II that the Superintendent of Patna Medical College and Hospital, Patna has got power to appoint, discharge or punish a non-gazetted staff except the British Nursing Sisters. The entire and complete Rules have not been brought on record by the petitioner and the same could not be brought on record even by the respondents also. It has also not been stated anywhere as to in which particular year these Rules were framed. However, it is contended on behalf of the petitioner that these Rules, framed prior to independence, still hold good as they are yet to be amended. The factum of framing of the aforesaid Rules before independence has not been controverted by the respondents also. Learned counsel has raised an issue that, in view of provision contained in Article 313 of the Constitution of India, until fresh statutory rules are framed by the Legislature in exercise of the powers conferred under Article 309 or by the competent authority as to the proviso to that Article, these Rules existing before the commencement of the Constitution would hold good and cannot be modified, altered or overruled by any administrative order or circular of the Government. It is submitted that from the Rules it appears that the petitioner being a non-gazetted employee belong" to the cadre of Patna Medical College and Hospital, Patna and as such he cannot be transferred out of the Patna Medical College and Hospital, Patna. It is

forcefully submitted that though an employee belonging to Selection Grade cadre can be subjected to transfer out of the Patna Medical College and Hospital, Patna but the petitioner being a Basic Grade Clerk cannot be transferred.

5. Learned counsel in this regard has placed reliance upon a decision of the Division Bench of this Court in *Koshi Project Worker's Association and Another Vs. State of Bihar and Others*, . It is submitted that this Court has taken notice in the aforesaid case that the Government of Bihar had published a Gazette Notification on 16th of April, 1950 notifying its earlier decision dated 15th April, 1950 to incorporate the following as a rule made under proviso to Article 309 of the Constitution of India that:--"all the enactments, rules and orders whether made under any enactment or otherwise which regulated the recruitment and conditions of service of persons appointed to public services and posts in connection with the affairs which are now the affairs of the State of Bihar and which were in force immediately before 26th of January, 1950, shall, until provision is made by or under an act of State Legislature to regulate such recruitment and conditions of service, be in force if they had been made by virtue of power under said proviso". Learned counsel has also placed reliance upon a decision of Apex Court rendered in *Sant Ram Sharma Vs. State of Rajasthan and Another*, in support of his submission that the administrative instructions cannot impose any restriction, not found in the Rules already framed, as that would tantamount supersession of the statutory rules by an administrative instruction.

6. It is next contended on behalf of the petitioner that against the earlier order of his transfer dated 28.6.2010 to Nalanda Medical College and Hospital, the petitioner approached this Court by filing C.W.J.C. No. 14487 of 2010. However, prior to that an order dated 3.2.2011 came to be passed by a Division Bench of this Court in a public interest litigation bearing C.W.J.C. No. 16856 of 2010 (*Vikash Chandra Guddu Baba v. The State of Bihar & Ors.*) making an observation that the petitioner alongwith others must be transferred out of the concerned office. Later on, the earlier order of transfer dated 28.6.2010 and relieving order dated 11.3.2011 were recalled so that the petitioner could be posted in another department of Patna Medical College and Hospital, Patna itself. This development was also informed to the Division Bench by the counsel for the State. Subsequently, in view of the aforesaid development, the C.W.J.C. No. 14487 of 2010 was disposed of on the ground that the cause of action has lost its meaning. However, after about a year, the petitioner has again been transferred to Darbhanga Medical College and Hospital, Darbhanga. It is submitted that once his transfer to Nalanda Medical College and Hospital was recalled to post him in some other department within the Patna Medical College and Hospital, Patna itself, there was no requirement of passing the subsequent order again transferring the petitioner out of Patna Medical College and Hospital, Patna. It is contended on behalf of the petitioner that this action of the State authorities suffers from vice of mala fide and as such is liable to be set aside. It is contended that the order appears to have been passed in a hush-hush manner

after being panicked by some observation made in the order dated 6.8.2012 passed by another Single Bench questioning as to how the petitioner has been brought back to Patna Medical College and Hospital, Patna again when the petitioner was considered necessary to be transferred by a Division Bench. Lastly, it is submitted that in view of the resolution regarding transfer and posting contained in Annexure-13 specially Clause 3 thereof and since the petitioner is going to superannuate in March 2013, he should have been transferred and posted at the place of his choice.

7. A counter affidavit has been filed on behalf of the respondent No. 2 defending the transfer order on the ground of the same having been passed under administrative exigencies particularly due to on going vigilance inquiry in connection with the financial irregularities committed in the purchase of medicines in the Patna Medical College and Hospital, Patna during the year 2008-09 and 2009-10. It has been stated that the petitioner has not been singled out for transfer as several other non-gazetted employees have been transferred on administrative ground out of Patna Medical College and Hospital, Patna which is apparent from the order as contained in Annexure-A dated 12.7.2012. It has also been stated that the petitioner had, on earlier occasion, had filed I.A. No. 5234 of 2012 in C.W.J.C. No. 13528/2012 challenging the order of his transfer. However, he was permitted to withdraw the same with a liberty to assail it in a separate writ application. However, this Court has made observation in the aforesaid order, a copy of which has been appended as Annexure-D, that Umesh Sharma has been transferred to Darbhanga only after the hearing has commenced in the batch of writ application. The Court has further observed that it is unfortunate that it needed the intervention of the Court for doing that when fairness required the authorities to act suo motu after observation of Division Bench in the public interest litigation. It is stated that a decision has been taken at the highest level for transferring all the employees whose conduct is in question and is being investigated in the on going vigilance inquiry, from one Medical College to another. It is also stated that vide Annexure-E, which is a circular of the State Government addressed to all the concerned, the power appears to have been delegated to the Superintendent of Patna Medical College and Hospital, Patna regarding appointment, transfer and posting within the Medical College with regard to Class-III and Class-IV employees. It is also reflected in the Annexure-E that so far transfer from one Medical College to another Medical College and Hospital is concerned that can be done by the Director-in-Chief.

8. Learned counsel for the State has submitted that the aforesaid decision of the Government contained in the letter dated 20.1.1992 was considered in detail by the Division Bench of this Court in Md. Kalimullah and Others Vs. State of Bihar and Others, . The Division Bench has clearly laid down that the aforesaid decision shows that all the Medical Colleges and Hospitals in Bihar have one and common cadre and Director-in-Chief would be entitled to make a transfer of Class-III employees from one Medical College to another. Relevant part of the Health

Manual has been brought on record as Annexure-G series. As per the decision No. 7759 dated 9th June, 1916, the Director of Health Services was declared to be the appointing authority in respect to all the non-gazetted appointments in the department including the Subordinate Medical Service. However, power to appoint and to take disciplinary action against the ministerial and inferior Government servant, whether temporary or permanent belonging to different Medical Colleges was delegated to its respective. Superintendents. A subsequent order of Government dated 3.3.2001 has also been brought on record to show that power to appoint/promote/transfer which was delegated to different authorities mentioned in paragraph No. 3 thereof has been recalled. However, for the Hospitals that power has not been recalled by way of exception but it has been clarified that the same could be exercised only after following due procedure of appointment and further that, before issuing appointment letters approval of the Directorate of Health Services would be required.

9. Upon appreciation of rival contention I do not find force in the submissions raised on behalf of the petitioner. The first submission that the Rules which were governing the filed, specially as contained in Annexure-26, cannot be superseded by administrative instruction, as the same, in view of provisions in Article 313 and the subsequent Government notification as noticed by the Division Bench in Koshi Project Worker's Association (supra) would be deemed to have been framed under the proviso to the Article 309 of the Constitution of India, prima facie appears to be very attractive. However, upon deeper scrutiny the aforesaid submission, so far it concerns the present case, does not seem to be tenable for the following reasons. So far the Rules for the management of the Patna Medical College and Hospital, Patna as contained in Annexure-26 are concerned, it has been stated in paragraph 16 of the I.A. No. 6605 of 2012 filed by the petitioner that these rules were in vogue when the petitioner was appointed and are yet to be amended or substituted by any subsequent statutory rules framed under Article 309 of the Constitution. Since appointing authority as well as the disciplinary authority of all the non-gazetted staff of the Patna Medical College and Hospital, Patna except British Nursing Sisters was the Superintendent of the Patna Medical College and Hospital, Patna, the State authorities or the Director-in-Chief cannot usurp the power of transfer in its hand on the strength of administrative instruction issued by the State Government. However, from the abstract of the Health Manual brought on record as Annexure-G to the counter affidavit filed on behalf of the respondent No. 2, it appears that Section 3 thereof provides that the Director of Health Services would-be the appointing authority in respect of all the non-gazetted employees in the Department including the subordinate medical services. Such decision was taken vide Reference No. 7759 dated 9.6.1916 itself. Thus, it can safely be construed that all the subordinate employees were under overall control of Director and he was appointing authority of all non-gazetted employees. Further, it appears from Section 14 of the aforesaid Health Manual that certain powers of the Director of Health Services were delegated to the various subordinate officials and under Clause 32 thereof,

it has been stated that power to appoint and to take disciplinary action against the ministerial and inferior Government servant, whether temporary or permanent in nature, was delegated to the Superintendent of the concerned Medical College in case of the employees of that particular Medical College. Learned counsel for the petitioner, though has placed reliance upon the Rule 13 of the aforesaid Management Rule of Patna Medical College and Hospital, but he forgot to mention Clause 8 thereof which is reproduced as under for better appreciation:--

8. He shall exercise such powers of control over the subordinate staff as may be delegated to him by the local Government under Rule XV of the Rules published by the Government of India in the Home Department under notification No. F-472-23, dated the 21st June, 1924.

10. It would be clear from the Rule 8 that the Superintendent could exercise power and control over subordinate staff as may be delegated by the local Government time to time. Since he was delegated with such power, Clause 13 had come into existence but Clause 8 clearly lays down that this power would always be subject to the extent of delegation by local Government. Thus, it can safely be construed that such exercise of power of control etc. of the Superintendent would be at the pleasure of the State Government as the original power vests in it. By now it is well settled that to "delegate" to another is not to "denude" yourself as has been noticed and held by a Division Bench of Orissa High Court in J.C. Budharaja Vs. State of Orissa and Others, . It has been held that the delegating body will retain not only power to revoke the grant, but also power to" act concurrently on matters within the area of delegated authority except in so far as it may already have become bound by an act of its delegatee.

11. Relevant passages from the aforesaid judgment are being reproduced as under:--

8. It is an accepted position in law, that to "delegate" to another is not denude yourself. As was observed by Wills. J. in Huth v. Clarka : 25 Q.B.D. 391. "In my opinion the word, in its general sense and as generally used, does not imply, or point to, a giving up of authority, but rather the conferring of authority upon someone else". As observed by Lord Coleridge, C.J., 25 Q.B. 304, the word "delegation" implies that powers are committed to another person or body which are as a rule, always subject to resumption by the power delegating. The person delegating does not denude himself. (Per Wharton's Law Lexicon, 1976 Reprint Ed. at page 316). Delegation implies also the power to withdraw delegation. As indicated in Wharton's Law Lexicon, delegation is a sending away: or a putting into commission; the assignment of a debt to another; the entrusting another with a general power to act for the good of those who depute him. The word "delegate" means little more than an agent. An agent exercises no power of his own but only the powers of his principal. The observation in Huth's case (supra) was referred to in Roop Chand Vs. State of Punjab, . In general, a delegation of power does not imply parting with authority. The delegating body will retain not

only power to revoke the grant, but also power to act concurrently on matters within the area of delegated authority except in so far as it may already have become bound by an act of its delegate. [See *Battelley v. Finsbury Borough Council*: (1958)56 LGR 165].

9. In *Corpus Juris Secundum*, Volume 26, "delegate" has been described as follows:--

As a noun, a person sent and empowered to act for another, one deputed to represent another in a more popular but less accurate sense, a regularly selected member of a regular party convention.

As a verb, in its general sense and as generally used, the term does not imply, or point to, giving up of authority, but rather the conferring authority upon someone else.

At common law, it is the transfer of authority by one person to another, the act of making or commissioning a delegate.

Expression "delegation of authority or power" is a term which like the word "delegate" does not imply a parting with powers by the person who grants the delegation, but points rather to the conferring of an authority to do things which otherwise that person would have to do himself.

In *Collins Cobuild English Dictionary* the word "delegate" has been stated to be a person who is chosen to vote or make decisions on behalf of a group of other people. If you delegate duties, responsibilities, or power to someone, you give them those duties, those responsibilities, or that power so that they can act on your behalf. If you are delegated to do something you are given the duty of acting on someone else's behalf by making decisions, voting, or doing some particular work.

In *Black's Law Dictionary*, 6th Edition, the word "delegate" has been stated to mean a person who is appointed, authorized, delegated or commissioned to act in the stead of another. Transfer of authority from one to another. A person to whom affairs are committed by another. "Delegation" according to said dictionary means, instructing another with a general power to act for the good of those who depute him; transfer of authority by one person to another.

According to *Venkataramaiya's Law Lexicon*, "delegation" as the word generally used does not imply a parting with powers by the person who grants the delegation, but points rather to a conferring of an authority to do things which otherwise the person would have to do himself. XXXX.

12. Similar view has been taken by a Full Bench of the Punjab and Haryana High Court in Civil Writ No. 3612 of 1973 (*Karnail Singh Vs. The State of Punjab and others* :). Relevant passages from the aforesaid judgment are reproduced as under:--

14. xxxx It is well-known that the delegation of the principal's authority to his

agent does not by itself result in the abdication of the principal's power in favour of the agent. Even after a principal delegates his power to an agent, he can nevertheless exercise the same himself unless the agent has already exhausted the power by virtue of the authority vested in him by the principal. A handy illustration is available in the case of a house-owner who executes a power of attorney in favour of his agent to sell his house. So long as the house is not sold out, the house-owner himself can dispose of the same notwithstanding the delegation made in favour of his agent. Similarly an authority competent to appoint a person (which is the meaning I gave to the expression "appointing authority") does not cease to be the appointing authority by merely authorizing a lower officer to make the appointment.

15. Reference can with advantage be made in this connection to the observations of Willis, J. in *Huth v. Clarke* L.R., (1890)25 Q.B. 391.

Delegation, as the word is generally used, does, not imply a parting with power by the person who grants the delegation, but points rather to the conferring of an authority to do things which otherwise that person would have to do himself. It is never used by legal writers, so far as I am aware, as implying that the delegating person parts with his power in such a manner as to denude himself of his rights.

The above quoted passage from the judgment of the House of Lords in *Huth's* case (*supra*) has been approved by their Lordships of the Supreme Court in *Gwalior Rayon Silk Mfg. (Wvg.) Co. Ltd. Vs. The Asstt. Commissioner of Sales Tax and Others*, in the following word:--

Delegation is not the complete handing over or transference of a power from one person or body of persons to another. Delegation may be defined as the entrusting, by a person or body of persons, of the exercise of a power residing in that person or body of persons, to another person or body of persons, with complete power of revocation or amendment remaining in the grantor or delegator. It is important to grasp the implications of this, for, much confusion of thought has unfortunately resulted from assuming that delegation involves, or may involve, the complete abdication or abrogation of a power. This is precluded by the definition. Delegation often involves the granting of discretionary authority to another, but such authority is purely derivative. The ultimate power always remains in the delegator and is never renounced.

It is, therefore, clear that the State Government does not denude itself of its power to appoint an Excise Inspector by merely delegating the same of the Excise and Taxation. Commissioner.

13. This Court is also in full agreement with the views expressed in the aforesaid decision.

14. That apart Rule 13 only speaks about the appointment, discharge or punish the non-gazetted staff but not about transfer. However, even if it is assumed that

the power of transfer within the Patna Medical College and Hospital, Patna would be deemed to have been there but the Rules are silent on transfer of the Class-III or IV employees from one Medical College to another Medical College. There is no quarrel with the proposition that pre-independence rules, having attained statutory provision as per the mandate of Article 313 and as per the subsequent notification of the State Government as mentioned above, cannot be replaced or altered by administrative action, however, under the provision as contained in Rule 8 of the aforesaid Rules itself, the final control regarding delegation of such power has been given to the local Government which is now State of Bihar. Learned counsel for the petitioner has placed strong reliance upon a decision of the Apex Court in *Sant Ram* (supra), however, the Apex Court has clearly laid down in paragraph No. 7 that the Government, though cannot amend or supersede statutory rules by administrative instruction, but if the rules are silent on any particular point, Government can fill up the gap and supplement the rules and issue instructions not inconsistent with the rules already framed. In the case in hand, though the power to appoint or discharge or punish as per the Annexure-26 has been given to the Superintendent but in view of the Rule 8 it can be safely construed that the delegator has retained the powers with him for inter-medical college transfer which would be apparent from Annexure-G. The subsequent circular dated 19/20.6.1992 (Annexure-E) is nothing but recasting of the delegation and defining the cadre of Class-III employees of the medical colleges of the State of Bihar. In view of the provisions contained in Annexure-E and Rule 8 of Annexure-26, the same cannot be held to be in violation of the constitutional provision.

15. The Division Bench of this Court in *Md. Kalimullah and Ors.* (supra) while considering in detail the decision of the Government as contained in letter dated 19.6.1992, which has been brought by the respondent No. 2 as Annexure-E to the counter affidavit, has observed that all the Medical Colleges and Hospitals of the Bihar has one cadre as per the decision of the Government contained therein and that has been upheld. Though Mr. Kanth, learned Senior Counsel appearing for the petitioner submitted that this decision appears to be in per incuriam due to non-consideration of the constitutional provisions of the Articles 309 and 313. However, in view of the facts and circumstances which has been discussed above there was no such requirement at all as the very basis of such argument is devoid of any foundation inasmuch as the Rules 8 to Section II of the Annexure-26 clearly lays down that the powers enjoyed by the Superintendent would be subject to the delegation of power by the State Government. That gives the State Government unfettered power to amend, modify or even recall the delegated powers. Aforesaid provision coupled with the provisions of Health Manual brought on record as. Annexure-G series empowers the State Government to delegate, modify, alter or recall its earlier delegation.

16. In above view of the matter the submission raised on behalf of the petitioner that the aforesaid decision of the Division Bench would be in per incuriam due to non-consideration of the constitutional provisions is held to be not tenable and

rejected.

17. Another issue has been raised that the petitioner being of Clerk of Basic Grade cannot be transferred out of the Patna Medical College and Hospital, Patna cadre. However, it appears from the statement of the petitioner himself specially from the letter written to the Director in the year 1974, as contained in Annexure-24 requesting him to adjust against a Lower Division Clerk namely Laxman Narain Tiwary who was working against the Selection Grade Post and has been transferred out of Patna Medical College and Hospital. Patna that at that point of time also the Lower Division Clerks were being transferred from one Medical College to another. The petitioner was finally adjusted against one Sri Ram Chandra Prasad who was working as Selection Grade Clerk and had been transferred. So far the issue that only Selection Grade Clerk can be transferred out of Patna Medical College and Hospital, Patna and not the clerks of the Basic Grade is concerned, no rule, regulations or instruction could be shown on behalf of the petitioner. However, the Division Bench of this case in *Md. Kalimullah* (supra) has observed that it is well settled that Selection Grade is a scale within a cadre. 70 percent posts in a cadre are of Basic Grade Scale, 20 percent posts are of Junior Selection Grade Scale and 10 percent posts are of Senior Selection Grade. Thus, the aforesaid limb of argument has also to be rejected. So far the issue of mala fide raised by the petitioner, is concerned, that, in my opinion, is also not tenable. Though the petitioner has tried to explain from his pleadings that there is nothing against him regarding the irregularities in purchase of medicines etc., however, in view of the observation of the Division Bench dealing with the issue of the irregularities and conduct of the petitioner, has required him to be transferred out of that office, that submission is also not acceptable. A decision to transfer him Nalanda Medical College and Hospital was of course recalled but now a decision has been taken by the State Government to transfer several clerks of the Patna Medical College and Hospital, Patna in view of the on going investigation by the Vigilance Department. From Annexure-6 to the counter affidavit filed on behalf of the Intervenor Vijay Narain Rai it appears that decision to transfer all the concerned employees to facilitate proper investigation by Vigilance Department has been taken at the highest level. It is not only petitioner who has been transferred but it is apparent from Annexure-A to the counter affidavit filed on behalf of the State that several other clerks also have been transferred from one Medical College to other Medical Colleges. From para (Ga) Annexure-1 to the counter affidavit filed by the aforesaid intervenor, which a joint report submitted by the authority, it appears that the petitioner was not co-operating during the course of enquiry.

18. So far the issue of choice posting is concerned that appears to have half-heartedly been raised by the petitioner as learned counsel could not point out that the petitioner has requested for his transfer to any Medical College other than Patna Medical College and Hospital.

19. Before parting with the matter I must indicate that the aforesaid facts and

circumstances do not appear to have been raised and considered by the learned Single Judge at time of hearing on 3.9.2012 as the I.A. No. 6605 of 2012 as well as the counter affidavit on behalf of the Respondent No. 2 came to be filed subsequent thereto.

20. In above view of the aforesaid discussion this Court is not persuaded to intervene into this matter as no valid ground could be set forth by the petitioner for quashing of the transfer order as contained in Annexure-1. Accordingly, this writ application is dismissed.