

THE HIGH COURT OF MADHYA PRADESH
Writ Petition No.19117/2019
Santosh Kumar Sihare Vs. The State of M.P. and others

Gwalior, Dated :17/10/2019

Shri M.P.S. Raghuvanshi, Advocate for petitioner.

Shri S.N. Seth, Government Advocate for State.

Shri R.B.S. Tomar with Shri S.S. Rawat, Advocate for respondent no.3.

This petition under Article 226 of the Constitution of India has been filed against the order dated 4/9/2019 passed by Deputy Secretary, Urban Administration and Housing Department, by which the representation made by the petitioner for cancellation of his transfer against the order dated 22/6/2019 has been rejected.

2. This case has an exchequered history. The petitioner is working on the post of Revenue Sub Inspector, whereas the respondent no.3 is also working on the post of Revenue Sub Inspector. By order dated 20/6/2019, the petitioner was transferred from Municipal Council, Datia to Municipal Council, Jaura, District Morena on the post of Incharge Chief Municipal Officer. By the same order, the respondent no.3, who was working on the post of Incharge Chief Municipal Officer, Municipal Council, Jaura, District Morena was directed to work

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on his substantive post in the same Municipality. It appears that on 22/6/2019 the petitioner was relieved from Municipal Council, Datia and accordingly, he submitted his joining at his transferred place on 22/6/2019 itself. The President, Municipal Council, Jaura, District Morena also accepted the joining of the petitioner by passing an order dated 22/6/2019 itself. It appears that by order dated 22/6/2018 the transfer order of the petitioner as well as of respondent no.3 was cancelled, which was challenged by the petitioner by filing a petition before this Court, which was registered as Writ Petition No.12388/2019. The said writ petition was disposed of by order dated 15/7/2019 with the following observations:-

“The fact that earlier vide order 20.06. 2019, name of the petitioner was placed at Sr. No. 13, and the petitioner was transferred to Nagar Parishad, Jaura, Distt. Morena and in pursuance to that order he was relieved on 22.06. 2019 and as per the petitioner, he has submitted his joining at Nagar Parishad, Jaura District Morena on 22.06. 2019 and vide impugned order respondent no. 3 is transferred to Nagar Parishad, Jaura Zila Morena and there are no orders regarding joining of the petitioner.

Therefore, in such circumstances this court deems it appropriate to dispose of this petition with direction to the petitioner to

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submit representation within seven days to the respondents/State who shall consider all the grievances of the petitioner and pass a self contained speaking order and communicate the same to the petitioner within further period of 15 days and till then status-quo with respect to posting of the petitioner be maintained that in case he has submitted his joining at the transferred place i.e. Nagar Parishad, Jaura, Distt. Morena, he may be permitted to work till disposal of the representation.”

3. It appears that the respondent no.3 filed a review petition, which was registered as R.P. No.987/2019 and the same was disposed of by order dated 29/7/2019 with the following observations:-

“From perusal of the operative para of the order dated 15.7.2019 it was directed as under :

“Therefore, in such circumstances this court deems it appropriate to dispose of this petition with direction to the petitioner to submit representation within seven days to the respondents/State who shall consider all the grievances of the petitioner and pass a self contained speaking order and communicate the same to the petitioner within further period of 15 days and till then status-quo with respect to posting of the petitioner be maintained that in case he has submitted his joining at the transferred place i.e. Nagar Parishad, Jaura, Distt. Morena, he may be permitted to work till disposal of the representation”.

From the aforesaid, it is clear that the

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Hon'ble Court has directed to maintain status quo with respect to posting of the petitioner in case he has submitted joining at the transferred place. Therefore, the stand taken by the petitioner in the present review petition that status quo has wrongly been directed to the maintained rather the court has taken into consideration the aspect that such joining of petitioner was not apparent on the face of record, therefore, the word "in case" has been used in the impugned order. The authorities are required to verify the aspect of joining of the respondent no.3 herein above as it will be a factual dispute. Thus the stand taken by the petitioner in the review petition does not appear to be genuine.

Accordingly, this review petition stands dismissed with no order as to the cost."

4. Being aggrieved by the order passed by the coordinate Bench in R.P. No.987/2019, the respondent no.3 filed a Writ Appeal No.1417/2019. In the said writ appeal, the Deputy Director, Urban Administration, Gwalior made a statement that in pursuance of order dated 15/7/2019 the representation made by the petitioner has already been dismissed by order dated 4/8/2019. The Division Bench took exception to the statement made by the Deputy Director and passed the following order:-

"It is surprising to note that the said rejection order has not yet been communicated to any of the concerned party thereby allowing respondent No.3 to reap undue advantage of the

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interim protection granted by order dated 15.07.2019.

It is thus directed that the present incumbents on the post of Principal Secretary and Dy. Director, Urban Administration, Gwalior shall file separate affidavits detailing the events which happened after passing of the order dated 04.08.2019 and the efforts made by them to communicate the said order to all the concerned parties.”

5. It is submitted by the counsel for the petitioner that although his joining at the transferred place was accepted on 22/6/2019 itself, however, the respondent no.3 did not allow him to occupy the seat and all important documents were retained by him and abusive language was also used. It was also mentioned in the application that the respondent no.3 was promoted to the post of Revenue Sub Inspector on 26/2/2017, whereas he was promoted on the post of Revenue Sub Inspector on 4/2/2010. It was also mentioned that the respondent no.3 is junior by 8 years. It appears that by order dated 4/9/2019, which was referred by the Deputy Director as order dated 4/8/2019 before the Division Bench in the writ appeal, the representation made by the petitioner has been cancelled. The present petition has been filed challenging the order dated 4/9/2019. Since the writ appeal

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No.1417/2019 was pending and the question that whether the impugned order was passed on 4/8/2019 or 4/9/2019, was in question, therefore, this Court by order dated 13/9/2019 adjourned the matter *sine die* with a liberty to the parties to make a mention after the disposal of the writ appeal. It is submitted by the counsel for the petitioner that by order dated 23/9/2019, writ appeal No.1417/2019 has been disposed of and the explanation given by the Deputy Director has been accepted and it has been held that in fact the impugned order was passed on 4/9/2019. Thus, it is submitted by the counsel for the petitioner that now there is no impediment before this Court to proceed further with the hearing.

6. The respondent no.3 has also filed his return.

7. It is submitted by the counsel for the petitioner that once the order dated 20/6/2019 was executed, then the authorities were not correct in cancelling the executed order. It is further submitted that although the joining of the petitioner was accepted on 22/6/2019, but the respondent no.3 created all sorts of hindrances in discharge of his duties. It is further submitted by the counsel for the petitioner that the respondent no.3 was

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initially appointed on 1/1/1988 in Municipal Council, Jaura itself and from the date of his initial appointment, he is working in the said Municipal Council. The respondent no.3 is junior by 8 years and he was given the charge of Incharge CMO in the year 2017.

8. *Per contra*, it is submitted by the counsel for the respondent no.3 that after cancellation of transfer by order dated 22/6/2019, the petitioner was relieved from Municipal Council Jaura, District Morena for enabling him to join at his original place of posting, i.e. Municipal Council, Datia. It is further submitted that merely because an order has been executed would not debar the authorities from cancelling the transfer order. Further, the petitioner is claiming that he should be given the charge of the post of Chief Municipal Officer, whereas he has no substantive right to claim so and the writ petition is not maintainable. Further, it is submitted by the counsel for the respondent no.3 that he had not represented against the order dated 20/6/2019 and the respondents on their own have cancelled the said order.

9. Heard learned counsel for the parties.

10. The undisputed facts are that both the petitioner and the

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respondent no.3 are holding the substantive post of Revenue Sub Inspector. It is also not in dispute that the petitioner is 8 years senior to the respondent no.3. It is also not in dispute that the respondent no.3 was appointed in the Municipal Council Jaura and from the date of his appointment, he is working in the said Municipal Council.

11. The Supreme Court in the case of **State of Haryana vs. S.M. Sharma and others** reported in **AIR 1993 SC 2273** has held as under:-

"9. It is only a posting order in respect of two officers. With the posting of Ram Niwas as Executive Engineer Sharma was automatically relieved of the current duty charge (if the post of Executive Engineer. Sharma was neither appointed/promoted/posted as Executive Engineer nor was he ever reverted from the said post. He was only holding current duty charge of the post of Executive Engineer. The Chief Administrator never promoted Sharma to the post of Executive Engineer and as such the question of his reversion from the said post did not arise. Under the circumstances the controversy whether the powers of the Board to appoint/promote a person to the post of an Executive Engineer were delegated to the chairman or to the chief Administrator, is wholly irrelevant.

10. Sharma was given the current duty charge of the post of Executive Engineer under the orders of the Chief Administrator and the

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said charge was also withdrawn by the same authority. We have already reproduced above Rule 4(2) of the General Rules and Rule 13 of the Service Rules. We are of the view that the Chief Administrator, in the facts and circumstances of this case, was within his powers to issue the two orders dated June 13, 1991 and January 6, 1992.

"11. We are constrained to say that the High Court extended its extraordinary jurisdiction under Article 226 of the Constitution of India to a frivolity. No one has a right to ask for or stick to a current duty charge. The impugned order did not cause any financial loss or prejudice of any kind to Sharma. He had no cause of action whatsoever to invoke the writ jurisdiction of the High Court. It was a patent misuse of the process of the Court "

The Supreme Court in the case of **Ramakant Shripad Sinai Advalpalkar vs. Union of India and Others**, reported in **1991 Supp (2) SCC 733** has held as under:-

"5. The arrangements contemplated by this order plainly do not amount to a promotion of the appellant to the post of Treasurer. The distinction between a situation where a government servant is promoted to a higher post and one where he is merely asked to discharge the duties of the higher post is too clear to require any reiteration. Asking an officer who substantially holds a lower post merely to discharge the duties of a higher post cannot be treated as a promotion. In such a case he does not get the salary of the higher post; but gets only what in service parlance is called

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a "charge allowance". Such situations are contemplated where exigencies of public service necessitate such arrangements and even consideration of seniority do not enter into it. The person continues to hold his substantive lower post and only discharges the duties of the higher post essentially as a stop-gap arrangement."

12. In the light of the aforesaid judgments, it is clear that neither the respondent no.3 nor the petitioner has any legal statutory vested or constitutional right to claim the post of current charge. However, in the present case, the petitioner was transferred on the post of Incharge Municipal Council Jaura, District Morena. It is the case of respondent no.3 that he never represented against the transfer order dated 20/6/2019. Thus, it is clear that without assigning any reason, the respondents have cancelled the order of transfer dated 20/6/2019 specifically when the respondent no.3 was posted in the Municipal Council in the year 1988 and he is there for the last 30 years. It is fairly conceded by the counsel for respondent no.3 that he was never transferred from Municipal Council Jaura at any point of time. In the present case, it is the claim of the petitioner that after the original transfer order dated 20/6/2019 was passed, he submitted

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his joining on 22/6/2019, which was accepted by the President of the Municipal Council, Jaura, District Morena on the same day. Although this Court while deciding the Writ Petition No.12388/2019 had directed that in case if the petitioner has submitted his joining at the transferred place, then he may be directed to work till disposal of the representation and review petition filed against the said order was also dismissed, but it is clear from the return filed by respondent no.3 that in fact the petitioner had joined at the transferred place on 22/6/2019. The respondent no.3 alongwith his return has filed the copy of the order dated 22/6/2019 passed by himself, thereby relieving the petitioner from the Municipal Council Jaura, District Morena. The said order has been placed on record as Annexure R/3-1. It is surprising that when the joining of the petitioner on the post of Incharge Chief Municipal Officer was already accepted, then how the respondent no.3 could pass such an order in the capacity of Incharge Chief Municipal Officer. Once the transfer order was executed and the petitioner had joined as Incharge Chief Municipal Officer, then the respondent no.3 was no more Incharge Chief Municipal Officer. Since the order dated

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22/6/2019, Annexure R/3-1, was passed by respondent no.3 himself by which the petitioner was relieved, it is clear that the respondent no.3 has also admitted that the petitioner had already submitted his joining on 22/6/2019 and his joining was accepted, otherwise there was no reason for the respondent no.3 to relieve the petitioner from Municipal Council Jaura, District Morena. Therefore, it is undisputed that the order dated 20/6/2019 was executed by the petitioner by submitting his joining on 22/6/2019.

13. The Division Bench of this Court in the case of **Manmohan Sharma Vs. The State of M.P. by order dated 2/2/2018 passed in W.A. No.1249/2017** has held as under:-

“Thus the grievance raised by the Appellant against the cancellation of executed order of transfer.

True it is, as held by learned Single Judge that the transfer is an incident of service and an employee cannot claim it as a matter of right; however, if an order of transfer is executed and if the employer intends to modify the same, incumbent it would be upon the Competent Authority to have sound administrative reasons to recall the executed order, because it not only have a bearing upon an employee, but it also has the effect on the Government exchequer of bearing the expenses of transfer.

In view whereof, the impugned order

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08.12.2017 passed in W.P No.21486/2017 deserves to be set aside. The order of transfer dated 05.12.2017 is quashed. Interim order dated 19.12.2017 is made absolute.

Appeal is disposed of finally in above terms.”

14. Thus, once the order dated 20/6/2019 was already executed by the petitioner, then the respondents should not have cancelled the said order. Further, in the impugned order dated 4/9/2019 the respondents have not clarified as to what persuaded them to cancel the executed order dated 20/6/2019 within a period of 2 days only specifically when the respondents have themselves mentioned that the petitioner is senior to the respondent no.3 by 8 years. Although the respondents have mentioned in the impugned order that it is the prerogative of the State to post an employee at a particular place, but once the order was already executed and secondly when the respondent no.3 is working in the Municipal Council Jaura, District Morena for the last 30 years and thirdly, when it is the stand of respondent no.3 that he has never represented against the transfer order dated 22/6/2019, then it was necessary for the respondents to explain as to what persuaded them to cancel the executed order. Even in the return

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the respondent no.3 has not stated anywhere that he had made any representation against the order dated 20/6/2019.

15. Be that whatever it may.

16. Once the order was already executed by the petitioner and his joining was accepted at the transferred place, then the same should not have been cancelled without any cogent reason. Under these circumstances, this court is of the considered opinion that not only the order dated 22/6/2019 by which the executed transfer order dated 20/6/2019 was cancelled is bad, but the order dated 4/9/2019 by which the representation of the petitioner has been cancelled is also bad.

17. At this stage, it is submitted by the counsel for the respondent no.3 that in fact it is for the respondent no.1 to explain that why it has cancelled the order and since the respondent no.1 has not filed its return, therefore, no adverse inference should be drawn against the respondent no.1.

18. From the impugned order dated 4/9/2019, it is clear that a fight is going on between the petitioner and respondent no.3 over the question of taking of charge and the respondent no.3 was not permitted to discharge his duties and even some abusive

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language was used. Furthermore, it is not the case of respondent no.3 that he had ever represented against the order dated 20/6/2019. When the respondent no.3 was not aggrieved by the order dated 20/6/2019, then it is not necessary to seek any explanation from the respondent no.1 for the simple reason that the respondent no.3 is posted in Municipal Council Jaura, District Morena for the last 30 years without any break.

19. Accordingly, this petition succeeds. The order dated 22/6/2019 as well as the order dated 4/9/2019 are hereby quashed. The respondent no.3 is directed to work on his substantive post of Revenue Sub Inspector as directed by order dated 20/6/2019 and the respondent no.3 is directed not to create any hindrance in the smooth functioning of the office of Incharge Chief Municipal Officer Jaura, District Morena. In case if the respondent no.3 files an application for his transfer to some other Municipal Council in the capacity of Revenue Sub Inspector, then the same shall be considered sympathetically by the respondents. It is further directed that since the officers of the rank of Revenue Sub Inspector are fighting for holding the post of Chief Municipal Officer, therefore, the State Government shall

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immediately make an appointment of regular Chief Municipal Officer, Jaura, District Morena.

20. With aforesaid observations and directions, the petition is finally **disposed of**.

Arun*

(G.S. Ahluwalia)
Judge