

General Officer Commanding-In-Chief and Another

Vs

Dr Subhash Chandra Yadav and Another

Civil Appeal No. 754 of 1988

(Ranganath Misra, M.M. Dutt JJ)

25.02.1988

JUDGMENT

DUTT, J. –

1. As elaborate submissions have been made by both the parties at the preliminary hearing of the special leave petition, we proceed to dispose of the points involved in the case on merits after granting special leave.
2. The appeal is directed against the judgment of the Allahabad High Court striking down Rule 5-C of the Cantonment Funds Servants Rules, 1937, hereinafter referred to as 'the Rules', as ultra vires the provisions of the Cantonments Act, 1924 and also quashing the impugned order of transfer dated October 27, 1986 passed by the GOC-in-Chief, Central Command.
3. The respondent, Dr Subhas Chandra Yadav, was appointed a Sub-Charge, Cantonment General Hospital, Lucknow, by the Cantonment Board by the appointment letter dated April 23, 1969. He was confirmed in that post on December 1, 1969 by an order issued by the Cantonment Board. The conditions of service of the employees of the Cantonment Board, which is a statutory body, are governed by the provisions of the Rules. At the time of the appointment of the respondent, his services were not transferable as per the provisions of the Rules then prevailing. His appointment letter also did not include any condition for transfer from one Board to another.
4. By a notification dated December 16, 1972, the Rules were amended and a new rule, being Rules 5-C was added to the Rules. Rule 5-C reads as follows :

5-C (1) The service of a servant shall be transferable from one post in one Board to another post in another Board :

Provided that :

- (a) The transferor and transferee Boards are situated within the same State; and
 - (b) The posts in both the Boards are similar and carry the same scales of pay.
- (2) Subject to such general directions as the Central Government may issue from time to time, the Officer Commanding-in-Chief, the Command, or such other authority as may be authorised by the Central Government in this behalf, shall be the competent authority to transfer a servant under this Rule.

(3) A servant on transfer under sub-rule (1) from one Board to another may, for the purposes of determination of seniority and eligibility for promotion opt :

(i) to be governed by the conditions applicable in this behalf to the servants of the Board from which he has been transferred (hereinafter referred to as the transferor Board); or

(ii) to be governed by the conditions applicable in this behalf to the servants of the Board to which he has been transferred (hereinafter referred to as the transferee Board) :

Provided that where a servant does not opt under this rule within thirty days from the date of assumption of charge in the transferee Board, he shall, for purposes of promotion and seniority, be governed by the conditions applicable in this behalf to the servants of the transferor Board.

(4) Save as provided in sub-rule (3), the terms and conditions of service of a servant transferred under this rule shall be deemed to be those applicable to the servants of the transferee Board.

(5) Where the servant opts under clause (ii) of sub-rule (3), the service put in by him under the transferor Board before his transfer shall be deemed to be service under the transferee Board.

5. For the first time, Rule 5-C provided for the transfer of the service of the employees of the Cantonment Boards from one post in one Board to another post in another Board within the same State. The GOC-in-Chief, Central Command, by his order dated October 27, 1986 transferred the respondent from the Cantonment General Hospital, Lucknow, to the Cantonment General Hospital, Varanasi, in place of one Dr. Bansal, who was also transferred by the same order to the Cantonment General Hospital, Bareilly.

6. Being aggrieved by the said order of transfer passed under Rule 5-C of the Rules, the respondent filed a writ petition in the Allahabad High Court challenging the validity of the order of transfer on the ground that Rule 5-C was ultra vires the provisions of the Cantonments Act and, as such, void.

7. As has been stated already, the High Court has struck down Rule 5-C holding, inter alia, that the services of the employees of the Cantonment Board are neither centralised nor is there a common State level service and that the impugned Rule 5-C, having provided for the transfer of the employees of one Board to another Board by the GOC-in-Chief, Central Command, is beyond the rule making power of the Central Government as contained in clause (c) of sub-section (2) of Section 280 of the Cantonments Act as it stood before it was amended. Hence this appeal.

8. Section 280 of the Cantonments Act confers power on the Central Government to make rules. The relevant portion of Section 280 of the Cantonments Act is as follows :

280. Power to make Rules. - The Central Government may, after previous publication, make rules to carry out the purposes and objects of this Act.

(2) In particular, and without prejudice to the generality of the foregoing power, such rules may provide for all or any of the following matters, namely :

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(c) the tenure of office, salaries and allowances, provident funds, pensions, gratuities, leave of absence and other conditions of service of servants of Boards;

9. Clause (c) of sub-section (2) of Section 280 was substituted by the amendment of the Cantonments Act by Act 15 of 1983. Before such amendment in 1983, clause (c) was as follows :

(e) the appointment, control, supervision, suspension, removal, dismissal and punishment of servants of Boards :

10. It is apparent that before the amendment, clause (c) did not confer on the Central Government power to frame rules regarding conditions of service which necessarily include transfer of the employees of the Boards. Rule 5-C, which was inserted in the Rules by a notification dated November 23, 1972 providing for the transfer of the employees of the Cantonment Boards, is on the fact to it contrary to the rule making power of the Central Government, as it stood before the amendment of the Act in 1983.

11. It is, however, contended by Mr. Raja Ram Aggarwal, learned counsel appearing on behalf of the appellants, that after the amendment of clause (c) of sub-section (2) of Section 280 of the Cantonments Act, conferring on the Central Government the power to lay down the conditions of service of the employees of the Boards, which include the power to make rules for transfer, Rule 5-C is valid, being quite in conformity with the provisions of the rule making power under Section 280(2)(c) of the Cantonments Act. We are unable to accept the contention.

12. When Rule 5-C was inserted into the Rules, it was void as being contrary to and in excess of the rule making power of the Central Government as contained in the unamended clause (c) of sub-section (2) of Section 280 of the Cantonments Act. It does not become valid merely because of the amendment of clause (c), inter alia, conferring power on the Central Government to frame rules relating to conditions of service.

13. Our attention has been drawn to the provision of sub-section (2) of Section 281 of the Cantonments Act, which provides that all rules made under the Act shall be published in the official gazette and in such other manner, if any, as the Central Government may direct and, on such publication, shall have effect as if enacted in the Act. It is urged on behalf of the appellants that in view of sub-section (2) of Section 281, Rule 5-C became a part of the statute and, accordingly, the question of its being contrary to the provisions of the Cantonments Act does not at all arise.

14. This contention is unsound. It is well settled that rules framed under the provisions of a statute form part of the statute. In other words, rules have statutory force. But before a rule can have the effect of a statutory provision, two conditions must be fulfilled, namely, (1) it must conform to the provisions of the statute under which it is framed; and (2) it must also come within the scope and purview of the rule making power of the authority framing the rule. If either of these two conditions is not fulfilled, the rule so framed would be void. The position remains the same even though sub-section (2) of Section 281 of the Act has specifically provided that after the rules are framed and published they shall have effect as if enacted in the Act. In other words, in spite of the provision of sub-section (2) of Section 281, any rule framed under the Cantonments Act has to fulfil the two conditions mentioned above for their validity. The observation of this Court in *Jestmani Gulabrai Dholkia v. Scindia Steam Navigation Company* [(1961) 2 Scr 811 : AIR 1961 SC 627], relied upon

by Mr. Aggarwal, that a contract of service may be transferred by a statutory provision, does not at all help the appellants. There can be no doubt that a contract of service may be transferred by statutory provisions, but before a rule framed under a statute is regarded a statutory provision or a part of the statute, it must fulfil the above two conditions. Rule 5-C was framed by the Central Government in excess of its rule making power as contained in clause (c) of sub-section (2) of section 280 of the Cantonments Act before its amendment by the substitution of clause (c); it is, therefore, void.

15. It is not disputed that the Cantonment Boards are statutory and autonomous bodies controlled entirely by the Cantonments Act. Each Cantonment Board is an independent body functioning within its limited jurisdiction. The Board is the appointing authority of its employees. The service under the Cantonment Board is not a centralised service nor is it a service at the State level.

16. There is much force in the contention of the respondent that as service under the Cantonment Board is not a centralised service or a service at the State level, the transfer of an employee from one Cantonment Board to another would mean the termination of appointment of the employee in the Cantonment Board from which he is transferred and a fresh appointment in the Board where he is so transferred. The GOC-in-Chief, Central Command, is not the appointing authority of the respondent or the employees of the Cantonment Board, and so transfer of the respondent by the GOC-in-Chief is not permissible. In any event, one autonomous body cannot transfer its employee to another autonomous body even within the same State, unless the services of the employees of these two bodies are under a centralised or a State level service. In this connection, we may refer to a decision of this Court in *Om Prakash Rana v. Swarup Singh Tomar* [(1986) 3 SCC 118 : 1986 SCC (L & S) 398]. Pathak, J. (as His Lordship then was) speaking for the court observed as follows : [SCC p. 126 : SCC (L & S) p. 406, para 9]

As is clear by now, the fundamental basis of the contention that the power of transfer under the Education Act and its Regulations continues in force even after the enactment of the Services Commission Act rests on the assumption that the power of appointment does not include the power of transfer. In our opinion, the assumption is unsustainable. The scheme under the Education Act envisages the appointment of a Principal in relation to a specific college. The appointment is in relation to that college and to no other. Moreover, different colleges may be owned by different bodies or organisations, so that each Principal serves a different employer. Therefore, on filling the office of a Principal to a college, a new contract of employment with a particular employer comes into existence. There is no State level service to which Principals are appointed. Had that been so, it would have been possible to say that when a Principal is transferred from one college to another no fresh appointment is involved. But when a Principal is appointed in respect of a particular college and is thereafter transferred as a Principal of another college it can hardly be doubted that a new appointment comes into existence. Although the process of transfer may be governed by considerations and move through a machinery different from the considerations governing the appointment of a person ab initio as Principal, the nature of the transaction is the same, namely, that of appointment, and that is so whether the appointment be through direct recruitment, through promotion from the teaching staff of the same institution or by transfer from another institution.

17. The observation extracted above clearly supports the contention made on behalf of the

respondent that the employees of one Cantonment Board cannot be transferred to another Cantonment Board inasmuch as the service under the Cantonment Board is not a centralised service or a service at the State level.

18. Mr. Aggarwal, however, submits that the respondent would not be in the least prejudiced by the transfer inasmuch as full safeguard has been provided for in Rule 5-C. The question whether the interest of the transferee has been protected or full safeguard has been provided for by Rule 5-C is quite irrelevant, if it is invalid and void. Moreover, the provisions of Rule 5-C are clumsy and lack clarity and a transfer may affect the transferee prejudicially. It is not necessary for us to discuss how the provisions of Rule 5-C may be prejudicial to the interest of an employee transferred to another Cantonment Board within the State, for, we are of the view that Rule 5-C is ultra vires the provision of the rule making power of the Central Government under the Cantonments Act.

19. The question, however, is whether the Central Government is entitled to framed rules for transfer of the employees of the Cantonment Boards under the substituted clause (c) of sub-section (2) of Section 280 of the Cantonments Act. It is true that under clause (c), as it now stands, the Central Government can frame rules pertaining to conditions of service of the Cantonment Board employees. But, in our opinion, even in spite of substituted clause (c), the Central Government will not be entitled to frame rules for transfer of an employee from one Cantonment Board to another within the State for the reasons stated already, namely, (1) the Cantonment Boards are autonomous bodies; (2) the service under the Cantonment Boards is neither a centralised service nor is it a service at the State level; and (3) any such transfer of an employee will mean termination of service of the employee in the Cantonment Board from where he is transferred and a fresh appointment by the Cantonment Board which he joins on such transfer.

20. So long as the Cantonment Board service is not made a centralised service or at least a State level service, there can be no transfer from one Cantonment Board to another Cantonment Board within the same State. The Central Government had better consider the question of making the Cantonment Board service a centralised service so as to enable one Cantonment Board to transfer its employees to another Cantonment Board.

21. As has been held by the High Court, the Central Government has power to frame rules about the transfer of the servants of the Board in exercise of its powers under clause (c) of sub-section (2) of Section 280 of the Act within the region in respect of which it has jurisdiction. For example, the respondent could be transferred from one hospital of the Cantonment Board, Lucknow, to another hospital under the same Board. But that apart, the Cantonments Act does not authorise the Central Government to frame rules for transfer from one Cantonment Board to another.

22. The High Court was, therefore, quite justified in striking down Rule 5-C of the Rules and in quashing the impugned order of transfer of the respondent.

23. For the reasons aforesaid, the judgment of the High Court is affirmed and this appeal is dismissed. There will, however, be no order as to costs.

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