

Rakesh Kumar Goswami Vs. Human Resource Development

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Court : Jharkhand

Decided On : Jul-18-2013

Appellant : Rakesh Kumar Goswami

Respondent : Human Resource Development

Judgement :

INTHEHIGHCOURTOFJHARKHANDATRANCHI W.P.(S)No.502of2013
RakeshKumarGoswami Petitioner Versus 1.TheStateofJharkhand
2.Director,PrimaryEducation,Deptt.of HRD, GovernmentofJharkhand,Ranchi
3.Director,SecondaryEducation,Deptt.of HRD, Govt.ofJharkhand,Ranchi
4.DeputyCommissioner,Godda 5.DistrictSuperintendentofEducation,Godda
6.DistrictEducationOfficer,Godda 7.InChargeHeadMaster,HighSchool,Sarotia,
Godda,Jharkhand Respondents CORAM
:HON'BLEMR.JUSTICESHREECHANDRASHEKHAR ForthePetitioner
:Mr.PradeepKumarVerma,Advocate FortheRespondents :M/s.AparajitaBhardwaj&
AshishKr.Shekhar,J.C.toG.P.VI 4/18.07.2013 In the writ petition the petitioner has
made the followingprayer: (i) Foradirectiontosetasidetheletterno.677(Law) dated
27/29.09.2012 issued by the Director, Primary Education whereby and
whereunder she rejected the claim of the petitioner for officiating
allowanceanddeputationallowance; (ii) for direction upon the respondents to pay
the Officiatingallowancebecausepetitionerworkedas a High School Teacher
instead of Primary School Teacher during the period 10.09.2005 to 06.09.2010 as
per the lawful direction of the DistrictSuperintendentofEducation,Godda;& (iii)

for direction to set aside the relieving order dated 06.09.2010 issued by the Incharge Head Master, High School Sarotia because it has been issued in violation of direction issued vide letter no. 917 dated 01.09.2010 by the District Education Officer, Godda.

2. The brief facts as stated in the writ petition are that, the petitioner was appointed as a Primary School Teacher. On 10.09.2005 in compliance of order dated 10.06.2005, the petitioner gave his joining in the High School, Sarotia. The petitioner continued to work there till by order dated 01.09.2010, he was relieved to join his parents school. The petitioner moved this Court in W.P.(S) No. 2916 of 2012 seeking a direction upon the respondents for grant of officiating allowance which was disposed of with a direction to the respondents to treat the writ petition as representation of the petitioner and to decide the representation by affording opportunity of hearing to the petitioner. In compliance of direction dated 15.06.2012 of this Court, the representation of the petitioner has been decided by order dated 27/29.09.2012 which has been impugned by the petitioner in the present writ proceeding.

3. Heard learned counsel appearing for the parties and perused the documents on record. 4..

Mr. Pradeep Kumar Verma, learned counsel appearing for the petitioner has raised a contention that order dated 10.06.2005 whereby, it has been ordered that the teachers who have been posted on deputation in the High School would not be entitled for grant of deputation allowance, does not curtail the entitlement for officiating allowance. He submits that there is a distinction between officiating allowance and deputation allowance. What has been ordered in order dated 10.06.2005 is that, the deputation allowance would not be paid to the teachers who have been posted on deputation as a High School Teacher however, it has not been provided in letter dated 10.06.2005 that such person would not be entitled for grant of any officiating allowance. He submits that since the petitioner was posted on a higher post, i.e., as the teacher in a High School, he was holding a higher post, and therefore, he was entitled for grant of officiating allowance in terms of Rule 90 of Jharkhand Service Code. Relying

on the provision as contained in Rule 32 of the Jharkhand Service Code, he submits that the petitioner in pursuance of order dated 10.06.2005 was, in fact, directed to officiate on a higher post, and therefore, he is covered under the provision as contained in Rule 32 of the Jharkhand Service Code. He further submits that in any event, order dated 10.06.2005 is an executive instruction and it would not override the provisions as contained in Jharkhand Service Code which is statutory in nature. He relies on the decisions of the Hon'ble Supreme Court in the cases reported in (2004) 2 SCC 297, (2007) 2 SCC 491, (2009) 4 SCC 34, and (2009) 13 SCC 90.

5. Per contra, Ms. Aparajita Bhardwaj, learned J.C. to G.P. VI appearing for the respondents submits that the order dated 10.06.2005 is specific and it has been provided that the teachers who would be posted on the vacant post in the High Schools, would not be paid deputation allowance. The petitioner joined the post in the High School on 10.06.2005 however, he failed to raise the claim for officiating allowance for a period of more than 7 years and for the first time he moved this Court in W.P.(S) No. 2916 of 2012 raising a claim for payment of subsistence allowance and therefore, his claim is barred by acquiescence. She has submitted that the petitioner does not fall under the category as mentioned in Rule 32 of the Jharkhand Service Code as, the order issued on 10.06.2005 is not an order issued by the appointing authority of the petitioner. She has further contended that even Rule 103 of the Jharkhand Service Code is not attracted in the case of the petitioner, for the simple reason that for claiming subsistence allowance, a person is required to hold two posts, either substantively or on a temporary basis which is not the case here. She relies on the decision of Hon'ble Supreme Court in the cases 4 reported in AIR 1967 SC 1910 and (1992) Supp.(1) SCC 150, to contend that since there is no provision for payment of deputation allowance in Jharkhand Service Code, the executive instruction issued under order dated 10.06.2005 would regulate the entitlement for grant of deputation allowance in the present case and it cannot be held illegal. She has pointed out that in fact the provision contained in Bihar State Nationalised Elementary School

Teacher(TransferandDisciplinaryAction)Rule,1994clearlybars theclaimofthepetitioner.

6. A perusal of the documents particularly order dated 10.06.2005wouldclearlyindicatethatsincetherewas shortageof High School Teachers, the persons such as petitioner who were workinginPrimaryandMiddleSchoolswere directedtobeplaced ondeputationanditwasspecificallymentionedintheorderdated 10.06.2005thatttheteacherssoplacedondeputationwouldnotbe entitledforgrantofdeputationallowance. Itisalsoamatterof record that after 10.06.2005, the petitioner did not raise any grievanceforgrantofficiatingallowance till, hefiledthewrit petitionbeforethisCourt.Byorderdated29.09.2012,theclaimof thepetitionerhasbeenrejectedrelyingonthe provisioncontained in BiharState NationalisedElementary School Teacher(Transfer and Disciplinary Action) Rule, 1994, which also provides that duringtheperiodofdeputationanemployeewouldnotbeentitled forgrantofdeputationallowanceoranyotherallowances.

7. Adverting to the contention raised on behalf of the learnedcounselforthepetitionerthat,eventhoughthepaymentof deputation allowance has been prohibited by order dated 10.06.2005, the petitioner, who was posted on deputation as a HighSchoolTeacherwhichisahigherpost,cannotbedeniedthe benefitofsubsistenceallowance,Iamoftheopinionthatforbeing entitledforpaymentofficiatingallowance,thepetitionermust first come within the purview of Rule 32 of Jharkhand Service 5 Code. Rule32,Rule90andRule103oftheJharkhandService Codeareextractedbelow:
Rule32. OfficiateAGovernment servantofficiatesina postwhenheperformsthedutiesofaposton which another person holds a lien. A Government servant may, however, be appointedtoofficiateinavacantpostonwhich no other person holds a lien by the authority competent to make a substantive appointment tothevacantpost. A Government servant may be appointed to officiateinapostthoughnotactuallyperformingthe dutiesthereof,asinthecasescitedbelow: (i) whileplacedundertrainingorundergoing acourseofinstruction(videRule101) (ii) whentransferredtoforeignservice(vide

Rule 270). Rule 90. Subject to the provisions of Rules 85 (c), 89 and 92, a Government servant officiating in a post will draw the presumptive pay of that post, provided that except in the case of a Government servant whose appointment to the post in which he is officiating was made on his own request under Rule 56(a), if the presumptive pay of the permanent post on which he holds a lien or would hold a lien had his lien not been suspended, should at any time be greater than the presumptive pay of the post in which he officiates, he will draw the presumptive pay of the permanent post. Rule 103. The pay of a Government servant appointed by the State Government to hold substantively, as a temporary measure, or to officiate in, two or more independent posts at one time shall be regulated as follows: (a) the highest pay to which he would be entitled if his appointment to one of the posts stood alone, may be drawn on account of his tenure of that post; (b) for each other post he may draw such reasonable pay, in no case exceeding half the presumptive pay (excluding overseas pay) of the post, as the State Government may fix; and (c) if a compensatory allowance is attached to one or more of the posts he may draw such compensatory allowance as the State Government may fix provided that such allowances shall not exceed the total of the compensatory allowance attached to all the posts.

8. A perusal of Rule 32 of the Jharkhand Service Code would indicate that, a person is said to officiate in a post when he performs duty on the post on which another person holds a lien. A person can be appointed to officiate in a vacant post also, on which no other person holds a lien, however, the order of officiation should have been passed by an authority who is competent to make substantive appointment on such vacant post. In the present case, admittedly, the petitioner was not asked to officiate on the post on which another person held a lien. The order dated 10.06.2005 is not an order issued by the person who is competent to make substantive appointment on the post of a High School Teacher. Further, by order dated 10.06.2005, the Primary School Teachers and Middle School Teachers were posted on deputation in the

vacant post of High School Teachers and order dated 10.06.2005 is not an order of appointment to officiate in a vacant post. It is also clear from order dated 10.06.2005 that the petitioner and others were directed to be posted in a vacant post of a High School Teacher as a temporary measure and the order dated 10.06.2005 is not an order appointing the petitioner as a High School Teacher. This order is plainly an order of deputation of the Primary School Teachers and Middle School Teachers in a vacant post in High Schools, and therefore, by order dated 10.06.2005 the status of the petitioner as a Primary School Teacher cannot be said to have changed or converted into the status of a High School Teacher.

9. Before dealing with the rival contentions with respect to operation of executive instruction and statutory Rule; it would be useful to notice the authorities cited by the learned counsel for both the parties. In *Harinder Kaur Vs. Union of India* reported in (2009) 13 SCC 90, the Hon'ble Supreme Court has held as under; 19. In *Punjab Water Supply & Sewerage Board v. Ranjodh Singh* this Court held: (SCC p. 501, para 19) 19. In the instant case, the High Court did not issue a writ of mandamus on arriving at a finding that the respondents had a legal right in relation to their claim for regularisation, which it was obligated to do. It proceeded to issue the directions only on the basis of the purported policy decision adopted by the State. It failed to notice that a policy decision cannot be adopted by means of a circular letter and, as noticed hereinbefore, even a policy decision adopted in terms of Article 162 of the Constitution of India in that behalf would be void. Any departmental letter or executive instruction cannot prevail over statutory rule and constitutional provisions. Any appointment, thus, made without following the procedure would be ultra vires.

10. In *Punjab Water Supply & Sewerage Board Vs. Ranjodh Singh* reported in (2007) 2 SCC 491, the Hon'ble Supreme Court has held as under; 19. In the instant case, the High Court did not issue a writ of mandamus on arriving at a finding that the respondents had a legal right in

relation to their claim for regularisation, which it was obligated to do. It proceeded to issue the directions only on the basis of the purported policy decision adopted by the State. It failed to notice that a policy decision cannot be adopted by means of a circular letter and, as noticed hereinbefore, even a policy decision adopted in terms of Article 162 of the Constitution of India in that behalf would be void. Any departmental letter or executive instruction cannot prevail over statutory rule and constitutional provisions. Any appointment, thus, made without following the procedure would be ultra vires.

11. In *DDAs Vs. Joginder S. Monga* reported in (2004) 2 SCC 297, the Hon'ble Supreme Court has held as under; 30. It is not a case where a conflict has arisen between a statute or a statutory rule on the one hand and an executive instruction, on the other. Only in a case where a conflict arises between a statute and an executive instruction, indisputably, the former will prevail over the latter. The lessor under the deed of lease is to fix the market value. It could do it area wise or plot wise. Once it does it area wise which being final and binding, it cannot resile therefrom at a later stage and take a stand that in a particular case it will fix the market value on the basis of the price disclosed in the agreement of sale.

12. The Hon'ble Supreme Court in *Sant Ram Sharma Vs. State of Rajasthan and others*, reported in AIR 1967 SC 1910, has held as under:

7. We proceed to consider the next contention of Mr. N. C. Chatterjee that in the absence of any statutory rules governing promotions to selection grade posts the Government cannot issue administrative instructions and such administrative instructions cannot impose any restrictions not found in the Rules already framed. We are unable to accept this argument as correct. It is true that there is no specific provision in the Rules laying down the principle of promotion of junior or senior grade officers to selection grade posts. But that does not mean that till statutory rules are framed in this behalf the Government cannot issue administrative instructions

regarding the principle to be followed in promotion of the officers concerned to selection grade posts. It is true that Government cannot amend or supersede statutory Rules by administrative instructions but if the rules are silent on any particular point Government can fill up the gaps and supplement the rules and issue instructions not inconsistent with the rules already framed.

13. In *State of M.P. Vs. G.S. Dall and Flour Mills*, reported in 1992 Supp (1) SCC 150, the Hon'ble Supreme Court has held as under:

19. The second ground on which the Full Bench has sought to invoke the instructions is also not correct. Executive instructions can supplement a statute or cover areas to which the statute does not extend. But they cannot run contrary to statutory provisions or whittle down their effect. The Full Bench seems to think that, unless the instructions are brought in, the notifications would have been in danger of abuse for want of proper guidelines as to the grant of exemption certificates. It is suggested that the notification contemplates rules to be issued for the purpose and that, since no rules had been issued, Directors of Industries were left with no parameters for the issue of exemption certificates and might act capriciously or arbitrarily in granting or refusing certificates. The instructions, it is said, have been issued to fill in this lacuna and are hence valid.....

14. Resisting the contention raised on behalf of the petitioner that order dated 10.06.2005 would not override the statutory provision as contained in the Jharkhand Service Code, the learned counsel for the respondents has rightly submitted that since the provision as contained in Rule 90 of the Jharkhand Service Code does not deal with the deputation allowance, the instructions contained in order dated 10.06.2005 would be operative in the present case.

15. In *Bimlesh Tanwar Vs. State of Haryana & others*, reported in (2003) 5 SCC 604, the Hon'ble Supreme Court has held as under:

47. It is also well settled that in the absence of rules governing seniority an executive order may be issued to fill up the gap. Only in the absence of a rule or executive instructions, the court may have to evolve a fair and just principle which could be applied in the facts and circumstances of the case.

16. In *Accountant General, State of M.P. Vs. S.K. Dubey & Another*, reported in (2012) 4 SCC 578, the Hon'ble Supreme Court has held as under:

32. In *Sant Ram Sharma* this Court negated the arguments advanced on behalf of the appellant therein that in the absence of any statutory rules governing promotions to selection grade posts the Government cannot issue administrative instructions and such administrative instructions cannot impose any restrictions not found in the rules already framed. The Court stated: (AIR p.1914, para 7)
7. It is true that the Government cannot amend or supersede statutory rules by administrative instructions, but if the rules are silent on any particular point the Government can fill up the gaps and supplement the rules and issue instructions not inconsistent with the rules already framed. The above legal position has been followed and reiterated by this Court time and again.

33. The Constitution Bench of this Court in *Lalit Mohan Debs* said: (SCC p.867, para 9)
9. It is true that there are no statutory rules regulating the selection of assistant to the selection grade. But the absence of such rules is no bar to the administration giving instructions regarding promotion to the higher grade as long as such instructions are not inconsistent with any rule on the subject. In *Union of India v. Central Electrical & Mechanical Engg. Service (CE&MES) Group A (Direct Recruits) Assn., CPWD*, this Court held that the executive instructions could fill gaps not covered by the rules but such instructions cannot be in derogation of the statutory rules.

17. In the result, I find substantial force in the submissions made by the learned counsel for the respondents. She has rightly contented that the petitioner is not covered by Rule 32 and he is not entitled for subsistence allowance in terms of Rule 90 or 103 of the Jharkhand Service Code.

18. In view of the above discussion, I am of the opinion that the order impugned in this proceeding does not suffer from any illegality and the petitioner is not entitled for grant of officiating allowance as claimed by him. The learned counsel appearing for the petitioner has not pressed the other prayers made in the writ petition.

19. This writ petition lacks merit and is hereby dismissed. (Shree Chandrashekhar, J.)
R. Shekhar Cp2/A.F.R.

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