

Pawan Kumar vs.consortium for Educational Communication

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Court : Delhi

Decided On : Nov-03-2017

Appellant : Pawan Kumar

Respondent : Consortium for Educational Communication

Advocate for Def. : Mr. Amitesh Kumar

Advocate for Pet/Ap. : Mr. Arun Khosla

Judgement :

IN THE HIGH COURT OF DELHI AT NEW DELHI Judgment reserved on: October 16, 2017 Judgment delivered on: November 03, 2017 + W.P.(C) 6379/2017 PAWAN KUMAR Through: Mr. Arun Khosla, Adv. with Ms.

... Petitioner

versus Khreeanka Kakkar, Adv. CONSORTIUM FOR EDUCATIONAL COMMUNICATION Through: Mr. Amitesh Kumar, Adv. and Respondent Ms. Binisa Mohanty, Adv. CORAM: HON'BLE MR JUSTICE V. KAMESWAR RAO

JUDGMENT

V. KAMESWAR RAO, J W.P.(C) 6379/2017 1. The present petition has been filed with the following prayers:-

"Wherefore in the premises, it is most respectfully prayed that this Honble Court may be pleased to issue (i) a writ of certiorari quashing the Respondents Order

No.CEC/Admn./80/2017/802336 dated 24.07.2017 and grant costs of the petition.

(ii) Any other and further relief deemed fit and proper in the facts and circumstances of the case may also be granted in favour of the petitioner and against the respondent. W.P.(C) No.6379/2017 Page 1 of 19 It is the case of the petitioner that he is employed with the respondent, 2. which is an Inter University Centre of University Grants Commission on Electronic Media on the post of Stenographer Grade-II in June, 1997. It is his case that he was required to report only to the respondents Delhi Office because it has no other office in any other City in India. He accordingly, set up his permanent residence at the present address for his family comprising of his wife, three children and mother. It is averred that he was selected in Prasar Bharati on the post of Private Secretary on deputation. The respondent granted permission of deputation for a period of one year extendable on year to year basis. Despite request for extending the petitioners deputation for a further period of two years, the respondent rejected the request and required petitioner to immediately report back. In that regard it had written a letter dated March 21, 2016 requiring the petitioner to report within 15 days failing which, it was decided that his office will be declared as vacant. He filed a Writ Petition being W.P.(C) No.2798/2016 for quashing of letters dated March 21, 2016 and October 08, 2015. The petition was disposed of on February 06, 2017. The petitioner reported back to the respondent.

3. It is his case that ever since his rejoining the respondent, its Director started acting vindictively and swearing that he will take the petitioner to task W.P.(C) No.6379/2017 Page 2 of 19 for having dragged the respondent into litigation, where he perversely opined that he had to personally eat a humble pie. It is his case that when he reported for duty on July 24, 2017, his office premises were locked and three hours later, he was given marching order in the form of an impugned order of even date dated July 24, 2017 declaring him to be placed at the disposal of EMMRC Roorkee on a temporary transfer with immediate effect. It is averred that never in the history of the respondent organization has ever a transfer of any personnel from New Delhi to any other city taken place and never was there any mention of the transferability of the post in the petitioners appointment order. The Memorandum of Association and the Byelaws of the respondent organization, does not mention of any other Branch other than the one in Delhi.

4. It may be stated here that when the matter was listed on July 26, 2017, Mr. Amitesh Kumar, Advocate appeared for the respondent and sought time to take instructions. On July 28, 2017, Mr. Kumar had filed a compilation of certain documents. That apart, a counter affidavit has also been filed by the respondent. In the counter affidavit, it is the case of the respondent that the respondent is an Inter University Centre of the University Grants Commission established under Section 12(ccc) of the UGC Act, 1956. Initially, respondent W.P.(C) No.6379/2017 Page 3 of 19 was made functional as a Project of Nuclear Science Center and one steering group of IUCEC was created to govern the same. Reference is made to Clause 2.14 and Clause 2.15 of the Rules, which provides for observance of Rules and Regulations. It is also stated that subsequently, respondent was registered as a Society under the Societies Registration Act, 1860, which was governed by its Memorandum of Association, Rules and Byelaws. Reference is made to various powers and functions of the Governing Board. Reference is also made to Rule 31, 32 and 33 of the Rules. Reference is also made to Rule 50 and Clause 5 of Byelaws, which provided for general condition of employment. Reference is also made to Clauses 6.19.10 and 6.19.14 of the Byelaws to contend that an employee can be transferred outside Delhi. The counter affidavit also refers to a Memorandum of Understanding signed between the UGC, respondent and IIT, Roorkee whereunder as per preamble of the MoU, respondent has been entrusted with the direct responsibility for the administrative and financial management of the EMMRC at Roorkee. It is the stand of the respondent that the MoU signed between UGC, respondent and IIT Roorkee, makes it apparent that not only the entire responsibilities of financial management of the EMMRC Roorkee has been handed over to the respondent but it is the respondent, which is responsible for appointment of all W.P.(C) No.6379/2017 Page 4 of 19 posts and in terms of clause 3.2 the employees of the EMMRC are to be treated as employees of respondent. A reference is also made to clause 3.9 of the MoU clearly stipulating that respondent will take over the existing staff, assets and liabilities of the erstwhile EMMRC, Roorkee. It is also stated that by virtue of the aforesaid Tripartite MoU, the EMMRC, Roorkee has in fact been subsumed in the respondent and for all administrative and financial purposes, the EMMRC Roorkee is part of respondent itself as a media center and in view of the said position, it is

permissible to utilize the services of the employees of respondent either in the office of the respondent at Delhi or in the media center at Roorkee as may be required in the interest of smooth administration and governance. He also refers to the decision of the Governing Board of respondent which in its 37th meeting held on March 15, 2016 considered the issue regarding the movement of staff between respondent and EMMRC, Roorkee and it was resolved, to transfer the staff between respondent and EMMRC, Roorkee on administrative ground with the approval of the Competent Authority. The respondent refers to the case of the petitioner, who is an employee of respondent holding the post of Stenographer Grade-II in the Nuclear Science Center vide letter dated October 09, 1991.

5. It is also stated that the terms of appointment included that he would be W.P.(C) No.6379/2017 Page 5 of 19 governed by the Rules and Byelaws of Nuclear Science Center in force from time to time. As and when IUCEC becomes a separate autonomous body, his services will be automatically transferred without any obligation to the Nuclear Science Center. The respondent referred to the appointment of Director, EMMRC, Roorkee by the respondent who joined on July 20, 2017. Since the entire administrative affair of EMMRC, Roorkee is to be managed by the respondent itself, therefore, after joining as Director, EMMRC, Roorkee the Director, EMMRC vide his letter dated July 20, 2017 has stated that he is in urgent need of a person, who has experience of working as a P.A./P.S. with senior officials and requested, he be provided with such an officer on urgent basis. It is on the request of the Director, EMMRC, Roorkee, it was decided to place the services of the petitioner at the disposal of EMMRC, Roorkee on temporary transfer basis with immediate effect for a period of three months or until further orders, whichever is earlier and accordingly, the impugned order was issued.

6. A rejoinder has been filed by the petitioner, wherein the petitioner opposed the stand of the respondent by stating that respondent is not empowered to effect transfer of employees to EMMRC, Roorkee, which is a media center. The respondent subsequent to his appointment entered into W.P.(C) No.6379/2017 Page 6 of 19 financial/administrative arrangement. It is also stated that Director of the respondent had acted malafidely in view of his earlier writ petition challenging

respondents notice of disciplinary action on the ground of his not unilaterally leaving the organization i.e Prasar Bharti, which was not releasing him even as respondent summoned his return. It is also stated that reliance placed upon the Rules and Byelaws of the Nuclear Science Center is entirely irrelevant because he was initially employed by the Center which ran the respondent. The respondent registration as an independent Society lead to his permanent employment with the respondent on June 09, 1998 as Steno Grade- II and Memorandum of Association, Byelaws and other Rules governs his employment. It is also stated that the Resolution No.15 of the respondent Board meeting dated March 15, 2016 has not been approved by the UGC. It is also stated, he is only answerable to any exercise of Authority by the Director or any senior according to the Rules and Byelaws of the respondent.

7. It is the stand of the petitioner that the respondent had totally misconstrued the import of Article 6.9.10 of the Byelaws. It is also averred that even a temporary transfer contrary to the Memorandum of Association and Byelaws of respondent, is illegal. Insofar as the Tripartite MoU between UGC, respondent and IIT, Roorkee is concerned, it is stated that the same W.P.(C) No.6379/2017 Page 7 of 19 does not confer jurisdiction upon respondent to make any transfers of its staff from Delhi to Roorkee and the reliance on the order dated October 18, 2011 giving charge of the post of Director EMMRC, Roorkee to joint Director Dr. Sunil Mehru is misconceived as the same does not amount to a transfer from Delhi to Roorkee.

8. During the course of hearing, an issue arose whether the Byelaws filed; by the petitioner along with writ petition are the true and correct copy of Byelaws as prevalent in the respondent organization, as the same have been contested by Mr. Amitesh Kumar, learned counsel for the respondent. Thereafter, the matter was adjourned to September 07, 2017, on which date Mr. Khosla has filed another set of Byelaws purported to have been downloaded from the website. Mr. Amitesh Kumar has also filed on record a communication dated September 06, 2017 of the Chief Administrative Officer of the respondent organization to state that the Byelaws, which have been filed as Annexure R-1 to the counter affidavit are the correct copy of the Byelaws. In view of the stand of the counsels, I directed the respondent to file the authenticated copy of Byelaws by way of an affidavit.

Accordingly, an additional affidavit was filed by the respondent wherein they have filed the original Memorandum of Association and Rules along with certificate; a copy W.P.(C) No.6379/2017 Page 8 of 19 of the UGC letter dated October 12, 1995, along with Office Order dated July 14, 1997 whereby copy of the Byelaws as approved by the respondent at its meeting held on February 27, 1996 was circulated to everyone including the petitioner. That apart, a communication of the UGC forwarding a copy of the revised MoA and Rules of respondent approved and signed by the Chairman, UGC was forwarded to the respondent.

9. Mr. Arun Khosla, learned counsel for the petitioner had submitted that respondent has not countered the three-fold submission made by the petitioner challenging the impugned Order dated August 24, 2017 purporting to transfer the

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from Delhi to Roorkee, namely: (i) The CEC is a Delhi based Society with no branches anywhere in the country and the

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was employed as Steno Gr.II solely and exclusively to work in CECs Registered Head Office in Delhi, with no stipulation of transferability to any other office, (ii) Respondent is not empowered to effect transfer of employees to EMMRC, Roorkee, which is a Media Centre that respondent has subsequent to the petitioners appointment entered into a financial / administrative arrangement with and W.P.(C) No.6379/2017 Page 9 of 19 (iii) The Director of respondent is acting mala fide vindictively in view of the petitioners earlier Writ Petition challenging respondents notice of disciplinary action on the ground of the

... Petitioner

not unilaterally leaving the organization that the

... Petitioner

was delegated to, namely Prasara Bharati, which was not releasing the petitioner even as respondent summoned his return. The threatened disciplinary action fell foul of this Honble Court in W.P.(C) 2798/2016 and the petitioner returned to the parent organization, CEC, to resume work 10. According to Mr. Khosla, the

reliance placed by the respondent upon the Rules & Bye-laws of the Nuclear Science Centre is entirely irrelevant because even though the petitioner was initially employed by the said Centre which ran the CEC, the latter's registration as an independent Society led to the petitioner's permanent employment with respondent on 09.06.1998 as Steno Gr.II and CEC's MoA, Bye-laws and other Rules govern his employment. According to him, the respondent admits in Para 5 of the counter that the Rules of respondent and any amendments thereto have to be approved by the University Grants Commission, and there is admission of want of empowerment to act on the alleged Resolution No.15 of the respondents W.P.(C) No.6379/2017 Page 10 of 19 Governing Board Meeting of March 15, 2016 resolving thereunder to transfer staff between CEC and EMMRC Roorkee. He submitted, the respondent has totally misconstrued the import of Article 6.19.10 of the Bye-laws while contending that the said Article posits the power of transfer of employees outside Delhi. The said Article has to be read for its true import in the context of preponderant stipulations of the respondent not being an all-India organization but solely and exclusively confined to Delhi. He submitted, the respondent admits that the impugned Order dated July 24, 2017 purports to transfer the petitioner from Delhi to Roorkee, albeit, temporarily, it falls foul of the MoA and Bye-laws of respondent. The Tripartite MoU between UGC, respondent and IIT Roorkee in the setting up of the Media Centre in Roorkee does not confer jurisdiction upon the respondent to make any transfers of its staff from Delhi to Roorkee and the reliance upon the Order dated October 18, 2011 giving additional charge of the post of Director EMMRC, Roorkee to Joint Director, Dr. Sunil Mehru, is misconceived in as much as the same does not amount to a transfer from Delhi to Roorkee. It is further submitted that respondent knows of its want of power to make any transfers and has never in the history of the organization made any transfer of any employee from Delhi to Roorkee or vice-versa. In any event, the petitioner's terms of employment W.P.(C) No.6379/2017 Page 11 of 19 do not permit such transfer. According to Mr. Khosla the reliance on the said MoU is entirely misplaced, as evidenced by the declaration of the UGC in its letter of January 4, 2005 with regard to the said MoU being co-terminus with the 10th Plan Period, i.e. till March 31, 2007. Insofar as the proposition that the UGC's approval is mandatory in order to give effect to the respondents Board Resolution of

transfer of staff from Delhi to Roorkee and vice-versa, he would rely on the judgment dated July 8, 2013 of this Court in B.K. Kapoor Vs. Government of NCT of Delhi more specifically para 11, which reads as under:-

".....Notwithstanding with the Executive Committee of SCERT being empowered to amend the Rules as per power conferred by Rule 43 it must additionally abide by Rule 64 which required amendment to the rule with the previous concurrence of the Govern of Delhi... 11. That for the proposition that an employer does not have an inherent right to transfer an employee from one organization to a subsequently incorporated another organization if such right was not specifically provided for in the employees terms of employment, he relied on the Apex Courts judgment reported as AIR 1960 SC650M/s. Kundan Sugar Mills v. Ziyauddin and Ors. W.P.(C) No.6379/2017 Page 12 of 19 12. That on mala fide, he relied on the following judgments: (i) AIR 2009 SC1399 Somesh Tiwari v. Union of India and Ors.; (ii) 97 (200) DLT141S. Ram Rao v. Managing Director, FCI & Ors.; (iii) 1995 (1) AD (DELHI) 768 Raghubir Singh v. Municipal Corporation of Delhi.

13. He prayed that the impugned Order dated July 24, 2017 be quashed and set aside while issuing directions that the period from July 25, 2017 should not be treated as a break in service and the petitioner should be deemed to have been on duty with a further direction, that the salary stopped as of July 25, 2017 be released, with litigation cost of Rs.1,10,000/-. In support of his submissions, Mr. Khosla would also rely upon the following judgments in support of his contentions:

1. M/s. Kundan Sugar Mills v. Ziyauddin and Ors. AIR 1960 SC650(V47C102 2. S. Ram Rao v. Managing Director, FCI & Ors. 97 (2002) DLT1413. The State Bank of India v. Shri N. Sundara Money (1976) 1 SCC822 14. On the other hand, Mr. Amitesh Kumar, learned counsel appearing for the respondent would justify the impugned order transferring the petitioner to W.P.(C) No.6379/2017 Page 13 of 19 EMMRC Roorkee by stating that it is not a transfer on permanent basis, but for a short duration in view of the exigencies of service and such transfer could not be resisted by the petitioner on the ground that there is no power with the respondent or for that matter malafide. He would contest the submission of Mr. Arun Khosla that the respondent has no power to transfer the petitioner by relying upon various

provisions of the Bye- laws/memorandum of understanding and the minutes of the meeting of the Governing Board dated March 15, 2016. In this regard he has drawn my attention to various provisions of the Bye-laws like clause 2.14 of the erstwhile Nuclear Science Centre, Rule 29 to 33 of the respondent which confers various powers and functions on the Governing Board; Rule 31, 32, 33, 36 and 50 of the CEC. Similarly, Clause 5.2, 5.4, 5.5 and 5.7 of the bye- laws of the respondent. Similarly, clause 6.19.10 and 6.19.14. He also stated in terms of Clause 7.11, in all exigencies which are not covered by the Rules, the Rules prescribed by the Central Universities shall apply and where such Rules are not applicable, Rules prescribed by the Government of India for its employees shall be applicable. According to him, in terms of the tripartite Memorandum of Understanding, Clause 3.9 clearly stipulates that respondent will take over the existing staff, assets and liabilities of erstwhile EMMRC W.P.(C) No.6379/2017 Page 14 of 19 Roorkee and pursuant thereto, EMMRC Roorkee is part of CEC as a Media Centre and as such it is permissible to utilize the services of the employees of the CEC either in the Office at Delhi or in the Media Centre at Roorkee. In so far as the minutes of the Governing Board meeting dated March 15, 2016 are concerned, he stated movement of staff of CEC and EMMRC with the approval of the competent authority has been agreed upon by the Governing Board and if that be so, according to Mr. Kumar, the plea of Mr. Khosla that such stipulation has no binding effect in the absence of approval from the UGC is without merit. He also draws my attention to the letter of the Director EMMRC, Roorkee dated July 22, 2017, wherein he has sought the services of the experienced PA so that he can start functioning effectively. Mr. Kumar would submit it is thereafter only the impugned order was issued with the approval of the Director asking the petitioner to report to Director EMMRC, Roorkee. That apart, it is his submission that in terms of the FR-14(B) of the FRSR, the petitioner could be transferred to Roorkee. He seeks the dismissal of the writ petition.

15. Having heard the learned counsel for the parties, during the course of hearing an issue arose whether the Bye-laws filed by the petitioner along with the writ petition are true and correct Bye-laws. Even though, it was the W.P.(C) No.6379/2017 Page 15 of 19 attempt of Mr. Khosla to submit that the Bye-laws filed by the petitioner along with petition are the correct one as the same has been

downloaded from the website of the respondent Organization, he did say that the filing of different extracts of Bye-laws by the parties would have no bearing in so far as the submissions made by him challenging the transfer on merit. In his rejoinder arguments, he did contest the applicability of FR-14(B) in the case of transfer.

16. The only issue which arises for consideration in this writ petition is whether the respondent is justified in issuing the impugned order. Mr.Khoslas primary contention was that in the absence of a stipulation in the appointment letter or in the Byelaws/Rules the transfer to Roorkee is impermissible, which submission was opposed by Mr. Kumar, who had relied upon the provisions of the Byelaws to draw an inference that power to transfer or for that matter an employee can be transferred out of Delhi exist. He also relied upon the Memorandum of Understanding and the minutes of the meeting of the Governing Board dated March 15, 2016 in support of his contention. This Court is of the view, the aspect whether the appointment letter/ Byelaws/Rules contemplate the petitioner/an employee can be transferred out of Delhi is inconsequential, in the facts, for the simple reason, in the absence of a stipulation in the Contract/Rules, a transfer, which may entail change of W.P.(C) No.6379/2017 Page 16 of 19 employer, change of terms and conditions of service, place of work, nature of work, then the same is impermissible. In the case in hand, except change of place of work that too temporarily, no condition has been changed, at least it has not been brought to the notice of this Court. If the submission of Mr. Khosla is to be accepted it would mean that an employee working with the respondent cannot be sent out of Delhi for any official work or discharging duties as, such a visit would entail change of place of work. Such a position cannot be contemplated in any appointment, as right to appoint contemplate, the right of an employer to call upon an employee discharge such duties for which he has been appointed. There is no dispute and accepted by Mr. Kumar that the transfer is temporary for three months. If that be so, the transfer of the petitioner to EMMRC is akin to a posting under the same employer (more so, after the merger) that too, for a brief period, after which it is expected he shall be brought back to Delhi. In other words, the transfer is not of a permanent nature as is contemplated normally. The impugned order cannot be interfered with in the facts.

17. The reliance placed by Mr. Amitesh Kumar on the Byelaw 7.11 or Rule 21 of the Memorandum of Association, is misplaced otherwise, there was no reason for the respondent to amend Byelaws by incorporating transfer of staff W.P.(C) No.6379/2017 Page 17 of 19 vide minutes dated March 15, 2016. Even the submission of Mr. Kumar by placing reliance on the Minutes of the meeting of the Governing Board dated March 15, 2016 is concerned, the same would be of no help, till such time the Byelaws are amended in accordance with the procedure laid down under the Memorandum of Association by taking the concurrence of the UGC as contemplated under Clause 21 of the Memorandum of Association and also in view of the position of law in B.K. Kapoor (supra).

18. In so far as the judgments relied upon by Mr. Khosla are concerned, in the case of Raghubir Singh (supra), this court had set aside the order of transfer on the ground of factual mala fide, which is not case of the petitioner in the present case. That apart, in so far as the judgment in the case of M/s. Kundan Sugar Mills (supra) is concerned, the same has no applicability in the facts of this case, as in the said case transfer of an employee was from one concern to another, which is not the case here. Insofar as the case of S. Rama Rao (supra) is concerned, the same has no applicability in the facts as the transfer of the petitioner is in administrative exigencies. Moreover, the factual malafide has not been pleaded by the petitioner by making the competent authority a party in this petition. Similarly, in the case of the State Bank of India v. Shri N. Sundara Money (supra) is concerned, the same has no W.P.(C) No.6379/2017 Page 18 of 19 applicability in the facts of this case, more so in view of my finding above. Even the judgment in the case of Somesh Tiwari (supra), wherein the Supreme Court has set aside the order of transfer which was passed in view of the punishment, has no applicability in the facts of this case, more so, in view of the conclusion of the Supreme Court in Para 20 that the transfer was effected on the allegation made against the appellant in an anonymous complaint, which is not the case herein.

19. In the peculiar facts of this case, as the transfer/posting is for a temporary period of three months or till further orders, whichever is earlier, this Court is of the view the impugned order does not require any interference by this Court in exercise of power under Article 226 of the Constitution of India. During the course

of the arguments, it transpired that the petitioner has not joined the place of transfer/posting. It is expected that the petitioner shall join the place of transfer/posting at the earliest. For the period of absence, during the pendency of the petition, the petitioner shall be at liberty to represent to the Authorities for treating the period as on leave due in accordance with the Rules/instructions. The petition is dismissed. No costs. CM No.26395/2017 Dismissed as infructuous. NOVEMBER03 2017/ak/jg V. KAMESWAR RAO, J W.P.(C) No.6379/2017 Page 19 of 19

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