

Devesh Kumar Pathak Vs. the State of Madhya Pradesh and ors.

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Court : Madhya Pradesh

Decided On : Jul-05-2007

Reported in : 2007(4)MPHT155

Judge : Dipak Misra and ; Shubhada R. Waghmare, JJ.

Appellant : Devesh Kumar Pathak

Respondent : The State of Madhya Pradesh and ors.

Advocate for Pet/Ap. : Mr. Greeshm Jain

Disposition : Appeal allowed

Judgement :

ORDER

Dipak Misra, J.

1. In this appeal preferred under Section 2 (2) of the Madhya Pradesh Uchcha Nyayalaya (Khand Nyaypeeth Ko Appeal) Adhiniyam, 2005 the legal propriety and pregnability of the order dated 7-9-2006 passed by the learned Single Judge in W.P. No. 12585/2006 is called in question.

2. Bereft of unnecessary details, the facts which are requisite to be exposted are that the appellant-petitioner (hereinafter referred to as 'the appellant') that the appellant, a Town Inspector, had been subjected to transfer on many an occasion.

While he was posted at Katni he was transferred to Jabalpur by order dated 10-7-2006. Thereafter by order dated 25-8-2006 he has been directed to join in Lokayukt Organisation at Bhopal.

3. The said order of transfer was assailed in the writ petition before the learned Single Judge on the ground that he has been subjected to frequent transfer which reeks of malafide and further he has been deputed to Lokayukt organization without his consent though the same is impermissible. It was urged before the learned Single Judge that his consent was a pre-requisite as it is a foreign service and that having not been done the order of transfer is absolutely vulnerable.

4. The learned Single Judge referred to his earlier order passed in W.P. No. 12064/05 (s) wherein proviso to FR-110 (a) was considered and the decision rendered in *State of U.P. and Ors. v. Ram Naresh Lal* : AIR 1970 SC1263 , and expressed the opinion that Lokayukt is an establishment created by the State under an Act and, therefore, it cannot be said that it is not an intra-departmental transfer. He further came to opine that consent of the appellant was not necessary. The learned Single Judge further observed that the decision rendered in W.P. No. 12064/04 (s) was challenged in a Special Leave Petition and the Apex Court has dismissed the same on the aforesaid bedrock the writ petition was dismissed.

5. Mr. AM. Trivedi, learned Senior Counsel along with Mr. Greeshm Jain, appearing for the appellant has raised the following contentions:

(a) The Lokayukt Organization having been brought into existence under the Madhya Pradesh Lokayukt Evam Up-Lokayukt Adhiniyam, 1981 (hereinafter referred to as '1981 Act') cannot be regarded a department of the Government and, therefore, the transfer to the said organisation would tantamount to foreign service.

(b) The frequent transfers passed by the authorities go a long way to show that order of alleged transfer is a motivated one and replete with malafide.

(c) The learned Single Judge has fallen into grave error by stating that the order passed by him has been affirmed by the Apex Court inasmuch as the SLP has been dismissed in limine. When a special leave petition is dismissed in limine, the same is not to be regarded as a precedent under Article 141 of the Constitution of India.

6. Mr. T.S. Ruprah, learned Additional Advocate General for the State, per contra, contended that the order passed by the learned Single Judge is absolutely presentable and does not warrant any interference inasmuch as the Lokayukt by no stretch of imagination be kept out of the purview of the conception of Government and, therefore, it cannot be held to be a foreign service requiring consent of the incumbent. It is further put forth by the learned Counsel that as the order passed by the learned Single Judge has been given the stamp of approval by the Apex Court in SLP this Court is not required to dwell upon the status of Lokayukt organisation.

7. It is not in dispute that Office of Lokayukt has been constituted under the 1981 Act. Section 3 of the Act which deals with the appointment of Lokayukt and Up-Lokayukt reads as under:

3. Appointment of Lokayukt and Up-Lokayukt.:

(1) For the purpose of conducting investigations in accordance with the provisions of this Act, the Governor shall, by warrant under his hand and seal, appoint a person to be known as the Lokayukt and one or more persons to be known as Up-Lokayukt: Provided that,-

(a) The Lokayukt shall be appointed after consultation with the Chief Justice of the Madhya Pradesh High Court and the Leader of the Opposition in the Legislative Assembly, or if there be no such leader, a person selected in this behalf by the members of the opposition in that House in such manner as the Speaker may direct;

(b) Up-Lokayukt shall be appointed after consultation with the Lokayukt, or where a sitting Judge of a High Court in which he is working, shall also be consulted.

(2) A person shall not be qualified for appointment as,:

(a) Lokayukt, unless he has been a Judge of the Supreme Court or Chief Justice or Judge of any High Court in India;

(b) Up-Lokayukt, unless he is or has been a Judge of any High Court in India or has held the office of the Secretary to Government of India or has held any other post under the Central or a State Government carrying a scale of pay (which is not less than that of an Additional Secretary to Government of India).

(3) Every person appointed as Lokayukt or Up-Lokayukt shall, before entering upon his office, make and subscribe, before the Governor, or some person appointed in that behalf by him, on oath or affirmation in the form set out for the purpose in the First Schedule.

(4) The Up-Lokayukt shall be subject to the administrative control of the Lokayukt and, in particular, for the purpose of convenient disposal of investigations under this Act, the Lokayukt may issue such general or special directions as he may consider necessary to the Lokayukt and may withdraw to himself or may, subject to the provisions of Section 7, make over any case to Up-Lokayukt for disposal:

Provided that, nothing in this sub-section shall be construed to authorise the Lokayukt to question any finding, conclusion or recommendation of Up-Lokayukt.

8. Section 4 of the 1981 Act provides that Lokayukt or Up-Lokayukt shall not hold any other office. Sub-sections (4) and (5) of Section 5 deal with the terms of office and other conditions of Lokayukt and Up-Lokayukt. The said provisions read as under:

5. Term of office and other conditions of Service of Lokayukt and Up-Lokayukt.:

(1) *** **

(2) *** **

(3) *** **

(4) The salary, allowances, pension and other perquisites payable to and other conditions of service of Lokayukt shall be the same as admissible to a sitting Judge of the Supreme Court as contained in the Supreme Court Judges (Conditions of Service) Act, 1958 (No. 41 of 1958) and the rules made thereunder.

(5) The salary, allowances, pension and other perquisites payable to and other conditions of service of Lokayukt (sic: Up-Lokayukt) shall be the same as admissible to a sitting Judge of a High Court as contained in the High Court Judges (Conditions of Service) Act, 1954 (No. 28 of 1954) and the rules made thereunder:

Provided that, if the Lokayukt or an Up-Lokayukt at the time of his appointment is in receipt of a pension (other than a disability or would pension) in respect of any previous service, his salary in respect of service as the Lokayukt or, as the case may be, Up-Lokayukt shall be reduced:

(a) by the amount of that pension; and

(b) if he has, before such appointment received in lieu of a portion of the pension due to him in respect of such previous service the commuted value thereof by the amount of that portion of the pension.

9. Section 6 of the 1981 Act postulates the provision for removal of Lokayukt. It reads as under:

'6. Removal of Lokayukt.:

(1) The Lokayukt shall not be removed from his office except by an order of the Governor passed after an address by the Madhya Pradesh Legislative Assembly supported by a majority of the total membership of the Legislative Assembly and by a majority of not less than two thirds of the members thereof present and voting has been presented to the Governor in the same session for such removal on the ground of proved misbehaviour or incapacity.

(2) The procedure for the presentation of an address and the investigation and proof of the misbehaviour or incapacity of the Lokayukt under Sub-section (1) shall

be as provided in the Judge (Inquiry) Act, 1968 (No. 51 of 1968), in relation to the removal of a Judge and, accordingly, the provisions of that Act shall, subject to necessary modifications, apply in relation to the removal of the Lokayukt as they apply in relation to the removal of a Judge.'

10. Section 7 of the 1981 Act deals with the matter which can be enquired into by the Lokayukt or Up-Lokayukt. The said provision is as under:

7. Matters which may be enquired into by Lokayukt or Up-Lokayukt.- Subject to the provisions of this Act, on receiving complaint or other information,:

(i) the Lokayukt may proceed to enquire into an allegation made against a public servant in relation to whom the Chief Minister is the Competent Authority;

(ii) the Up-Lokayukt may proceed to enquire into an allegation made against any public servant other than that referred to in Clause (i):

Provided that the Lokayukt may enquire into an allegation made against any public servant referred to in Clause (ii).

Explanation: For the purposes of this section the expressions 'may proceed to enquire' and 'may enquire' include investigation by police agency put at the disposal of Lokayukt and Up-Lokayukt in pursuance of Sub-section (3) of Section 13.

11. The Lokayukt has been given the power to inquire into certain categories of complaints. Section 13 of the 1981 Act deals with staff of Lokayukt and Up-Lokayukt. The said provision is as follows:

13. Staff of Lokayukt and Up-Lokayukt.:

(1) The Lokayukt may appoint, or authorise an Up-Lokayukt or any officer subordinate to the Lokayukt or an Up-Lokayukt to appoint, officers and other employees to assist the Lokayukt and the Up-Lokayukt in the discharge of their functions under this Act.

(2) The categories of officers and employees who may be appointed under Sub-section (1), their salaries, allowances and other conditions of service and the administrative powers of the Lokayukt and Up-Lokayukt shall be such as may be prescribed, after consultation with the Lokayukt

(3) Without prejudice to the provisions of Sub-section (1), the Lokayukt or an Up-Lokayukt may for the purpose of conducting enquiries under this Act, utilize the services of:

(i) Divisional Vigilance Committee constituted under Section 13-A;

(ii) any officer or investigating agency of the State or Central Government with the concurrence of that Government; or

(iii) any other person or agency.

(4) The services of officers and employees, other than those appointed by the Lokayukt under Sub-section (1) shall not be taken back before the expiry of the period of deputation by the concerned department without prior concurrence of the Lokayukt.

12. Section 13-A deals with constitution of Divisional Vigilance Committee. Sub-section (7) reads as under:

13-A. Constitution of Divisional Vigilance Committee.:

(1) *** **

(2) *** **

(3) *** **

(4) *** **

(5) *** **

(6) *** **

(7) Subject to forgoing provisions the procedure relating to conduct of meetings of the committee, its place of sitting and other allied matters, shall be such as may be prescribed by the State Government in consultation with the Lokayukt.

13. Section 16 of the 1981 Act confers powers on the Lokayukt to make suggestions. We proceed to quote the same:

16. Lokayukt to make suggestions.:

The Lokayukt, if in the discharge of his function under this Act, notices a practice or procedure which in his opinion affords an opportunity for corruption or maladministration, he may bring it to the notice of the Government and may suggest such improvement in the said practice or procedure as he may deem fit.

14. It is submitted by Mr. A.M. Trivedi, learned Senior Counsel for the appellant that if the anatomy of 1981 Adhiniyam is properly scanned the Office of Lokayukt by no stretch of imagination can be regarded as a part of Government Department.

15. The learned Senior Counsel has submitted that the learned Single Judge has erroneously relied on F.R. 110. The said F.R. 110 is reproduced below:

F.R. 110. Authorities competent to transfer a Government servant to foreign service.- (a) No Government servant may be transferred to foreign service against his will:

Provided that this sub-rule shall not apply to the transfer of a Government servant to the service of a body, incorporated or not which is wholly or substantially owned or controlled by the Government.

[Proviso added by F.D. Notification No. 1503-R-149-IV-RI, dated 18-5-1960]

(b) A transfer to foreign service outside India may be sanctioned by the Governor General in Council.

Note : The Government of Madras is authorised to transfer to service in Ceylon any Government servant other than a member of an All India Service.

(c) Subject to any restriction which the Governor General in Council may by general order impose in the case of transfer to the service of an Indian State, a transfer to foreign service in India may be sanctioned by the Local Government under which the Government servant transferred is serving.

16. It is contended by him that the learned Single Judge has committed manifest error by holding that the proviso to F.R. 110 (a) is applicable to the case of Lokayukt. On a scrutiny of said proviso it is discernible that what is postulated in F.R. 110 (a) is not applicable to the transfer of a Government servant to the services of the body incorporated or not which is wholly or substantially owned or controlled by the Government.

17. The seminal question that arises is whether the establishment of Lokayukt is wholly or substantially controlled by the Government Department. The learned Single Judge has placed reliance upon the decision rendered in the case of Ram Naresh Lal (supra), to arrive at the conclusion that the establishment of Lokayukt can be equated with the department of Government. In Ram Naresh Lal (supra), the Apex Court has held as under:

11. Regarding the first point, it seems to us that it was not necessary that the Development Commissioner should have issued a fresh order for appointment of the respondent. The respondent was member of the Subordinate Service and by having been transferred to the Planning Department he had not ceased to be a member of service. If a person is a member of the service and he is transferred from one department to another it is not necessary that he should be reappointed to the service or he should be appointed to the department to which he is transferred. As soon as he is transferred permanently he begins to hold the permanent post which he starts holding in the transferee department. It is true that the letter dated May 21, 1958, contemplated that a fresh appointment of staff who elected to remain in the Planning Department would be made but apparently later on the Government realised that it was not necessary to pass such an order of reappointment. It seems to us that the respondent, having elected not to go back to his parent department, because an employee in the Planning Department and, therefore, the Development Commissioner was entitled to dismiss the respondent.

12. Assuming that the respondent had not been permanently transferred and further assuming that he was still on deputation in the Planning Department, even then the Development Commissioner was entitled to dismiss the respondent by virtue of various orders. The order dated May 21, 1958, which has been extracted above, clearly places the control over the entire staff on deputation from the Irrigation Department to the Planning Department with the Development Commissioner. The word 'control', is a wide word and includes disciplinary jurisdiction. In the context there is no doubt that it was the intention to give disciplinary jurisdiction over the entire staff on deputation to the Development Commissioner. The previous order dated July 15, 1956, had vested the power of transfer and punishment in the Development Commissioner. It seems to us that the later order in no way confers lesser powers on the Development Commissioner. There is nothing in the Constitution which debars the Government from conferring powers on an officer other than the Appointing Authority to dismiss a Government servant provided he is not subordinate in rank to the Appointing Officer or Authority. These three orders (viz., D/- August 3, 1932, May 21, 1958 and March 4, 1960) which we have mentioned above, read together clearly confers power on the Development Commissioner to dismiss persons on deputation in the Planning Department.'

18. We have already quoted the provisions of the 1981 Adhiniyam. It is to be borne in mind that in a parliamentary system of democracy the concept of check and balances has its own paramountacy. True it is, there are various constitutional wings which carry out the same function. The citizenry grievances have to be looked into. The corruption in the public life is required to be curbed. A situation of non-corruptibility has to emerge. A Statutory Authority like Lokayukt is required to enquire into the allegations of corruption against the public functionaries. In many a country the concept of Ombudsman has emerged in various spheres. A Lokayukt acts like a watch dog of the administration. It is, in a way comparable, to that of Ombudsman, the concept of which was first developed in Sweden in 1809. In a democratic set up the role of Ombudsman or a Lokayukt by no stretch of imagination cannot be marginalized, for the grievance of the citizens are manifold. Every citizen, in praesenti has a right to know about the relevant information about what is going on in the country. There has to be transparency in the

administration. As has been provided under the provisions of 1981 Adhiniyam the Lokayukt has the power to investigate into the activities of the Ministers. It is worth noting that the office of Ombudsman has a different role in the countries like Sweden, Denmark, Finland, Norway, New Zealand, Mauritius, Guyana and United Kingdom. The Lokayukt has the authority to enquire into the wide range of things, namely, abuse of official position, corruption, etc. The appointment of Lokayukt is done by the Governor after consultation with the leader of the opposition and he also enjoys powers of Contempt of Courts Act, 1971.

19. At this juncture, it is seemly to refer the decision rendered in the case of Institution of AP Lokayukt/Up-Lokayukt, AP and Ors. v. T. Rama Subba Reddy and Anr. (1997) 9 SCC 62, wherein a two Judge Bench of the Apex Court while dealing with the provisions under the Andhra Pradesh Lokayukt Act, 1983 and advertent to the signification and purposes of the enactment expressed the view as under:

17. Before parting with these matters, it may be necessary to note that the legislative intent behind the enactment is to see that the public servants covered by the sweep of the Act should be answerable for their actions as such to the Lokayukt who is to be a Judge or a retired Chief Justice of the High Court and in appropriate cases to the Up-Lokayukt who is a District Judge of Grade 1 as recommended by the Chief Justice of the High Court, so that these Statutory Authorities can work as real Ombudsmen for ensuring that people's faith in the working of these public servants is not shaken. These Statutory Authorities are meant to cater to the need of the public at large with a view to seeing that public confidence in the working of the public bodies remains intact. When such authorities consist of high judicial dignitaries it would be obvious that such authorities should be armed with appropriate powers and sanctions so that their orders and opinions do not become mere paper directions. The decisions of Lokayukt and Up-Lokayukt, therefore, must be capable of being fully implemented. These authorities should not be reduced to mere paper tigers but must be armed with proper teeth and claws so that the efforts put in by them are not wasted and their reports are not shelved by the Disciplinary Authorities concerned. When we turn to Section 12, Sub-section (3) of the Act, we find that once the report is

forwarded by the Lokayukt or Up-Lokayukt recommending the imposition of penalty of removal from the office of a public servant, all that is provided is that it should be lawful for the Government without any further inquiry to take action on the basis of the said recommendation for the removal of such public servant from his office and for making him ineligible for being elected to any office etc. Even if it may be lawful for the Government to act on such recommendation, it is nowhere provided that the Government will be bound to comply with the recommendation of the Lokayukt or Up-Lokayukt. The question may arise in a properly instituted public interest litigation as Act implies a power coupled with duty which can be enforced by a writ of mandamus by the High Court or by writ of any other Competent Court but apart from such litigations and uncertainty underlying the results thereof, it would be more appropriate for the legislature itself to make a clear provision for the due compliance with the report of Lokayukt or Up-Lokayukt so that the public confidence in the working of the system does not get eroded and these institutions can effectively justify their creation under the statute.

We have quoted the aforesaid paragraph in extenso only to pyramid the idea that the importance of establishment of Lokayukt cannot be allowed to pave the path of a permissible glacier as that would extinguish the real height the office does posses.

20. In view of the aforesaid analysis we are of the considered opinion that the conclusion arrived at by the learned Single Judge that it is controlled by the State Government and hence, posting in the Lokayukt does not amount to foreign service is not acceptable. Thus, we unhesitatingly come to hold that F.R. 7 (9) would be applicable to the case at hand.

21. The learned Single Judge, as has been indicated hereinabove, has referred to the order passed in the Special Leave Petition. We have perused the order passed by Their Lordships in Special Leave Petition. The said Special Leave Petition has been dismissed in limine. It is well settled in law that when a Special Leave Petition is dismissed in limine it does not amount to precedent under Article 141 of the Constitution. In this context, we may refer with profit to the decision rendered in the case of *State of Manipur v. Thingujam Brojen Meetei* AIR 1996 SC 2124,

wherein it has been held as under:

9. ...The dismissal of a special leave petition by a non-speaking order which does not contain the reasons for dismissal does not amount to acceptance of the correctness of the decision sought to be appealed against. The effect of such a non-speaking order of dismissal without anything more only means that this Court had decided only that is it not a fit case where the special leave petition should be granted. Such an order does not constitute law laid down by this Court for the purpose of Article 141 of the Constitution [See : *Mis. Rup Diamonds v. Union of India* : 1989(40)ELT226(SC) ; *Late Nawab Sir Mir Osman Ali Khan v. Commr. of Wealth Tax, Hyderabad* : [1986]162ITR888(SC) and *Supreme Court Employees' Welfare Association v. Union of India* : (1989)IILLJ506SC].

Similar view has been expressed in the case of *Om Prakash Gargi v. State of Punjab and Ors.* : (1996)11SCC399 .

22. In view of the aforesaid analysis of ourselves, we do not intend to advert to the facet whether the order passed by the Authority is reeked with malafide or not, because this is not an order of transfer but a deputation to foreign services and the said order suffers from inherent fallacy as no consent was taken from the petitioner.

23. In view of the aforesaid premises the writ appeal is allowed, the order passed by the learned Single Judge is set aside and as a sequitur the order passed by the Authority on 25-8-2006 sending the appellant to Lokayukt establishment on deputation is annihilated. However, in the facts and circumstances of the case, there shall be no order as to costs.