Paritosh Singh and Others. Vs. State of U.P. and Others.

Paritosh Singh and Others. Vs. State of U.P. and Others.

SooperKanoon Citation : sooperkanoon.com/918078

Court : Allahabad

Decided On : Dec-08-2010

Judge : Uma Nath Singh; Devendra Kumar Arora, JJ.

Appeal No. : Writ Petition No. 832 (S/B) of 2008

Appellant : Paritosh Singh and Others.

Respondent : State of U.P. and Others.

Judgement :

1. Heard Sri S.K. Kalia, learned Senior Advocate assisted by Sri V.B. Kalia, Advocate for the petitioners and Mrs. Sangita Chandra, learned Additional Chief Standing Counsel for the respondents.

2. By means of present writ petition, the petitioners are assailing the orders passed by the Commissioner, Commercial Tax dated 27.06.2008, by which the petitioners have been sent back to Lok Nirman Vibhag (parent department) where the petitioners had been substantively appointed. The petitioners also prayed that they be allowed to work on the post of Assistant Commissioner (Commercial Tax) in the Commercial Tax Department and a further writ of mandamus has also been sought for seeking directions to the respondents to consider and absorb the services of the petitioners in Commercial Tax Department on the post of Assistant Commissioner with effect from the date the services of the petitioners were transferred to the Commercial Tax Department i.e. 10.09.2001.

3. The order dated 27.06.2008 has been challenged on the ground that the same has been passed in a most illegal, arbitrary and malafide manner just to deprive the petitioners from being considered for their merger in the Trade Tax Department and the reasons assigned in the impugned order for repatriation of the petitioners to the Public Works Department (here-in-after referred to as the P.W.D.) on non-availability of post in the Commercial Tax Department are based on unfounded reasons as several posts of Assistant Commissioner are still lying vacant and the respondent no.4 has passed the impugned order without their being any jurisdiction to take decision in the matter as the State Government is the appointing authority of the petitioners and the decision to transfer the services of the petitioners was also taken by the State Government way back in the year 2000-01.

4. The factual matrix of the case as culled out from the pleadings of the writ petition are as under:-

5. The petitioners were appointed on the post of Assistant Engineer (Electrical/ Mechanical) through the U.P. Public Service Commission in the U.P. P.W.D. In the year 2000, several divisions of Electrical/ Mechanical were abolished and as a result of which several staff of the said divisions became surplus. The State Government constituted a high level committee headed by the then Chief Secretary, Government of U.P. on 13.04.2000 to consider the posting of the surplus employees of the various departments in the Trade Tax Department (now Commercial Tax Department). It was resolved that for the purpose of speedy recovery of tax and restricting tax evasion, a new cell known as physical verification cell is to be created in the Trade Tax Department and for that purpose several surplus employees of various departments should be transferred to Commercial Tax Department on the basis of transfer of their services. It was also decided that all those persons who have been declared surplus in various other departments of the State Government shall be sent to the Commercial Tax Department on the basis of seniority so as to avoid any opposition of the employees concerned and if the decision of their transfer of service is not complied with by any incumbent, then his services were liable to be dispensed with.

6. In pursuance of the decision taken by the high level committee, the State Government wrote a letter on 13.04.2000 to the Engineer-in-Chief, U.P. Public Works Department to give the names of the employees from the Public Works Department, who are to be transferred to Commercial Tax Department alongwith their service records of the past ten years. The State Government vide order dated 10.09.2001 transferred the services of the petitioners from U.P. Public Works Department to Commercial Tax Department and in pursuance of the said transfer order, vide order dated 18.09.2001 the respondent no.4 allowed the joining of the petitioners at their respective places with the conditions that the services of the petitioners are being transferred to the Trade Tax Department firstly for a period of three years and their services will be liable to transfer back to the parent department without any notice as per requirement or unsuitability. It was also mentioned in the order dated 18.09.2001 that the petitioners shall maintain their lien in their parent department and they shall be transferred back to the parent department three months prior to their attaining the age of superannuation. The petitioners were given status of Trade Tax Officer Grade-I (now known as Assistant Commissioner Trade Tax) and after expiry of three years tenure their services were extended vide order dated 02.06.2004 and 10.01.2005 respectively by one year each time.

7. The Principal Secretary, Tax & Registration Department wrote a letter to the Principal Secretary, Public Works Department with regard to 18 posts of Assistant Engineer in Public Works Department, who were transferred to the Commercial Tax Department for keeping 18 posts of Assistant Engineer in abeyance so that 18 posts of Assistant Engineer in the Commercial Tax Department be created. The Principal Secretary, Public Works Department sought a report from the Engineer-in-Chief, Public Works Department. The Engineer-in-Chief submitted a report on 21.04.2003 mentioning therein that 10 divisions in Public Works Department have been closed, on account of which, 42 posts of Assistant Engineer had been kept in abeyance and it would not affect the Public Works Department if 18 posts of Assistant Engineer are kept in abeyance in the department and 18 such posts of Assistant Engineer are created in the Commercial Tax Department. The petitioners on the basis of said report claimed that since the parent department had given its no objection to the Commercial Tax Department, the Commissioner

Commercial Tax had no jurisdiction or authority to act against intention of the government and sent back to the petitioners to their parent department.

8. Apart from this, it is also mentioned that service conditions of the members of the Trade Tax Department are regulated by U.P. Sale Tax Service Rules, 1983 (here-in-after referred to as the 1983 Service Rules) the rule 8 of 1983 Service Rules provides only a graduate degree for appointment on the post of Trade Tax Officer and the petitioners being Engineering graduate can easily be accommodated in the Trade Tax Department substantively.

9. It has also been mentioned that in the Commercial Tax Department the total number of sanctioned posts of Assistant Commissioner is 792 and with the increased work on account of imposition of Value Added Tax (here-in-after referred to as the VAT) additional 172 posts of Assistant Commissioner have been sanctioned, whereas 546 persons are presently working as Assistant Commissioner and, as such, 246 posts of Assistant Commissioner are lying vacant in the department and it will serve no useful purpose to send the petitioners back to the parent department when the regularly selected Assistant Commissioners from U.P. Public Service Commission are yet to be appointed.

10. It is also alleged that the petitioners' consent was not taken at any stage and they had been forced to leave their parent department for fear of their services being terminated. No condition was mentioned while transferring the services of the petitioners that they will be liable to be repatriated. It was the Commissioner, Trade Tax, who on his own imposed conditions in an unjust and unfair manner. The respondent no.4, who is not the appointing authority of the petitioners, had imposed certain conditions giving the colour to the appointment of the petitioners in the Commercial Tax Department as 'deputation'. The petitioners were intended by the government originally to be employees of the Commercial Tax Department for all times to come and accordingly transfer of services from the parent department to the Commercial Tax Department of the petitioners were for all times to come. The transfer of services from the Public Works Department to the Commercial Tax Department was only one mode of recruitment.

11. By means of counter affidavit, it has been brought on record that the Commissioner, Commercial Tax Department had not on its own passed the order dated 27.06.2008. In fact, he had been authorized to do so by the State Government itself vide its order dated 27.08.2007. The counter affidavit further states that the Trade Tax had taken Assistant Engineers and Junior Engineers from the Public Works Department and Irrigation Department only for the short period of time under specified conditions of service/ posting.

12. The Service Rules, 1983 envisage only two modes of recruitment on the post of Assistant Commissioner. The direct recruitment is to be done on 50% of posts and remaining 50% are to be filled by promotion from the Trade Tax Officers, through Public Service Commission. Since the petitioners were working as Assistant Commissioners for verification purposes only and were mainly attached to the Check Posts, Mobile Squads and Special Investigation Branch. The work in such branches reduced due to the imposition of the VAT. The posts of Assistant Commissioners created by the government vide its order dated 10.06.2008 were mainly with respect to assessment and not with respect to verification. It was denied in the counter affidavit that there was a proposal by the State Government to absorb the petitioners in the Commercial Tax Department. The government had specified in its order dated 27.08.2007 that under the Rules absorption of Assistant Engineers as Assistant Commissioner, Commercial Tax is not possible, and merely the possessing a graduate degree in engineering would not entitle the petitioners, Assistant Engineers of Public Works Department to be absorbed as Assistant Commissioner, Commercial Tax without any selection by the U.P. Public Service Commission under the Service Rules, 1983.

13. In counter to the amended paras of the writ petition, it was mentioend that a cadre review was undertaken and now instead of 479 posts, only 232 posts of Assistant Commissioner, Commercial Tax are there in the Check Posts, Mobile Squads and Special Investigation Branch i.e. the branch in which the petitioners were mostly working. Besides, several promotions of ministerial cadre had taken place and direct recruitments had been done by the U.P. Public Service Commission in the year 2003 and 2004. Therefore, regularly promoted/ selected employees being available, there was no need of the petitioners in the Commercial

Tax Department and they were rightly repatriated vide order dated 27.06.2008.

14. On the basis of arguments advanced before this Court on 28.04.2010, this Court passed the following orders:-

"In Annexure No.2 to the writ petition, it appears that a meeting regarding transfer of service of petitioners from the Public Works Department as Assistant Engineers to the Sales Tax Department was held under the chairmanship of the then Chief Secretary of U.P., wherein a decision was taken to transfer the service of some employees including the petitioners from the Public Works Department to the Sales Tax Department. Since Chief Secretary in the helm of the affairs, we would like his reaction to the controversy by filing an affidavit. In view of the above, the Chief Secretary, Government of U.P is directed to file an affidavit on the controversy, within a period of two weeks. We also grant a liberty to resolve the issue at his level irrespective of the pendency o the writ petition".

15. In compliance of order of this Court, the Chief Secretary to the Government of U.P. held meeting on 1.05.2010 which was attended by the Principal Secretaries of Department of Personnel, Irrigation, Tax and Registration, Secretary Finance, Commissioner Commercial Tax, Special Secretary, Public Works Department, Special Secretary, Tax & Registration and Additional Legal Remembrancer to the Government of U.P. and after consideration of various issues the High Level Committee chaired by the then Chief Secretary again decided that the petitioners as well as all the employees of Public Works Department and Irrigation, who were posted on transfer of service basis in the department of Commercial Tax had to be repatriated to their parent department.

16. Sri Kalia, learned Senior Advocate while arguing the matter submitted that the decision taken in the meeting dated 11.05.2010 was in fact no decision at all. It is was a reiteration of earlier stand of the respondents on the ground that the service Rules, 1983 did not envisage any procedure of merger or absorption of any employees substantively appointed in other departments. Sri Kalia vehemently submitted that the State Government can very well amend the rules as it had done so earlier and provide for absorption of the petitioners. Of course, the views of Public Service Commission for such amendment to be carried out in the rules, had

to be taken by the government.

17. This Court directed the State Government to explore the possibility of taking the views of Public Service Commission for amendment of the Service Rules, 1983.

18. The State Government informed that after the imposition of VAT, there are sufficient number of officers of the rank of Assistant Commissioners available in the Commercial Tax Department and there is no need of borrowed employees to be absorbed in the Commercial Tax Department. Further in the Public Works Department, there is need of such employees and, hence, there is no necessity for amendment in the service rules to be carried out.

19. Sri Kalia, learned Senior Advocate during the course of arguments submitted that the views of the present incumbent to the post of Chief Secretary and Secretary Tax & Registration being contrary to the views of earlier incumbents to the office and, as such, it is necessary that the records be perused. On the insistence of Sri Kalia, the record was produced before the Court. The minutes of the meeting held on 12.01.2000 reveals that surplus employees in the Public Works Department viz. Executive Engineers, Assistant Engineers and Junior Engineers were to be taken in Trade Tax Department mainly for the purpose of verification at Check Posts and Mobile Squads. The Commissioner, Trade Tax Department also informed that Class-III posts were also lying vacant in the department and ministerial employees/ Class-III incumbents in the Public Works Department and Irrigation Department could also be asked to serve for the time being in the Trade Tax Department. The record reveals that in the said meeting, it was decided that the sending the engineers to the borrowing department would be a temporary arrangement and no direct recruitment and promotion in the resultant vacancy in the parent department would take place. The officers so posted were to be utilized for verification work only. A detailed proposal was to be made in regard to the duties, responsibilities and administrative control to these officers.

20. The record further indicates that after the meeting dated 12.01.2000, another High Level Committee was held on 13.04.2000, wherein it was decided that a separate verification cell was to be created in the Trade Tax Department wherein

Assistant Commissioners, Trade Tax Officers Grade-I and Trade Tax Officers Grade-II were to be posted along with the clerical staff, stenographers and other class-IV employees. The incumbents would be such employees as were made available by the Public Works Department and Irrigation Department due to disbanding of various divisions. It was also decided that as per rules, transfer of service within the government did not require any option to be taken from the employee concerned. However, it would be worthwhile to take various Unions into confidence by circulating a proposal and invoking their cooperation in the matter. Also a uniform principle regarding nomination of the employees by the administrative department was formulated so that only junior most employees be sent and there could not be any allegation of pick and choose. The Finance Department expressed its opinion that corresponding number of posts be created in the Trade Tax Department for employees who are being lent to it. However, this was not done and the posts continued to be in the parent department, where the lien of these employees is still maintained. Only the budget allocation/ adjustment regarding payment of salary and other allowances has been done on yearly basis.

21. The condition of service of these borrowed employees were laid down by two orders dated 23.08.2000 and 29.09.2000 passed by the Secretary, Tax and Registration, in which there was a specific mention that all facilities available to the employees in their parent department shall be made available in the borrowing department. The first assignment was for three years and thereafter, it could be extended for one year at a time for a maximum period of five years. However, just before retirement of any of these borrowed employees, they necessarily required to send back to their parent department for completion of formalities regarding pension papers etc. Their lien are maintained in their parent department alongwith seniority, confirmation, promotion etc.. Minor penalties could be given by the Trade Tax Department, but in the case of major penalties, the matter is to be referred to the parent department to take appropriate action. The service condition formulated by the aforesaid two orders issued by the Secretary, Tax & Registration Department, were circulated on 25.05.2001 amongst the Assistant Engineers concerned (including the petitioners), which option was also signed by them to indicate their awareness and willingness to be transferred to the Trade Tax Department on the conditions mentioned therein. The first list of 62 Assistant

Engineers was sent by the Principal Secretary, Public Works Department on 30.04.2001 and the Principal Secretary, Tax & Registration passed the orders of posting of such Assistant Engineers attaching them as Trade Tax Officers Grade-I to various Assistant Commissioners In-charge of verification cell. Vide orders dated 29.08.2001, 10.04.2001, 18.09.2001 and 03.10.2001 the Trade Tax Officer Grade-I has been re-designated as Assistant Commissioner Trade Tax. The same conditions of service as proposed vide orders dated 23.08.2000 and 29.09.2000 and later on signed by the petitioners and others on 25.05.2001 were reiterated in the orders of posting of the Assistant Engineers. The petitioners continued to work on the said conditions and, as such, the last extension was granted in 2006. The Government turned down the proposal for absorption of these employees in the Trade Tax Department and communicated its decision to the Commissioner, Trade Tax on 27.08.2007. The Commissioner Trade Tax in turn issued the consequential order dated 27.06.2008, which alone has been challenged.

22. Smt. Sangita Chandra, learned Additional Chief Standing Counsel appearing on behalf of the respondents submitted that as is evident from bare perusal of the minutes of meetings dated 12.01.2000 and 13.04.2000 and consequential issuance of government orders dated 23.08.2000 and 29.09.200, the service conditions prescribed by the State Government were clear. There is no such thing as 'deputation' from one government to another government department. The deputation is usually resorted to when services of an employee are lent to Public Sector Undertakings/ Government Company etc. The deputation allowance is paid as per the provisions of the Financial Hand Book in such cases. Transfer of service is resorted to when employees are needed in one government department and another government department is in a position to lend such employees.

23. It is also submitted by Smt. Chandra that the option signed by the various Assistant Engineers on 25.05.2001 regarding service conditions for transfer of their services would clearly show that such transfer of service was accepted with the open eyes by the petitioners. The petitioners knew that their services could be dispensed with by the parent department as several divisions had been disbanded, therefore, they accepted the terms of such transfer knowing fully well that they were liable to be sent back to their parent department at any time.

24. It is further submitted by Smt. Chandra, learned Additional Chief Standing Counsel that the petitioners have prayed for issuance of a writ of mandamus to the authorities to let them continue in the borrowing department on the basis of legitimate expectation that earlier a proposal had been forwarded through the government to the Principal Secretary, Tax & Registration and Principal Secretary, Public Works Department to put corresponding number of posts in abeyance in the Public Works Department and create same number of posts in the Commercial Tax Department to accommodate the petitioners and like persons.

25. Smt. Chandra vehemently submitted that it is a settled position of law that unless a proposal has been actually matured into a government order and communicated to the person concerned under authentication of authorized signatory of the Government, it cannot be said to be government decision, which cannot be later on changed. In support of her submission a reference has been made to the Constitution Bench judgment in the case of State of Punjab vs. Bachhitter Singh, 1962 (Suppl) (3) SCC 713; and Sethi Auto Service Station vs. Delhi Development Authority 2009 (1) SCC 180.

26. It is also argued on behalf of the respondents that the petitioners of the present writ petition in effect praying that this Court issue a mandamus to the authorities to amend the rules and it is settled law that no mandamus can be issued to the authorities to act against the statutory provisions or even to effect the amendment of the rules, as the rules are framed under the powers delegated by the legislature. No mandamus can be issued to exercise powers of delegated legislation in a manner specified by the Court. In support of her submission she placed reliance on the decision of M/s Narinder Hemraj vs. Lt. Governor of Union Territory of Himachal Pradesh, 1971 (2) SCC 747. It is also submitted that the work of tax assessment was never entrusted to the petitioners independently. The petitioners were only given a small/ abridged training and were not equipped to do assessment work, as is generally required for regularly appointed Assistant Commissioners. Out of 321 vacancies of Assistant Commissioners in the department, a requisition for direct recruitment of 291 Assistant Commissioners has already been sent to the U.P. Public Service Commission. The remaining 27 vacancies are to be filled up by promotion quota also through selection by Public

Service Commission under the rules. If the petitioners are absorbed at this stage in the Commercial Tax Department, various anomalies would result with regard to fixation of seniority and consequential promotion etc. with regard to both direct recruits and the promotees in the Commercial Tax Department itself.

27. In response to the submission of learned counsel for the petitioners that the amendment to the Trade Tax Rules, 1983 can very well be done by the government as it had been done earlier with regard to the Trade Tax Officers Grade-I recruited from the limited departmental examinations held in the year 1997, it was pointed out that the notices circulated amongst the departmental candidates with respect to limited departmental examinations for the recruitment of Trade Tax Officers Grade-I clearly shows that the limited departmental examination was open for the ministerial cadre to those persons who were less than 45 years of age and who had rendered regular satisfactory and substantive service of seven years in the Trade Tax Department itself. These persons were members of the service of Trade Tax Department, were first recruited as Trade Tax Officer Grade-I and thereafter an amendment in the rules was made to accommodate them as regular members of service of the Trade Tax Officers, to give them their due seniority. This amendment was challenged by the regularly recruited Trade Tax Officers and regular promotees also, since it gave seniority to the persons who had not come through the Public Service Commission, but through the limited departmental examination. This Court allowed the writ petition. The Supreme Court upheld the amendment of the rules and grant of consequential seniority to such members of service.

28. We have considered the rival submissions of learned counsel for the parties and gone through the record.

29. Learned counsel for the petitioners placed reliance on the judgment of Hon'ble Supreme Court rendered in the of Ram Prakash Makkar vs. State of U.P. & others 2009 (4) SCC 725 and submitted that intention of the Government was to make appointment by way of transfer of service in Trade Tax Department and only formality left was issuance of order regarding seizure of lien of the concerned employee in the borrowing department. This case is distinguishable on the facts as

the petitioner therein was a ministerial employee i.e. Steno-typist and he was also confirmed after probation on the promoted post in the borrowing department. In the case of State of Punjab and others vs. Inder Singh & others reported in 1997 (8) SCC 372, the Hon'ble Supreme Court observed that the constables in Punjab Police, who were taken on deputation to the Criminal Investigation Department of Punjab Police, they earned promotion on ad-hoc basis and after a long time they were sought to be repatriated to their own cadre as constable or head constable depending upon their original position in the parent cadre. It was held that in the cases where transfer of service of an employee to a post out side his cadre is made, on temporary basis, after the expiry of period of deputation, the employee has to come back to his parent department to occupy the same position, unless in the meanwhile he has earned promotion in his parent department as per the recruitment rules. In the case of Inder Singh (supra) the respondent therein had worked for nearly 20 to 28 years in the C.I.D. and, therefore, the Hon'ble Supreme Court suggested that since the nature of work in the police department as well as the C.I.D. was almost similar and the respondents-petitioners therein had earned considerable experience working in the C.I.D., the government could consider the absorption of such employees. However, the caveat was that the rules permitted such absorption. The Hon'ble Supreme Court observed that the authority competent to decide whether an assignment is of deputation is the authority which controls the service or the post from which such employee is transferred.

30. In the case of Mahesh Kumar K. Parmar & others vs. S.I.G. of Police & others reported in 2002 (9) SCC 458, the Hon'ble Supreme Court observed that the case of certain Head Constables of the Gujarat Police who were drafted into the Intelligence Bureau which was set up as separated organization by the State Government. They continued for long in the Intelligence Bureau even after rules were framed separately for recruitment, service conditions etc. of the Intelligence Bureau. Then they were repatriated to the parent organization. The petitioner's grievance was that since they could be brought into Intelligence Bureau by way of transfer in accordance with rules, and they have already rendered service for long, much beyond their initial deputation period, they have acquired a right to be permanently absorbed in the Bureau, or at least they have a legitimate expectation to be so absorbed. The Hon'ble Supreme Court rejected the arguments on the

ground that the State Government never contemplated a permanent absorption of the existing employees on deputation and since the nature of their transfer of service was that of deputation, the employer has always a right to repatriate the deputationist to the parent organization. The Hon'ble Supreme Court was of the opinion that since there is no enforceable right of the petitioners to be permanently absorbed in the borrowing department, no mandamus can be issued in this regard.

31. In the case of Kunal Nanda vs. Union of India reported in 2000 (5) SCC 362 the Hon'ble Supreme Court was considering the case of C.R.P.F. Personnel taken on deputation to the C.B.I. held that deputationist cannot assert and succeed in his claim for permanent absorption in the department where he works on deputation, unless his claim is based upon a statutory rule, regulation or order having the force of law. A deputationist can always and at any time be repatriated to his parent department at the instance either of the borrowing department or the parent department. There is no vested right in such a person to continue for long on deputation to get absorbed in the borrowing department.

32. More recently in the case of M/s. T. Nadu Magnesite Ltd. vs. S. Manickam reported in 2010 AIR SCW 3311 the Hon'ble Supreme Court was considering the case of certain employees of Tanmag a Government Company, the appellant before the Supreme Court. The respondents were duly selected and appointed on their respective posts in the aforesaid company. Soon, however, they became in excess of the cadre strength in Tanmag and were called upon to express their willingness to work in another Joint Venture Company wherein Tanmag had 20% of share and also administrative control. The respondents opted for such transfer without any monetary loss and alteration of service conditions with seniority and other benefits. Soon, however, the Joint Venture Company ran into difficulties and was closed down. The respondents had already became employees of the Joint Venture Company and they had lost their lien in the original company, appellant - Tanmag. The respondents filed a writ petition for being absorbed in Tanmag. The learned Single Judge dismissed the writ petition. However, the Division Bench allowed the appeal on the submission made by the respondents that they are entitled to be taken back in Tanmag in terms of the earlier transfer order, which protected the service conditions of the respondents. The division Bench lost sight

of the vital fact that there was a permanent transfer of service entailing loss of lien. On the basis of vague arguments advanced regarding legitimate expectation, the Division Bench allowed the appeal filed by the respondents.

32. The Hon'ble Supreme Court observed that "the Division Bench in its anxiety .... to help the respondents .... seems to have stretched the principle of promissory estoppel beyond tolerable limits. Undoubtedly, while exercising extraordinary original jurisdiction under Article 226/227 of the Constitution of India the High Court ought to have come to the rescue of those who are victims of injustice, but not at the cost of well established legal principles." The Hon'ble Supreme Court thereafter referred to Constitution Bench decision in the case of State of Orissa vs. Ram Chandra Dev, AIR 1964 SCC 685 wherein it was held that "although an appropriate order can be issued in favour of party, it must be established that the party has a right and the said right is legal, and is invaded or threatened. The existence of a right is thus the foundation of a petition under Article 226." The Hon'ble Supreme Court also referred to various other decisions and came to conclusion that the Division Bench committed an error of law in concluding that there was a breach of principles of promissory estoppel/ equitable estoppel.

33. It is settled legal position that if the rules do not permit certain action no mandamus can be issued to the authorities to act against the rules. The Hon'ble Supreme Court in the case of M/s. Narinder Hemraj vs. Lt. Governor of Union Territory of Himachal Pradesh reported in 1971 (2) SCC 747 was pleased to observed that power of making rules is a power of legislation delegated under the proviso to Article 309 of the Constitution of India. Just as a mandamus cannot be issued to the Legislature to enact a particular law, no mandamus can be issued to the executive to frame particular rule or make amendment therein.

34. On examination of the record, it is evident that the petitioners signed upon the circular dated 25.05.2001 regarding their service condition when they were deputed to the Trade Tax Department and they cannot resile from the same.

35. Learned counsel for the petitioners had shown to this Court the proposal and correspondences between the two departments with regard to keeping in abeyance 18 posts of Assistant Engineers in P.W.D. and creating a corresponding

number of posts of Assistant Commissioners in the Trade Tax Department. This correspondence continued from 2003 upto 2005, but the government finally disapproved all these proposals and it communicated its final decision that as per the rules the Assistant Engineers borrowed from the P.W.D. cannot be absorbed in the Trade Tax Department vide its order dated 27.08.2007. Only the consequential orders were issued by the Commissioner, Trade Tax on 27.06.2008 repatriating the petitioners to their department. In the present case, the consequential order alone has been challenged and the original decision of the State Government dated 27.08.2007 has not been challenged. In the case of Government of Maharashtra vs. Deokar's Distillery reported in 2003 (5) SCC 669 the Hon'ble Supreme Court has held that when writ petitions are filed challenging only consequential orders without challenging the original orders by which the cause of action arose, such writ petitions deserve to be dismissed as not maintainable.

36. On 04.07.2008, this Court issued interim directions directing the authorities to allow the petitioners to work on the post on which they were working prior to passing of the impugned order. From July, 2008 onwards the petitioners continued to serve as Assistant Commissioner, Trade Tax on the basis of said interim order and, therefore, no right can be said to have accrued to the petitioners due to long service rendered in the Trade Tax Department. The petitioners were appointed as Assistant Engineer in P.W.D. through selection by the U.P. Public Service Commission in the year 1999 and continued to work in P.W.D. till 2001 i.e. for three years. Thereafter, they were deputed to work in the Trade Tax Department in the verification cell from 2001 onwards. The government finally decided that they cannot be absorbed as Assistant Commissioner, Trade Tax in August, 2007 and communicated its decision to the Trade Tax Commissioner to take necessary action for repatriation. The Trade Tax Commissioner passed consequential order of repatriation in June, 2008. The petitioners cannot said to be working in the department for more than nine years as argued by the learned counsel for the petitioners and on that basis, no legal right can said to have been accrued in their favour.

37. Sri S.K. Kalia, learned Senior Advocate has argued that Engineer-in-Chief, who is Head of the Department, was ready and willing that these Assistant Engineers may be absorbed in the Trade Tax Department and read out a letter dated 25.03.2008 (Annexure-3 to the writ petition) in this regard and also submitted that the Principal Secretary, Public Works Department had no business to make a demand with regard to employees lent by the P.W.D. to the Trade Tax Department in the meeting dated 11.05.2010. It is incomprehensible that a subordinate officer like the Engineer-in-Chief would go against the wishes finally expressed by his administrative head of department i.e. the Principal Secretary, P.W.D. after taking into account all aspects of the matter. Also during the course of arguments, this Court made a specific query whether the P.W.D. is ready and willing to accept the petitioners on the same seniority and status as they originally enjoyed in their parent department. The decision of the P.W.D. Secretary has been communicated vide letter dated 28.07.2010 wherein it has been informed that no promotion from the post of Junior Engineer to Assistant Engineer has been made since 1982. Regarding promotion from the post of Assistant Engineer to Executive Engineer, the petitioners shall enjoy the same seniority and status as they enjoyed at the time, when they were appointed in the P.W.D..

38. In view of the aforesaid analysis of the facts and circumstances and legal position, this Court is of the considered view that the present petition does not warrant any interference by this Court under Article 226 of the Constitution of India.

39. The writ petition is dismissed accordingly.