

(2011) 01 KAR CK 0218

Karnataka High Court

Case No: Writ Petition No. 6551 of 2010

Chandru. H.N. Gowda

APPELLANT

Vs

State of Karnataka and Others

 State of Karnataka and

Others Vs Sri Rangaraju and

Others

RESPONDENT

Date of Decision: Jan. 22, 2011

Acts Referred:

- Constitution of India, 1950 - Article 162, 309
- Karnataka State Civil Services Rules, 1977 - Rule 8 (49)

Citation: (2011) ILR (Kar) 1585 : (2011) 3 KarLJ 562 : (2011) 4 KCCR 399 SN

Hon'ble Judges: V.G. Sabhahit, J; Subhash B. Adi, J; K. Govindarajulu, J

Bench: Full Bench

Advocate: Ravivarma Kumar in W.P No. 6551/2010 and Revathi Adinatha Narde, G.A. in W.P. No. 13605/2010, for the Appellant; Ravi B. Naik, Assts. in W.P No. 6551/2010, M.S. Bhagwat, for R3, 5, 7 and 9, K.V. Narasimhan, for R2, R1 and R4 and Indo Legal Inc., for R6, 8 and 10 in W.P. No. 13605/2010, for the Respondent

Judgement

@JUDGMENTTAG-ORDER

V.G. Sabhahit, J.

W.P. No. 6551/2010 and connected W.P. No. 13605/2008 are posted before this Full Bench for consideration of the question of law framed in W.P. No. 6551/2010, which reads as under:

Whether the guidelines of Government vide order No. DPAR 4 STR 2001, Bangalore dated 22.11.2001 relating to the transfer of Government servants which has come into force with effect from 22.11.2001 has statutory force or not?

2. We have heard the learned Senior Counsel appearing for the Petitioner in W.P. No. 6551/2010, which is filed being aggrieved by the order passed by the Karnataka

Administrative Tribunal, Bangalore, dated 25.02.2010 in Application No. 4452/2009, wherein the application filed by the third Respondent herein challenging the order of transfer dated 30.09.2009 has been allowed. The learned Senior Counsel submitted that in view of the provisions of Articles 309 and 162 of the Constitution of India and the provisions of the Karnataka State Civil Services Act, 1978 (for brevity, "the Act") providing for promulgation of the rules for implementing the provisions of the Act, the State Government can only regulate the proceedings by framing Rules providing for guidelines of transfer. He has also referred to the provisions of the Karnataka State Civil Services Rules (for short "the Rules"), which have come into effect from 01.04.1958, wherein the word "Transfer" has been defined under Rule 8(49) of the Rules as follows:

(49) "Transfer" means the movement of a Government servant from one headquarters station in which he is employed to another such station either (a) to take up the duties of a new post; or (b) in consequence of a change of his headquarters;

The learned Senior Counsel has further referred to Section 8 of the Karnataka Civil Services Act, 1978, (hereinafter referred to as "the Act"), wherein the power to make rules is provided to the State Government and he has further relied upon the provisions of Section 3(2) regarding the procedure to be followed for promulgation of the Rules. The learned senior Counsel, having regard to the provisions of the above said Articles of the Constitution of India and the Act and the Rules submitted that since transfer is a condition of service and there is already a provision made under the Act, wherein the word "transfer" has been defined, empowering the State Government to make Rules for transfer of Government servants in the State, the transfer of Government servants can be effected only by making the rules. In the light of the said provisions under the Act and the Rules no executive power under Articles 162 and 309 of the Constitution of India could be exercised by the executive of the State. The learned Senior Counsel further submitted that the Government order, which is admittedly, an executive order passed in exercise of the executive power of the State and which has come into effect from 22.11.2001 has no statutory force and the same cannot be enforced.

3. The learned Counsel appearing for the Respondents 3, 5, 7 and 9 in W.P. No. 13605/2008 submitted that the provisions of the Government order providing for guidelines for transfer of Government servants in the State dated 22.11.2001 have statutory force in view of the settled position of law that in the absence of any provision made in the Act, nor any rules having been promulgated regarding the conditions of transfer, it is always open to the State to provide guidelines for transfer by passing executive orders under Article 162 read with Article 309 of the Constitution of India. In support of his contention, he has relied upon a number of decisions of this Court and the Hon"ble Supreme Court. The learned Counsel further submitted that even when there are Rules providing for transfer or any other

condition of service if there is a lacuna, the same can be filled up by issuing an executive order.

4. The learned Government Advocate appearing for the State submitted that the Government order dated 22.11.2001 has been issued in exercise of the executive power of Article 162 of the Constitution of India and since Rules could not be framed under the Karnataka State Civil Services Act, 1978, executive order has been passed providing conditions for service and guidelines for transfer on the basis of the recommendation made by the Administrative Reforms Commission and the said order has statutory force.

5. In reply, the learned Senior Counsel appearing for the Petitioner in W.P. No. 6551/2010 submitted that as there is already provision in the Act, wherein "transfer" has been defined, empowering the State to make Rules for transfer of Government servants, no executive order could be passed and the guidelines for transfer should be made only by promulgating the Rules.

6. We have given careful consideration to the contentions of the learned Counsel appearing for the parties.

7. Article 309 of the Constitution of India reads as follows:

309: Recruitment and conditions of Service of persons serving the Union or a State;

Subject to the provisions of this Constitution, Acts of the appropriate Legislature may regulate the recruitment, and conditions of service of persons appointed, to public services and posts in connection with the affairs of the Union or of any State:

Provided that it shall be competent for the President or such person as he may direct in the case of services and posts in connection with the affairs of the Union, and for the Governor of a State or such person as he may direct in the case of services and posts in connection with affairs of the State, to make rules regulating the recruitment, and the conditions of service of persons appointed, to such services and posts until provisions in that behalf is made by or under an Act of the appropriate Legislature under this articles, and any rules so made shall have effect subject to the provisions of any such Act.

Article 162 of the Constitution of India deal with the extent of executive power of the State reads as follows:

162. Extent of Executive Power of State: "Subject to the provisions of this Constitution, the executive power of a State shall extend to the matters with respect to which the Legislature of the State has power to make laws:

Provided that in any matter with respect to which the Legislature of a State and Parliament have power to make laws, the executive power of the State shall be subject to and limited by, the executive power expressly conferred by this Constitution by any law made by Parliament upon the Union or authorities thereof.

Section 3 of the Karnataka State Civil Services Act, 1978 deal with the regulation of recruitment and the conditions of service, which reads as follows:

Section 3: Regulation of recruitment and the conditions of service: (1) Subject to the provisions of this Act, the State Government, may, by notification, make rules,-

(a) specifying the different categories of posts in the different branches of public services of the State, the total number and nature of posts in each such category and the scale of pay admissible to each such category;

(b) for the regulation of the recruitment and conditions of service of persons appointed to public services:

Provided that in respect of the offices and servants of the High Court, the powers of the State Government under this subsection, shall be exercised by the Chief Justice of the High Court:

Provided further that in respect of the Secretariat Staff of the Houses of the Legislature, the powers of the State Government under this Sub-section, shall be exercised by the Special Board.

Rule 8(49) of the Karnataka Civil Service Rules defines "transfer" as follows:

Rule: 8(49): "Transfer" means the movement of a Government servant from one headquarters station in which he is employed to another such station either (a) to take up the duties of a new post; or (b) in consequence of a change of his headquarters.

8. It is clear from the above said provisions of Karnataka State Civil Service Act and Karnataka Civil Service Rules that, the Act provides for regulation of recruitment and the conditions of service by promulgating rule. The rule defines transfer, however, there is no provision either in the Act or in the Rules providing for any guideline for transfer and therefore we have to decide as to whether the executive order passed under Article 162 of the Constitution of India, when rules are not made for giving effect to the guidelines to be provided for transfer, which has been done by the State Government and Government order dated 22.11.2001 has statutory force.

9. It is clear from the provisions of Article 162 of the Constitution of India that the executive power of a State shall extend to the matters with respect to which the Legislature of the State has power to make laws. The executive power of the State shall be subject to, and limited by, the executive power expressly conferred by this Constitution or by any law made by Parliament upon the Union or authorities thereof. Therefore, the contention of the learned Senior Counsel appearing for the Petitioner that, there is already provision made in the Act and the Rules providing for promulgating of Rules to regulate the conditions of service including transfer has to be considered to find out as to whether the said order could be passed under Article 162 of the Constitution of India. Fact that though there is provision in the Act

for promulgating rules and the procedure is also provided for promulgating rules, that no rules have been framed providing for transfer of government service and guidelines there under is not disputed. It is also not in dispute that, the order dated 22.11.2001 is passed in exercise of Executive Power of the State under Article 162 of the Constitution of India. Therefore, in the absence of any rules framed pursuant to the provisions of the Act, the executive order has been passed by the State in exercise of Article 162 of the Constitution of India. It is well settled that, having regard to the provisions of Article 309 and 162 of the Constitution of India that, executive orders can be passed in the absence of any rules providing for regulations of conditions of service in respect of which no rules have been made. In the case of [Paluru Ramkrishnaiah and Others Vs. Union of India \(UOI\) and Another, ,](#) the Hon"ble Supreme Court has laid down as follows:

An executive instruction could make a provision only with regard to a service matter which was not covered by the Rules and that such executive instruction could not override any provision of the Rule framed under Article 309

10. Similarly even in situations when there is a rule providing for regulation of conditions of service of transfer if there is any gap, the executive power of the State to pass an order under Article 162 of the Constitution of India cannot be denied as held by Hon"ble Supreme Court in the case of [Dr. Krushna Chandra Sahu and others Vs. State of Orissa and others,](#) wherein the Hon"ble Supreme Court at para 31 has held that;

Para 31: "Now, power to make rules regulating the conditions of service of persons appointed on Government posts is available to the Governor of the State under the proviso to Article 309 and it was in exercise of this power that the present rules were made. If the statutory rules, in a given case, have not been made, either by Parliament or the State Legislature, or, for that matter, by the Governor of the State, it would be open to the appropriate Government (the Central Government under Article 73 and the State Government under Article 162) to issue executive instructions. However, if the rules have been made but they are silent on any subject or point in issue, the omission can be supplied and the rules can be supplemented by executive instructions." (Ref: [Sant Ram Sharma Vs. State of Rajasthan and Another, \).](#)

11. The Division Bench of this Court while considering the order passed by the Karnataka Administrative Tribunal, wherein the tribunal had held that, the Government order dated 22.11.2001 has statutory force, has confirmed the said finding in Ramesh Babu K. v. State of Karnataka and Ors. in W.P. No. 28507/2009 dated 19.1.2010 it is observed at para 9 as follows:

Para 9: The another legal contention urged by the learned Senior Counsel on behalf of the Petitioner is that the guidelines framed by the State Government for effecting premature transfer of its officers has no statutory force also cannot be accepted by

this Court for the reason that the Tribunal, in such matters, rejected such contentions holding that the guidelines framed by the State Government for guidance of the Cadre Management Authority to effect premature transfer of its offices and the same have got a statutory force.

12. In view of the decision of the Hon"ble Supreme Court and admitted facts that there is no rules providing for regulating the transfer and providing guidelines therein. The executive order issued in exercise of power under Article 162 of the Constitution of India will have statutory force and can be enforced, as the extent of executive power of the State to make laws is subject to the provisions of the Constitution and the executive power of the State shall extend to the matters in respect to which legislature has power to make laws. Accordingly, we answer the question of law that is referred to us by holding that the Government Order No. DPAR 4 STR 2001, Bangalore, dated 22.11.2001 relating to transfer of Government Servants which has come into force from 22.11.2001, has statutory force.

Accordingly, Writ Petitions shall be placed before the Division Bench for disposal in accordance with law, after obtaining order of the Hon"ble Chief Justice.