



**IN THE HIGH COURT OF MADHYA PRADESH
AT JABALPUR
BEFORE
HON'BLE SHRI JUSTICE SUSHRUT ARVIND DHARMADHIKARI
AND
HON'BLE SMT. JUSTICE ANURADHA SHUKLA
WRIT APPEAL No. 1862 OF 2024
THE STATE OF MADHYA PRADESH AND OTHERS
Versus
KUNWARLAL CHOWKIKAR**

Appearance :

Shri B.D. Singh– Deputy A.G. for the appellants/State.

Shri Sanjay Sanyal – Advocate for the respondent.

Reserved on:- 31.08.2024

Pronounced on:- 03.10.2024

ORDER

Per Justice Sushrut Arvind Dharmadhikari :

Heard finally with the consent of both the parties.

This appeal under Section 2(1) of the Madhya Pradesh Uchha Nyayalay (Khandpeeth Ko Appeal) Adhiniyam, 2005 has been filed assailing the order dated 26.09.2023 passed in W.P. No. 6688/2021, whereby the writ petition filed by the respondent herein was allowed and learned Single Judge quashed the impugned order dated 23/11/2016 passed



by the Commissioner, Public Instructions, Bhopal (Annexure A/5) directing the appellants herein to regularize the period of service of respondent w.e.f. 01/09/2005 to 30/11/2006 and to pay the arrears of salary within a period of 90 days from the date of receipt of certified copy of the order.

2. Brief facts of the case are that the respondent is a retired Headmaster having completed entire service tenure of 37 years and 3 months. On the basis of complaint, the respondent was transferred to Government Higher Secondary School, Khedicut but he did not join at the transferred place of posting. The respondent challenged the said transfer order before this court by way of writ petition No. 6580/2006. Said writ petition came to be decided by directing the appellants herein to take a decision on the grievance of the respondent after giving an opportunity of hearing. In compliance of the order passed in W.P. No. 6580/2006, while deciding the representation filed by the respondent in respect of his transfer, the District Education Officer, Betul vide order dated 16/08/2005, on administrative ground, maintained the order of transfer but modified the same and in place of Government Middle School, Khedicut, the respondent was transferred to Government Middle School, Goula (Annexure A/4). Respondent did not join his duties either in Government Middle School,



Goula. Thereafter, the documents annexed with the petition show that the respondent made a complaint to M.P. State, Schedule Caste Commission, Bhopal, alleging discrimination on the basis of his caste. After examining the complaint, M.P. State, Schedule Caste Commission, Bhopal, vide its letter dated 22/04/2006 issued recommendation in favour of the respondent and in response thereof the Director, Public Instructions, Madhya Pradesh passed order dated 04/10/2006 directing the District Education Officer, District Betul to transfer the respondent according to Policy framed in the year 2006-2007 regarding transfer of the employees. He further directed to issue warning to Block Education Officer, Amla for causing harassment to the respondent. Thereafter, vide order dated 28/11/2006, the District Education Officer, Betul has posted the respondent at Government Middle School, Sasawad, District Betul on transfer as per the choice of respondent and in compliance of the said order, respondent joined his posting at transferred place. District Education Officer, Betul also issued warning to Block Education Officer, Betul not to repeat such behaviour in future. Admittedly, the respondent was absent from his duty from 01/09/2005 to 30/11/2006 and vide order dated 23/11/2016, the Commissioner, Public Instructions, Bhopal has declared the said period of absent as 'no work no pay', which was challenged by the respondent before this Court by way of W.P. No. 6688/2021. Learned Single Judge, in its order dated 26/09/2023



observing that the alleged unauthorized absence was not attributable to the respondent, inasmuch as the authorities themselves issued the order of cancellation of transfer and the record further reflects that the respondent was being harassed at the behest of the then Block Education Officer, Amla; accordingly, the Commissioner, Public Instructions, Bhopal vide its order dated 04/10/2006 issued clear directions to take appropriate action against the then Block Education Officer, Amla and has set aside the impugned order dated 23/11/2016 directing the appellants to regularise the period w.e.f. 01/09/2005 to 30/11/2006 and accordingly pay arrears of salary to the respondent within a period of 90 days failing which the arrears would carry interest at the rate of 6% per annum. Being aggrieved by the said order, appellants/State has filed the present appeal.

3. Learned counsel for the appellants contended that the respondent did not perform his duties w.e.f. 01/09/2005 to 30/11/2006, therefore, he would not be entitled for any salary for the aforesaid period. Learned Single Judge failed to appreciate the fact that the respondent never joined the place of posting at Khedicut or at Goula but relying on the order dated 04/10/2006 passed by the Director, Public Instructions, Bhopal the learned Single Judge allowed the writ petition No. 6688/2021 and quashed the impugned order dated 23/11/2016, which is illegal and the same cannot be



sustained. It is also contended that on perusal of the impugned order, it reflects that the respondent remained unauthorizedly absent from his service w.e.f. 01/09/2005 to 30/11/2006 and aforesaid period has been treated as “no work no pay”, therefore, learned Single Judge ought not to have interfered with the impugned order dated 23/11/2016, hence, impugned order deserves to be set aside. In support of his contentions, learned counsel for the appellants has placed reliance on the decision of Hon'ble Apex Court in the case of **State of Bihar & Others Vs. Kripa Nand Singh & Anothers, (2014) 14 SCC 375**, saying that the period of unauthorized absent cannot be treated as compulsory waiting period but was in fact voluntary, which is solely attributable to the respondent herein, therefore, the respondent would not be entitled for any salary. Hence, learned counsel for the appellants prays for setting aside of the impugned order.

4. Per contra, learned counsel for the respondent opposed the prayer contending that the appellants/State committed irregularity while transferring the respondent. Since the transfer order passed by the Authority was contrary to Rules and Regulations and moreso, the respondent was subjected to harassment by the Block Education Officer, Amla, therefore, the respondent is entitled to get the salary for the period



of 01/09/2005 to 30/11/2006. It is further contended that learned Writ Court has not committed any illegality or perversity, which requires any interference by this Court. Hence, prays for dismissal of writ appeal.

5. Heard the learned counsel for the parties.
6. The controversy seems to be involved in the case is that the respondent did not join at the transferred place of posting and remained absent for the period w.e.f. 01/09/2005 to 30/11/2006, which was declared as 'no work no pay' vide Annexure A/5. The respondent did not dispute the fact regarding his absence for the aforesaid period, however, questioning the action taken by the authority on the ground of discrimination, the respondent filed a representation before the M.P. State Scheduled Caste Commission, Bhopal, which was decided later on and in response thereof vide order dated 04/10/2006 the Director, Public Instructions, Bhopal, directed the D.E.O that the respondent be posted at the place of his choice. During the pendency of said representation, the respondent did not perform his duty at any place and remained absent unauthorizedly.
7. While passing the impugned order, the learned Single Judge came to the conclusion that the alleged unauthorized absence were not attributable to the respondent inasmuch as the Authorities themselves issued the order of cancellation of transfer and the record further reflects that the



respondent was being harassed at the behest of the then Block Education Officer, Amla. As per learned Single Judge, the alleged period of absence was not on account of any fault of the respondent.

8. The question which arises before this Court is as to whether the period of unauthorized absence can be regularized merely on the ground that the employee was being harassed by the superior authority and his transfer was not in accordance with the policy and the representation was pending before the Commission.

9. The Division Bench of this Court in the case of *Mridul Kumar Sharma Vs. State of M.P.* reported in ILR 2015 MP 2556 has held as under:-

“4. Counsel for the appellant placed reliance on the decision of the Division Bench of this Court dated 15.7.2015 in W.A.No.381/2015. Observations in this decision, however, will be of no avail to the appellant in the face of the decision of the Supreme Court in the case of *Gujarat Electricity Board and another Vs. Atmaram Sungomal Poshani* reported in (1989) 2SCC 602, which is directly on the point. In paragraph 4, the Supreme Court observed thus:

‘4. Transfer of a government servant appointed to a particular cadre of transferable posts from one place to the other is an incidence of service. No government servant or employee of Public Undertaking has legal right for being posted any any particular place. Transfer from one place to other is generally a condition of service and the employee has no choice in the matter. Transfer from one place to other is necessary in public interest and efficiency in the public administration. Whenever, a public servant is transferred he must comply with the order but if there be any genuine difficulty in proceeding on transfer it is open to him to



make representation to the competent authority for stay, modification or cancellation of the transfer order. If the order of transfer is not stayed, modified or cancelled the concerned public servant must carry out the order of transfer. In the absence of any stay of the transfer order a public servant has not justification to avoid or evade the transfer order merely on the ground of having made a representation, or on the ground of his difficulty in moving from one place to the other. If he fails to proceed on transfer in compliance with the transfer order, he would expose himself to disciplinary action under the relevant rules, as has happened in the instant case.

The respondent lost his service as he refused to comply with the order of his transfer from one place to the other.

(emphasis supplied).”

10. It is well settled principle of service jurisprudence that the representation filed by the employee does not create any right in his favour to remain at the same place from where he has been transferred until the representation is decided. He must first join the transferred place even if he has to avail the remedy of representation.
11. On perusal of the record, there is no document to show that the respondent had ever worked at Khedicut or at Goula at any point of time. At first instance, when respondent was transferred to Govt. Middle School, Khedicut, he challenged the same before the High Court by way of filing W.P. No. 6580/2006 and in compliance of order passed by the Court, the Authority took decision upon the representation filed by the respondent and modified the transfer order placing the respondent at Govt.



Middle School Goula. Being dissatisfied by the said order, the respondent instead of ventilating his grievance before the High Court again, has taken a recourse of lodging a complaint with the M.P. State Schedule Caste Commission, Bhopal and the respondent remained absent from his service till the outcome of the said representation. During said period, no interim protection was granted in favour of the respondent and obviously, the Commission had no power to issue such interim protection in favour of the respondent. Indisputably the Commission intervened in the matter as a result of which, the respondent got posting at his desired place and accordingly joined.

12. In this regard Article 338 Constitution of India provides constitution of National Commission for Scheduled Castes and the Commission shall investigate and monitor all the matters relating to the safeguards provided for the Scheduled Castes under the Constitution or under any other law for the time being in force or under any order of the Government and to evaluate the working of such safeguards. The Commission shall inquire into specific complaints with respect to the deprivation of rights and safeguards of Scheduled Castes. The Commission shall have all the powers in respect of the summoning and enforcing the attendance of any person etc., as stipulated in the provision. However, it has been held by the



Hon'ble Supreme Court as well as various High Courts in catena of judgment that the Commission may not interfere in the service conditions of an employee viz. transfer, promotion , posting etc., which all are governed under the Service conditions of an employee. The scope of Article 338 of the Constitution of India cannot be expanded for the purpose of interfering with the routine administrative affairs of the employer, which all are governed under the Service Rules in force.

13. In the case at hand, learned Single Judge has failed to consider the fact that under the garb of pendency of representation before the M.P. State Scheduled Castes Commission, Bhopal, which has no authority to issue direction in respect of service matter, the respondent did not join his duty for the period in question; whereas no interim protection was ever granted in his favour by any authority empowered under the law and in absence of any stay on the transfer order, a public servant must carry out the order of transfer. In the absence of any stay on the transfer order, a public servant has no justification to avoid or evade the transfer order merely on the ground of having made a representation. Learned Single Judge seems to be of the opinion that the respondent was not allowed to work though he was ready, which in given facts of the case, is not correct, as it is established that the respondent did not work during the period in



question at Government Middle School, Khedicourt or Government Middle School, Goula, where he was transferred. Merely on the basis of presumption, learned Single Judge could not have come to the conclusion. Even we accept that the transfer order was wrong, even then the respondent did not have any right to remain absent unauthorizedly merely on the basis of pendency of representation. The respondent ought to have joined his duty at transferred place according to the provision given in M.P. Civil Services (Joining Time) Rules, 1982, therefore, in view of the attending facts and circumstances of the case, in our considered opinion, aforesaid period cannot be termed as “on duty”.

14. Learned Single Judge has wrongly arrived at the finding that it is not the fault of the respondent but is of the State. Learned Single Judge failed to appreciate the fact that the respondent did not work earlier as well as after the order was modified, therefore, the question of regularising the period does not arise.
15. Accordingly, present writ appeal stands allowed and impugned order dated 26/09/2023 passed in W.P. No. 6688/2021 is set aside and impugned order dated 23/11/2016 passed by Commissioner, Public Instructions, Bhopal is hereby restored. However, the respondent would be entitled for other consequential benefits as already been directed by the



Commissioner, Public Instructions, Bhopal vide order dated 23/11/2016
(Annexure A/5).

(SUSHRUT ARVIND DHARMADHIKARI)
JUDGE

(ANURADHA SHUKLA)
JUDGE

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