

IN THE HIGH COURT OF KARNATAKA AT BENGALURU

DATED THIS THE 24TH DAY OF NOVEMBER, 2023

PRESENT

THE HON'BLE MR JUSTICE K.SOMASHEKAR

AND

THE HON'BLE MR JUSTICE RAJESH RAI K

WRIT PETITION NO.17670 OF 2023(S-KSAT)

BETWEEN

DR. PRAJNA AMMEMBALA,
D/O PROF. A.V.NAVADA,
AGED ABOUT 46 YEARS,
KAS (SENIOR SCALE),
RESIDING AT NO.7,
1ST 'A' MAIN ROAD, 2ND CROSS,
SHIVANAGARA, RAJAJINAGAR,
BANGALORE - 560 010.

...PETITIONER

(BY SRI. PRITHVEESH M.K, ADVOCATE)

AND

- 1 . THE STATE OF KARNATAKA,
REPRESENTED BY ITS PRINCIPAL SECRETARY,
DEPARTMENT OF PERSONNEL AND ADMINISTRATIVE
REFORMS, VIDHANA SOUDHA,
BANGALORE - 560 001.
- 2 . THE STATE OF KARNATAKA,
REPRESENTED BY ITS PRINCIPAL SECRETARY (ACS),
DEPARTMENT OF FOOD CIVIL SUPPLIES AND CONSUMER
AFFAIRS, NO.8, CUNNINGHAM ROAD,
BANGALORE - 560 052.
- 3 . SRI. PATHARAJU.V,
S/O VEERAMARAI AH,
AGED ABOUT 49 YEARS,
WORKING AS ADDITIONAL DIRECTOR - 1(IRA),
DEPARTMENT OF FOOD CIVIL SUPPLIES AND CONSUMER

AFFAIRS, NO.8, CUNNINGHAM ROAD,
BANGALORE - 560 052.

...RESPONDENTS

(BY SRI. S.P.KULKARNI, SENIOR COUNSEL FOR
SRI. H.M.UMESH FOR C/R3;
SRI. V.SHIVAREDDY AGA FOR R1 & R2)

THIS WRIT PETITION IS FILED UNDER ARTICLES 226 AND 227 OF THE CONSTITUTION OF INDIA PRAYING TO a) CALL FOR RECORDS PERTAINING TO THE IMPUGNED ORDER DATED 02/08/2023 PASSED IN APPLICATION No. 2947/2023 BY THE HON'BLE KARNATAKA STATE ADMINISTRATIVE TRIBUNAL (ANNEXURE-A) AND ETC.

THIS WRIT PETITION HAVING BEEN HEARD AND RESERVED FOR ORDERS ON 17.11.2023, COMING ON FOR PRONOUNCEMENT THIS DAY, **RAJESH RAI.K, J.**, MADE THE FOLLOWING:

ORDER

Heard Learned Counsel Sri. Prithveesh M K for the Petitioner and learned senior counsel Sri. S.P. Kulkarni for Sri. H.M.Umesh for Respondent No.3 and Learned AGA.

2. This Writ Petition arises out of order passed by the Karnataka State Administrative Tribunal (for short 'tribunal') in A.No. 2947/2023 dated 02.08.2023. Wherein the tribunal was pleased to allow the application by setting aside the impugned transfer notification bearing No. SiAaSuEi 181 AaSeEi 2023 dated 06.07.2023.

3. The facts in brief that led the petitioner to this court, as borne out from the pleading are as follows :

Petitioner who is currently a KAS (senior Scale) officer who was appointed by way of direct recruitment in the year 2006 initially

as a tahsildar. Further, the Petitioner came to be promoted as KAS(Junior Scale) officer in the year 2015 and to KAS (Senior Scale) in the year January, 2021.

4. Pursuant to him being promoted as stated supra, vide order dated 02.02.2022 he was posted as Deputy Secretary, department of Social Welfare, Karnataka Government Secretariat. This posting order came to be questioned before the tribunal and tribunal upholding his transfer directed the petitioner to report to the transferred place. Posteriorly, on 27.01.2023 petitioner was further transferred to the post of Deputy secretary, Department of Home. Within one month of this order being passed, i.e, on 27.02.2023 petitioner was reverted back to his earlier place of posting i.e. as Deputy Secretary, Department of Social Welfare. But one Sri. M.J.Venkateshaiah who was working as Deputy Secretary, Department of Social Welfare was due to retire in two months. It is in this background, pursuant to the said order petitioner was relieved from the post of Deputy Secretary, Department of home on 16.03.2023 and reported to 1st respondent head office seeking for appropriate posting.

5. Posteriorly, on petitioner being without posting since 17.03.2023 respondent No.1 passed transfer notification, transferring him to the post of Additional Director-I Department of Food, Civil Supplies and Consumer affairs where respondent No. 3

was working, vide bearing No.SoAaSiEi 181 AaSeEi 2023 dated 06.07.2023. This came to be challenged by the respondent No.3 herein on it being premature and without prior approval of Chief Minister. Tribunal examined the rival contentions and proceeded to set aside the impugned order on the ground that it being premature and respondent No.3/petitioner herein is ineligible to hold the post as provided by C and R rules pertaining to the Department of Food, Civil Supplies and Consumer Affairs. It is in this coveted background the respondent No.3/petitioner has approached this Hon'ble Court challenging the order passed by the tribunal supra.

6. It is contended by the petitioner that the original posting of respondent No.3 to the place in question i.e. Additional Director-I of Food, Civil Supplies and Consumer Affairs vide order dated 09.11.2021 is in itself is bad in law. As the post of Additional Director-I supra is an encadred post and as per government order dated 18.12.2017 which is produced at page 64 of the writ petition and hence the said post can only be filled by person who is in the grade of IAS (Viz. page-74). The said provision also mentions a rider wherein in the absence of there being no eligible persons from the cadre of IAS to be posted to the said place, then it shall be filled by a person who is in the cadre of KAS(super time scale).

7. The petitioner draws the attention of this court to Annexure A1 to the application before the tribunal and contends

that the respondent No.3/applicant before tribunal is a KAS (senior scale) officer and hence as per government order mentioned supra the respondent No.3 has no eligibility to hold the said post.

8. It is in this background, the learned counsel for the petitioner contended that the respondent No.3 who has approached the tribunal has no *locus standi* to challenge the impugned transfer notification as his posting is *par se* flawed and defective. The petitioner urges this contention by buttressing two decisions passed by the co-ordinate bench of this Court in **Sri.Ravindranath A Hanchilal Vs State of Karnataka and others** in **WP.No.226457/2020** and **Dr.K.T.Subhas Chandra Vs. The Commissioner of Collegiate Education Department and others.** in **W.P. No. 47197/2013.**

9. Learned counsel for the petitioner also vehemently submits the respondent No.3 herein belongs to the Department of Personnel and Administrative Reforms and he was occupying the said place vide notification dated 09.11.2021 and the said notification is not a transfer order but an order of deputation passed in favour of respondent No.3 herein. On this background he would contend, even appreciating the said position, the tenure of respondent No.3 to hold the said place in question would come to rest on 9th of November as he would complete the minimum tenure of two years in the said place.

10. *Per contra*, the learned senior counsel for respondent No.3 contends that he was posted to the place in question vide order dated 09.11.2021 and he took charge of the said post on 10.11.2021. Hence, displacing him by the impugned order is in the teeth of transfer guidelines of 07.06.2013 as the same is premature and without posting. Learned senior counsel to countenance his contentions relies upon the decision of ***Seema H Vs. State of Karnataka*** reported in ***2016 SCC OnLine Kar 8202***.

11. Learned senior counsel in contra to the submissions made by the learned counsel for the petitioner with respect to eligibility criterion of the respondent No.3 to hold the said place is concerned, relies upon the government order produced at Annexure-A4 to the application bearing notification No.SiAaSuEi 175 AaSeVa 2022, Bengaluru dated 27.07.2022. Wherein, the state government has upgraded the post of respondent No.3 from KAS(senior scale) to KAS (Selection grade) which can be seen at Sl.No.37 of the order and it is in this background he has been continued to the place in question. The learned senior counsel also asserts the finding recorded by the tribunal in paragraph 9 of the impugned order with respect to the eligibility of the respondent No.3 to hold the post is concerned and submits that tribunal has rightly appreciated this position based on materials available on record.

12. This Writ petition being heard and disposed on 25.10.2023, was again restored back to file on account of Respondent No.3 filing R.P.No.521/2023 which came to be allowed on 09.11.2023 for fresh consideration. Accordingly, heard the respective parties and perused the entire records made available to this Court.

13. Respondent No.3 came to be deputed to the place of Additional Director-I, as KAS (Senior scale) officer on 09.11.2021 and it was on 27.07.2022 by a government order, his cadre was upgraded to Selection grade and pursuant to which he continued in the same place. We now find it relevant to refer the government order dated 27.07.2022 which reads as under-

"ಸರ್ಕಾರದ ಆದೇಶ ಸಂಖ್ಯೆ: ಸಿಆಸುಇ 175 ಆಸೇವ 2022,

ಬೆಂಗಳೂರು ದಿನಾಂಕ: 27.07.2022

ಪ್ರಸ್ತಾವನೆಯಲ್ಲಿ ವಿವರಿಸಿರುವ ಅಂಶಗಳ ಹಿನ್ನೆಲೆಯಲ್ಲಿ, ಅಧಿಸೂಚನೆ ಸಂಖ್ಯೆ:ಸಿಆಸುಇ 118 ಆಸೇವ 2022, ದಿನಾಂಕ: 31/05/2022 ರಲ್ಲಿ ಕೆ.ಎ.ಎಸ್(ಹಿರಿಯ ಶ್ರೇಣಿ) ವೃಂದದಿಂದ ಕೆ.ಎ.ಎಸ್(ಆಯ್ಕೆ ಶ್ರೇಣಿ) ವೃಂದಕ್ಕೆ ಬಡ್ಡಿ ನೀಡಿ, ಆಡಳಿತದ ಹಿತದೃಷ್ಟಿಯಿಂದ ಮತ್ತು ಅವಶ್ಯಕತೆಗಳನ್ವಯವಾಗಿ ಅವರುಗಳು ಕರ್ತವ್ಯ ನಿರ್ವಹಿಸುತ್ತಿರುವ ಹುದ್ದೆಗಳಲ್ಲಿಯೇ ನೇಮಿಸಿ ಮುಂದುವರಿಸುವುದರಿಂದ ಈ ಕೆಳಕಂಡ ಅಧಿಕಾರಿಗಳು ಬಡ್ಡಿ ಹೊಂದಿ ಕರ್ತವ್ಯ ನಿರ್ವಹಿಸುತ್ತಿರುವ ಹುದ್ದೆಗಳನ್ನು ತಾತ್ಕಾಲಿಕವಾಗಿ ಕೆ.ಎ.ಎಸ್(ಆಯ್ಕೆ ಶ್ರೇಣಿ) ವೃಂದಕ್ಕೆ ಉನ್ನತೀಕರಿಸಿ/ಸೇರ್ಪಡೆ ಮಾಡಿ ಆದೇಶಿಸಿದೆ."

The name of the respondent No.3 finds place at Sl.No.37 of this order.

14. By close scrutiny of the government order mentioned supra would indicate that, the state has passed the said order in terms of Rule 60 of the Karnataka Civil Service Rules upgrading the cadre of respondent No.3, only for temporary period. Before we

speaking anything about the nature of upgradation that respondent No.3 has been conferred with, we find it relevant to refer to the judgement rendered by the Hon'ble Apex Court in **BSNL v. R. Santhakumari Velusamy**, reported in **(2011) 9 SCC 510** which reads as under -

"29. On a careful analysis of the principles relating to promotion and upgradation in the light of the aforesaid decisions, the following principles emerge:

(i) Promotion is an advancement in rank or grade or both and is a step towards advancement to a higher position, grade or honour and dignity. Though in the traditional sense promotion refers to advancement to a higher post, in its wider sense, promotion may include an advancement to a higher pay scale without moving to a different post. But the mere fact that both—that is, advancement to a higher position and advancement to a higher pay scale—are described by the common term "promotion", does not mean that they are the same. The two types of promotion are distinct and have different connotations and consequences.

(ii) Upgradation merely confers a financial benefit by raising the scale of pay of the post without there being movement from a lower position to a higher position. In an upgradation, the candidate continues to hold the same post without any change in the duties and responsibilities but merely gets a higher pay scale.

(iii) Therefore, when there is an advancement to a higher pay scale without change of post, it may be referred to as upgradation or promotion to a higher pay scale. But there is still difference between the two. Where the advancement to a higher pay scale without change of post is available to everyone who satisfies the eligibility conditions, without undergoing any process of selection, it will be upgradation. But if the advancement to a higher pay scale without change of post is as a result of some process which has elements of selection, then it will be a promotion to a higher pay scale. In other words, upgradation by application of a process of selection, as contrasted from an upgradation simpliciter can be said to be a promotion in its wider sense, that is, advancement to a higher pay scale.

(iv) Generally, upgradation relates to and applies to all positions in a category, who have completed a minimum period of service. Upgradation can also be restricted to a percentage of posts in a cadre with reference to seniority (instead of being made available to all employees in the category) and it will still be an upgradation simpliciter. But if there is a process of selection or consideration of comparative merit or suitability for granting the upgradation or benefit of advancement to a higher pay scale, it will be a promotion. A mere screening to eliminate such employees whose service records may contain adverse entries or who might have suffered punishment, may not amount to a process of selection leading to promotion and the elimination may still be a part of the process of upgradation simpliciter. Where the upgradation involves a process of selection criteria similar to those applicable to promotion, then it will, in effect, be a promotion, though termed as upgradation.

(v) Where the process is an upgradation simpliciter, there is no need to apply the rules of reservation. But where the upgradation involves a selection process and is therefore a promotion, the rules of reservation will apply.

(vi) Where there is a restructuring of some cadres resulting in creation of additional posts and filling of those vacancies by those who satisfy the conditions of eligibility which includes a minimum period of service, will attract the rules of reservation. On the other hand, where the restructuring of posts does not involve creation of additional posts but merely results in some of the existing posts being placed in a higher grade to provide relief against stagnation, the said process does not invite reservation."

(emphasis supplied by me)

When this being the legal position, upgradation order passed supra in respect of respondent No.3 is passed in order to temporarily arrange the right personnel eligible to hold the post in question. But, the order dated 27.07.2022 cannot be interpreted in a manner that the respondent No.3 is promoted to the cadre of KAS (Selection grade) as promotion would not only include the increase

in pay scale and rank but it also would include advancement in honour, dignity and grade. (See - ***Union of India vs Pushpa Rani and Others*** reported in ***(2008) 9 SCC 242***).

15. Hence, it cannot be stated that the respondent No.3 is more eligible to hold the post than petitioner herein, as both of them belong to the same cadre i.e, KAS (Senior Scale) officer.

16. This being the position, now we proceed to examine the initial posting of the Respondent No.3 vide order dated 09.11.2021 juxtapose the requirement as per the government order 18.12.2017. The government order mentioned supra which declared the eligibility criteria to hold the post of the Additional Director-I is concerned, clearly specified that the said post can only be held by the person in the cadre of I.A.S and no such person being available, it is only then, a person from the cadre of KAS (Super time scale) be placed as Additional Director-I. On the other hand, while respondent No.3 was deputed to the post mentioned supra, he was KAS (Senior Scale) officer. Hence, we find that the initial posting of the respondent no. 3 to the post mentioned *infra* itself is *per se* bad in law and liable to be quashed on it being defective. When the initial posting of respondent No. 3 is *malum ni se(wrong in itself)*, he questioning the posting given to the Petitioner by way of impugned order herein has no legs and liable to be struck down at the inception itself as per law laid down by the co-ordinate bench of

this Hon'ble Court in **Dr.K.T.Subhas Chandra Vs. The Commissioner of Collegiate Education Department and others.** in **W.P. No. 47197/2013.** While this aspect being queried to the respondent No.3 herein, the learned senior counsel submits that the petitioner is also not eligible to hold the post mention *Ibid.* We are unable to appreciate this contention of the learned senior counsel, on the sole premises of "***Ex injuria jus non oritur***"(***illegal acts does not create law***). **Respondent No.3 having taken the advantages of wrongful posting, cannot then take advantage of bar of any law to frustrate the lawful process.** Hence, it cannot be said that the respondent No.3 has *locus standi* to challenge the veracity of impugned order and also in so far as posting the petitioner is concerned.

17. The tribunal without appreciating the said factual position has proceeded to mis-interpret that the Government by its order dated 27.07.2022 has upgraded the eligibility criteria to hold the post of Additional Director-I from KAS (Senior scale) to KAS (selection grade) and has concluded that the respondent No.3 whose cadre is also upgraded by the same order is eligible to hold the post when compared to the petitioner herein. Even if the government order dated 27.07.2022 is read otherwise so as to mean the eligibility of post in question has been upgraded to Selection grade then such interpretation will be *dehors* the

government order dated 18.12.2017 as it clearly provides that the eligibility to hold the post is not one of selection grade but of grade of super time scale. Such being the scenario the manner of language used in the government order dated 27.07.2022 would only mean that cadre of respondent No.3 is upgraded, not the entire post itself.

18. In the second limb of the arguments, the learned senior counsel would submit before this court that the order impugned is a premature one and even without showing any posting to him. In this regard, it would be germane to resort back to the transfer guidelines dated 07.06.2023, which guards not only the transfer but also the deputation of the respondent herein, wherein it provides that the minimum tenure of deputation is two years only and the respondent has completed the tenure of two years by 09.11.2023 itself. Moreover, it is now well-settled law by various judgement of Hon'ble Apex Court so also this Court that deputation is a temporary arrangement and the same cannot be claimed as a matter of right and the deputationist shall report back to his home department once the tenure at borrowing department is completed, unless absorbed or extended by the borrowing department. (See - ***Union of India v. V. Ramakrishnan***, reported in **(2005) 8 SCC 394** and ***Kunal Nanda v. Union of India***, **(2000) 5 SCC 362**, reported in **(2000) 5 SCC 362**). Now, when all the knots being

untied, we now proceed to carefully examine the terms of the impugned notification more specifically the last paragraph of the impugned notification which reads as under-

"ಆದೇಶದಿಂದ ಸ್ಥಳ ನಿರೀಕ್ಷಣೆಗೆ ಬರಲಿರುವ ಅಧೀಕಾರಿಗಳಿಗೆ ಮುಂದಿನ ಸ್ಥಳ ನಿಯುಕ್ತಿಗಾಗಿ ಸಿ.ಆ.ಸು.ಇ ಇಲಾಖೆಯಲ್ಲಿ ಕಾರ್ಯವರದಿ ಮಾಡಿಕೊಳ್ಳುವಂತೆ ನಿರ್ದೇಶನ ನೀಡಲಾಗಿದೆ"

On conjoint reading, this would clearly indicate that it is not only the transfer order passed in favour of the petitioner herein but also the repatriation order passed in favour of the respondent No.3. Even otherwise, learned AGA for the state submits that, transfer of petitioner is post Chief Ministers Approval and also submits that said transfer notification is passed for public and administrative exigencies. Such being the scenario, the respondent No.3 claiming that the impugned order is bad in law on it being premature and without posting is without any basis and hereby rejected.

19. We now place our opinion as to eligibility of the petitioner to hold the post in question is concerned. It is not in dispute that the petitioner is an equivalent cadre officer vis-à-vis the respondent No.3, except for the reason the respondent No.3 cadre has been upgraded. Apart from the reason that respondent No.3 was initially deputed to the said place and he has now completed his tenure, further the upgradation was also given only to meet the eligibility criteria, we find no other ground to say that

the petitioner is eligible to hold the post and said upgradation, if required can also be awarded to the Petitioner herein.

20. Be that as it may, the respondent No.3 since inception is neither eligible to hold nor has locus to challenge any posting made and furthermore he has worked in the said place for two years and his minimum tenure is now completed. But, if considered initial posting of the respondent No.3, then the Petitioner who is also in the same cadre of KAS (Senior Scale), is very much eligible to hold the post on deputation if the same benefit of upgradation is awarded to him and it is in this background we hold this Writ Petition in favour of the Petitioner.

21. Further, the Hon'ble Apex Court in ***B. Srinivasa Reddy v. Karnataka Urban Water Supply & Drainage Board Employees' Assn.***, (2006) 11 SCC 731 (2), in paragraph No. 51 has held that -

"51. It is settled law by a catena of decisions that the court cannot sit in judgment over the wisdom of the Government in the choice of the person to be appointed so long as the person chosen possesses the prescribed qualification and is otherwise eligible for appointment"

(emphasis laid by me)

Hence, it is settled that this Court cannot sit on perceptivity of the State Government in posting a person to a particular post is concerned. But, it is well within the domain of this Court to decide

upon the eligibility of a person who has been posted to particular place. In this legal position, when harped upon the impugned order herein and on scrutinizing it gingerly, we fail to appreciate the conduct of 1st respondent to pass the impugned order or even the order dated 09.11.2021 wherein the respondent No.3 was posted to the place in question. As these orders are very narrow and blanket as to why a person of a lower cadre is posted to an encadred post which can only be held by a person of higher cadre. In present case, person either IAS cadre or KAS(Super time scale) cadre can only be posted as Additional Director-I. Hence, we are constrained to opine that, even though such transfer orders bear the chief ministers signature on it, but such orders cannot be said to be a licit order as we find absence of reasons to enlighten the Chief Minister as to non-availability of eligible persons to be posted to said post and as to why a person of a lower cadre is posted to the said encadred place. Hence the following

ORDER

a) Writ Petition is **Allowed**.

b) The impugned order passed by the tribunal in A.No. 2947/2023 dated 02.08.2023 is hereby set aside and thereby notification bearing No.SiAaSuEi 181 AaSeEi 2023 dated 06.07.2023 issued by respondent No.1 is upheld.

c) It is made clear that the petitioner shall report to the place of Additional Director -I Department of Food, Civil Supplies and Consumer Affairs, Bengaluru, subject to state considering posting eligible persons to the said post. In the event petitioner being transferred from said place, the same cannot be considered as premature. Consequently, the respondent No.3 is directed to report back to the Head office of respondent No.1 herein and they shall give him the posting forthwith.

d) We also direct the state government to issue necessary guidelines i.e, as to the circumstances under which a lower cadre person can be posted to higher cadre post and also to make it mandatory to assign proper reasons when a lower cadre person is posted to a post designated for higher cadre before getting chief ministers approval.

No order as to costs.

This court places on record its deep appreciation for the able research and assistance rendered by Official Law Clerk/Research Assistant, MR.Shreedhar Ganapati Bidre.

**Sd/-
JUDGE**

**Sd/-
JUDGE**