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BABULAL JAIN
v.
STATE OF M.P. AND ORS.

APRIL 24, 2007

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[S.B. SINHA AND MARKANDEY KATJU, JJ.]

Service Law:

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Deputation to a higher post—Fixation of pay—Instructions of State Government that transfer from one Department to another would be treated as posting and not appointment—Pay of employee fixed as per FR 22(D)—Later pay refixed and excess payment ordered to be recovered—Held, the substantive post held by employee did not provide for channel of promotion to the post he was posted on Deputation—For all intent and purpose he was deputed to that post—As such, he could not have been placed on a higher scale of pay—FR 22(D) is not applicable to a case of deputation—However, in exercise of jurisdiction under Article 142 of the Constitution, Department directed to refund the amount recovered from the employee—Fundamental Rules—FR 22(D)—Constitution of India, 1950—Article 142.

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Appellant, an Accountant in the Collectorate, was posted on deputation to the post of Election Supervisor. On 9.2.1999, State of Madhya Pradesh issued an Office Memorandum to the effect that transfer from one Department of the Government to the other Department would be treated as posting and not appointment, and on being appointed on higher post, pay would not be fixed under FR 22(D) or 22(A) of M.P. Civil Services (CCA) Rules, but on the pay being drawn by him on the lower post. On 13.12.2000 the Collector added the word “promotion” in the offer of appointment of the appellant by corrigendum.

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He was relieved of his duties as Election Supervisor with effect from 31.12.2001, the date on which he attained the age of superannuation. Meanwhile, in view of the circular dated 9.2.1999, his pay was refixed in the

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pay scale of his substantive post by order dated 26.12.2001, and the excess payment made to him was directed to be recovered. The appellant challenged the said order and, ultimately, the High Court dismissed his writ petition holding that since the employee had been given the higher scale of Election Supervisor on which post he was not promoted as per law, there was no

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illegality in the order of refixation of his pay and there was no question of quashing the recovery. A

In the appeal filed by the employee, it was contended that the Office Memorandum dated 9.2.1999 was *ultra vires* Fundamental Rule 22(D) and the M.P. Civil Services (CCA) Rules; and that, in any case, recovery could not have been made from his salary. B

Allowing the appeal in part, the Court

HELD: 1. The substantive post held by the appellant did not provide for a channel of promotion to the post of Election Supervisor and, as such, the Collector of the District could not have, in law, appointed him on the post of Election Supervisor and later issue a corrigendum that he had been promoted thereto. Thus, for all intent and purport, he was only deputed to that post. Having been placed on deputation to a post which carries higher responsibilities, some allowance could have been granted in his favour, but he could not have been placed on a higher scale of pay. It is, therefore, not a case that the Finance Department of the State of Madhya Pradesh could not have issued a clarification in this behalf as ultimately the financial burden would be on the State. Fundamental Rules 22(D) of the Rules refers to regular promotion to a post and is not applicable to a case of deputation. C

[Para 10, 11, 12 and 13] [519-B-G] D

2. However, in a case of this nature, no recovery should be directed to be made. Appellant has discharged higher responsibilities. It is not a case where he obtained higher salary on committing any fraud or misrepresentation. The mistake, if any, took place on a misconception of law. He has since retired. A sum of Rs. 22,000/- has been recovered from him. Such recovery has been effected without issuing any show cause notice. His case on merit in this behalf was not considered by the Government and even by the Tribunal. The respondents shall refund the said sum of Rs. 22,000/- to the appellant and also direct his retirement benefit to be calculated as if he had reached the age of superannuation only as an Accountant on the re-fixed pay and not on the scale of pay of Election Supervisor. This direction is issued in exercise of jurisdiction under Article 142 of the Constitution of India. E

[Paras 14 and 17] [519-H; 520-A-B; C-D] F

CIVIL APPELLATE JURISDICTION : Civil Appeal No. 2125 of 2007. G

From the Judgment and Order dated 27.04.2005 of the High Court of H

A Madhya Pradesh, at Indore Bench in W.P. No. 2032 of 2003.

Paramjit Singh Patwalia, Amanpreet Singh Rahi, Manjeet Singh, Harikesh Singh, T.V. George, Satish Kumar and Ashwani Bhardwaj for the Appellant.

B G.P. Singh, Sushma Singh, Monohar Singh Bakshi, Debasis Misra, Naveen Sharma and B.S. Banthia for the Respondents.

The Judgment of the Court was delivered by

S.B. SINHA, J. 1. Leave granted

C 2. The question which has been raised in this appeal arising out of a judgment and Order dated 27.4.2005 passed by the Madhya Pradesh High Court in Writ Petition (Civil) No. 2032/2003 centers around the interpretation of FR 22(D) of the M.P. Civil Services (CCA) Rule. Appellant was working as an Accountant. He was purported to have been recommended for his alleged promotion to the post of Election Supervisor by the Collector, District Dewas D (MP) in terms of a letter dated 25.7.1998 addressed to the Chief Electoral Officer, Bhopal in the following terms:

E “Election Supervisor posted in District Dewas has since superannuated. For filing of this vacant post, name of Shri R.B. Puranik was recommended to be promoted to the post election supervisor vide OM Sr. No. 1374/estab/98 dated 12.6.98. Thereafter Shri Babulal Jain, accountant, vide his application dated 25.7.98 has consented to be appointed to the post of election supervisor.

F Thereafter, at the concerned Seniority list, being at serial No. 4 Mr. Babulal Jain is senior to Mr. Puranik and experienced in election related work.

Photo Copy of his ACRs are enclosed.

Thereafter it is recommended that Shri Babulal Jain, accountant, be promoted to the post of election supervisor.

G Encl :- Sd/-
Photo Copy of ACRs Collector
For the Years 93-97 District : Dewas (M.P.)”

H 3. The said recommendation having been accepted, he was appointed to the said post in the pay scale of Rs. 4000-100-6000 until further orders.

4. He was later on put in the pay scale of Rs. 4500-125-7000 with one increment as his personal pay. The Government of Madhya Pradesh, however, issued a circular letter on or about 9.2.1999 in regard to the fixation of pay on appointment to the post involving higher duties and responsibilities, stating; **A**

“When any Government servant is appointed on higher post from one Department of Government to another department of the Government, the following guidelines are being issued State Government regarding pay fixation after careful consideration: **B**

i. Transfer from department of the Government to another on higher post shall not be treated as appointment rather posting. **C**

ii. On being appointed on higher post the pay fixation of the concerned Government servant shall not be fixed under FR 22(D) or 22(A) rather on pay being drawn by him on lower post.”

5. On or about 13.12.2000, the Collector added the word “promotion” in his offer of appointment by way of Corrigendum after the words “until further orders”; **D**

“In the light of the objection dated 24.10.2000 raised at the time of pay fixation of Sh. Babulal Jain, then Asst. Grade-II/Accountant/now, Election Supervisor, Election Branch, Collecotrate, Dewas (M.P.) partial modification of OM Sr. No. 28.9.98/estab/98 Dewas dated 28.9.98 vide which he was appointed as Election Supervisor on the sanction of the Chief Election Officer (M.P.) the word “promotion” is added after until further order. Rest part of the order shall be effective as usual.” **E**

6. On and from 1.1.2000 he started drawing a salary of Rs. 6625/- per month. He was relieved of his duties as Election Supervisor with effect from 31.12.2001 by an Order dated 5.10.2001. On or about 26.12.2001, his pay was directed to be re-fixed in the light of the said Office Memorandum dated 9.2.1999 as on 1.1.2000 at Rs. 6000 + Rs. 179 as personal pay. It was directed that excess amount paid to him be recovered. He attained the age of superannuation on 31.12.2001. **F**
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7. Questioning the said order, he filed an original application before the Madhya Pradesh Administrative Tribunal.

8. Having regard to the fact that the appellant had filed a representation **H**

A in respect of the said Order dated 13.12.2001 before the Chief Electoral Officer, Bhopal on 22.12.2001, the Tribunal in view of Section 21(b) of the Administrative Tribunals Act, 1985 dismissed the said application summarily. A Writ Petition filed thereagainst has been dismissed by the High Court by reason of the impugned judgment stating;

B “It is clear from the reply that the original post of the petitioner is Asstt. Grade-II, which is equivalent to Supervisor/Asstt. Superintendent. The petitioner had been given the pay-scale of Accountant/Election Supervisor, on which post he was not promoted as per law. In such circumstances, there is no illegality in the order of re-fixation of pay. The petitioner was himself working as Accountant. In such circumstances, there is no question for quashing the recovery.”

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9. Mr. Manjit Singh, the learned counsel appearing on behalf of the petitioner raised the following contentions in support of this appeal.

D (i) The purported office memorandum dated 9.2.1999 is *ultra vires* Fundamental Rule 22(D) of the Rules, in terms whereof, promotion granted to the petitioner and consequent fixation of his salary on a higher scale of pay could not have been directed to be rescinded relying on or on the basis thereof and

E (ii) In any event no recovery could have been directed to be made from the salary of the appellant.

Rule 22(D) of the M.P. Civil Services (CCA) Rule reads as under:-”

F (1) Notwithstanding anything contained in these rules where a Govt. holding a post in a substantive temporary or officiating capacity is promoted or appointed in substantive temporary or officiating capacity to another post carrying duties and responsibilities of greater importance than those attaching to the post held by him, his initial pay in the time scale of the higher post shall be fixed at the stage next above the pay notionally arrived at by increasing (his pay in respect of the lower post by one increment at the stage at which such pay has accrued).”

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H 10. It is not the case of the appellant that the post of Assistant Grade-II provides for a channel of promotion to the post of Election Supervisor. Appellant, indisputably was an employee working in the Collectorate having been appointed by the State of Madhya Pradesh. A Collector of a District has

many functions; one of them being to oversee holding of elections in his district as an Electoral Officer. He, therefore, although could have recommended for the posting of the appellant on the post of Election Supervisor, the question of his appointment or for that matter promotion thereto did not and could not arise. Appellant did not show that there exists any channel of promotion from the post of Assistant Grade-II to the post of Election Supervisor.

11. Thus, for all intent and purport, he was only deputed to that post. Having been placed on deputation to a post which carries higher responsibilities, some allowance could have been granted in his favour, but he could not have been placed on a higher scale of pay.

12. In absence of any channel of promotion, the Collector of the District could not have, in law, appointed him on the post of Election Superintendent and later issue a corrigendum that he had been promoted thereto. Appellant before us has also not brought to our notice the extant rules of promotion operating in the field. It does not appear to be a case where the question of promotion to the said post was considered in terms of the rule by a competent authority. It furthermore does not appear that any Departmental Promotion Committee considered the cases of all eligible candidates therefor. Whereas in terms of the extant rules, the controlling authority may direct deputation of an employee from one post to the other, it is beyond any doubt that for the purpose of grant of promotion, it was obligatory on the part of the Collector to follow the statutory rules operating in the field.

13. It is, therefore, not a case as was sought to be made out that the Finance Department of the State of Madhya Pradesh could not have issued a clarification in this behalf as ultimately the financial burden would be on the State. Fundamental Rules 22(D) of the Rules to which our attention has been drawn by the learned counsel for the appellant refers to regular promotion to a post. It does not contemplate a situation of this nature. FR 22(D) is not applicable to a case of deputation. It certainly would not apply where a purported order of promotion has been effected from one cadre to the other and that too without following the statutory rules. We, therefore, do not find any error in the judgment of the High Court in this behalf.

14. We, however, are of the opinion that in a case of this nature, no recovery should be directed to be made. Appellant has discharged higher responsibilities. It is not a case where he obtained higher salary on committing

A any fraud or misrepresentation. The mistake, if any, took place on a misconception of law. He was at least entitled to some allowances. In re-fixing his pay, his claim to that effect has not been considered. He has since retired. A sum of Rs. 22,000/- has been recovered from him. Such recovery has been effected without issuing any show cause notice. His case on merit in this behalf had not been considered by the Government and even by the Tribunal.

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15. The Tribunal did not assign any reason in support of its order. The correct legal position was not brought to the notice of the tribunal.

16. For the reasons aforementioned, this appeal is allowed in part and to the extent mentioned hereinbefore.

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17. We, therefore, while directing the respondents to refund the said sum of Rs. 22,000/- to the appellant herein, also direct that his retirement benefit shall be calculated as if he had reached the age of superannuation only as an Accountant on the re-fixed pay and not on the scale of pay of the Election Supervisor. We issue this direction in exercise of our jurisdiction under Article 142 of the Constitution of India. No costs.

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Appeal partly allowed.