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TEJSHREE GHAG ETC. ETC.

v

PRAKASH PARASHURAM PATIL AND ORS. ETC. ETC.

MAY 17, 2007

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

Service Law:

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Transfer—Transfer of incumbents from higher time scale to lower time scale—Incumbents suffering loss of pay—Co-employees also transferred from lower to higher scale—Transfer orders set aside by High Court—Co-employees case that the terms and conditions of service governed by Rules of 2005, thus order of High Court not sustainable—On appeal held: Terms and conditions of services of employees unless altered expressly would be governed by Rules

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in existence at the time when the impugned orders were passed—Rules of 2005 not given retrospective effect—Executive power of passing transfer orders can be exercised only in terms of extant Rules—Also principles of natural justice were to be complied with—Thus, order of High Court upheld—Maharashtra Education Service Administrative Officer of Municipal School Board, Assistant Deputy Educational Inspector, Assistant Project Officer, Assistant Teacher in Junior Colleges of Education, Coordinator, Councillor, Extension Officer in State Council of Educational Research and Training Pune, Lecturer in Junior Colleges, Programme Assistant, Science Supervisor, District Science Supervisor, Subject Assistant, Subject Expert and Technical Assistant (Recruitment) Rules, 2005.

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In the cadre of Maharashtra Education Service Group 'C' there were 16 categories of posts. Pursuant to an advertisement in 1991, respondents were directly appointed as Assistant Deputy Education Inspector. Thereafter, appointments were made for the post of Assistant Teacher, Physical Education Teacher and Science Supervisor. No seniority list was published. A purported seniority list was published in the year 2001 only. Objections were invited. Respondents were transferred to the post of Asstt. Project Officer/Asstt. Teacher and Asstt. Teacher/Asstt. Project Officer were transferred to the posts of ADEL. As a result the quantum of pay of the respondent was reduced. Respondents challenged the transfer order. Original applications were

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dismissed and also the Review applications were dismissed. Private respondents filed writ petitions. The order of the tribunal and the order in Review petitions were set aside. Hence the present appeal.

Dismissing the appeal, the Court

HELD: 1.1. The cadre of Maharashtra Education Service Group 'C' consists of 16 categories of posts. All posts at all material times were not treated to be equivalent at least in the matter of scale of pay. It is stated that a decision to sanction three tier scale of pay to full time teachers teaching in higher school was taken by the State Government. According to it if the direction of the High Court is given effect to, the same would violate the conditions of service of the employees concerned working in the Education Department and only in that view of the matter Maharashtra Education Service Administrative Officer of Municipal School Board, Assistant Deputy Educational Inspector, Assistant Project Officer, Assistant Teacher in Junior Colleges of Education, Coordinator, Councillor, Extension Officer in State Council of Educational Research and Training Pune, Lecturer in Junior Colleges, Programme Assistant, Science Supervisor, District Science Supervisor, Subject Assistant, Subject Expert and Technical Assistant (Recruitment) Rules, 2005 have been framed. By reason of 2005 Rules the effect of the judgment of the High Court is not sought to be taken away. It was not given retrospective effect. Rules framed by the State had also not been brought to the notice of the High Court.

[Para 9, 10 and 14] [219-D, E, B, C; 220-A]

1.2. Respondents were holders of posts on which they were employed. The posts carried the scales of pay prescribed therefor. The terms and conditions of their service, thus, unless altered expressly, would be governed by the rules which were in existence at the time when the impugned orders were passed. It is true that the State has the power to alter the terms and conditions of service even with retrospective effect by making rule framed under proviso appended to Article 309 of the Constitution of India, but it is also well-settled that the rules so made ordinarily should state so expressly.

[Paras 11 and 12] [219-F, G]

1.3. The orders of transfer were passed by Authority in purported exercise of its executive power. Executive power can be exercised only in terms of the extant Rules. Where executive order results in civil consequences, principles of natural justice are required to be complied with prior thereto. It is not a case where an order of transfer was passed by way of change of place

A of employment within an organization simpliciter. An order of transfer ordinarily should be in terms of the existing rules. Transfer may even be incidental to the conditions of service, but thereby nobody can be deprived of his existing right. Existence of a power and exercise thereof are two different concepts. An Executive power in absence of any statutory rules cannot be exercised which would result in civil or penal consequences. Such exercise of power must, moreover, be *bona fide*. It cannot be done for unauthorized purpose. An Executive order passed for unauthorized purpose would amount to malice in law. An order of transfer cannot prejudicially affect the status of an employee. If orders of transfer substantially affect the status of an employee, the same would be violative of the conditions of service and, thus, illegal. Transfers must be made to an equivalent post. The orders of transfer impugned before the Tribunal in any even could not have been passed without complying with the principles of natural justice.

[Paras 15 and 17] [220-B-E; 221-C, D]

D *Ramadhar Pandey v. State of U.P. & Ors.*, [1993] Supp. 3 SCC 35; *Hussain Sasan Saheb Kaladgi v. State of Maharashtra*, [1988] 4 SCC 168 and *P.C. Wadhwa v. Union of India and Anr.*, [1964] 4 SCR 598, relied on.

Vice-Chancellor, L.N. Mithila University v. Dayanand Jha, [1986] 3 SCC 7; *Prasar Bharti & Ors. Amarjeet Singh & Ors.* [2007] 2 SCALE 486, referred to.

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CIVIL APPELLATE JURISDICTION : Civil Appeal No. 2697 of 2007.

From the Final Judgment and Order dated 22.3.2006 of the High Court of Judicature at Bombay in WP. Nos. 86, 87, 88, 155, 166, 3088, 3089 & 3114 of 2004.

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C. Balakrishna, P.V. Daware and Dr. Kailash Chand for the Appellant.

Indu Malhotra, Arjun Suresh, A.P. Mayee and V.N. Raghupathy for the Respondents.

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The Judgment of the Court was delivered by

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

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2. This appeal is directed against the judgment and order dated 22.03.2006 passed by the High Court of Bombay in various writ petitions filed by the private respondents herein whereby and whereunder the order of the Tribunal

dated 13.03.2002 as also the order passed in the Review Petition arising therefrom dated 14.08.2003 were set aside. A

3. The said writ petitions came up for consideration by the High Court in the following circumstances.

4. In the Education Department of the State of Maharashtra there exists a cadre of Assistant Teachers. There are 16 categories of posts in the said cadre. Respondents were directly appointed as Assistant Deputy Education Inspector (for short, "ADEI") pursuant to an advertisement issued by the State of Maharashtra on 01.10.1992. Advertisements for other posts in the same cadre were also issued, namely, for the posts of Asstt. Teacher, Physical Education Teacher, Science Supervisor etc. pursuant whereto appointments were made in the said post. However, no seniority list was published for a long time. A purported seniority list was published only on 09.08.2001. Allegedly, before publishing the said final seniority list objections were invited. B
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5. Respondents, as noticed hereinbefore, who were appointed as Assistant Deputy Education Inspector, were transferred to the post of Asstt. Project Officer/Asstt. Teacher and those who had been working as Asstt. Teacher/Asstt. Project Officer were transferred to the posts of ADEI. Indisputably, by reason of such orders of transfer, the respondents suffered civil consequences as the quantum of their pay was reduced. D

6. Original applications were filed by them before the Maharashtra Administrative Tribunal, alleging : E

- (i) Orders for transfer on the basis of provisional seniority list was without jurisdiction;
- (ii) Those who were holding the posts of Asstt. Teacher could not have been transferred as ADEI as they were not qualified therefor; and F
- (iii) By reason of such transfers, the pay scale of the respondents would be reduced G

7. By reason of an order dated 13.03.2002 the said original applications were dismissed. Review applications filed thereagainst were also dismissed. The High Court, however, in the writ petitions filed by the respondents in terms of its judgment dated 22.03.2006 which is impugned before us upon noticing the scales of pay payable to the different classes of employees, *inter* H

A *alia*, opined :

B “What emerges from the above discussion is that the post of
A.D.E.I had been recognized as distinct post under the recruitment
rules. The appointment to the said posts is both by promotion as well
as by direct recruitment. The promotion is from the post amongst
others of Assistant Masters, A.D.E.I.s have promotional avenue to
the post of Deputy Education Inspector to which posts the other
posts in Grade III are not entitled for consideration. The post of
A.D.E.I. as set out earlier carries higher pay scale than those other
posts. In these circumstances, the respondent authorities could not
C have clubbed these posts under a common seniority or for that matter
made the posts transferable from one to another. This would be
treating holders of dissimilar posts as belonging to one class, which
they are not. This will also be in violation of the recruitment rules and
affecting the promotional avenue of A.D.E.I.s. Though there is no
right to promotion, there is right to be considered. By the action of
D transfer, this right of the Petitioner has been affected. This clearly
amounts to an infringement of Article 14 and 16 of the Constitution
of India.”

E 8. It was furthermore held that transfer of persons holding substantive
posts carrying lower time scale of pay would be violative of Article 14, 16 and
311 of the Constitution of India. It was stated :

F “The order entailed loss of pay as well as loss of seniority and
postponement of future chances of promotion. It is in that context the
Apex Court held in that case that the effect of reduction in rank, the
appellant suffered loss of pay and also suffered loss of seniority as
also postponement of future chances of promotion to the senior scale.
On the facts, therefore, the court held that the appellant was not
reverted for administrative reasons for unavailability of post but for
different reasons. The act of the Respondent State therefore, in
transferring the petitioner from the higher time scale to lower time
G scale would attract Article 311 of the Constitution of India. A reduction
in the rank may be by way of punishment or it may be an innocuous
thing. If the Government servant has a right to a particular rank, then
the very reduction from that rank will operate as a penalty, for he will
then lose the emoluments and privileges of that rank. In such cases
the test for determining whether the reduction in such cases is or is
H not by way of punishment is to find out if the order for the reduction

also visits the servant with any penal consequences. In the instant case, the Petitioners suffer penal consequences inasmuch as the petitioner's are losing their emoluments and privileges of the rank" A

9. Mr. C. Balakrishna, learned counsel appearing on behalf of the appellants, would, *inter alia*, submit that the terms and conditions of service of the employees being governed by the statutory rules, the impugned judgment cannot be sustained. Our attention in this behalf has been drawn to the notification dated 27.05.2005 making rules in terms of proviso to Article 309 of Constitution of India called 'Maharashtra Education Service Administrative Officer of Municipal School Board, Assistant Deputy Educational Inspector, Assistant Project Officer, Assistant Teacher in Junior Colleges of Education, Coordinator, Councillor, Extension Officer in State Council of Educational Research and Training Pune, Lecturer in Junior Colleges, Programme Assistant, Science Supervisor, District Science Supervisor, Subject Assistant, Subject Expert and Technical Assistant (Recruitment) Rules, 2005' (Rules). It was contended that in terms of the said rules, the respondents were not entitled to hold the posts of Assistant Deputy Education Inspector. B C D

10. It is not in dispute that the cadre of Maharashtra Education Service Group 'C' consists of 16 different categories of posts. All posts at all material times were not treated to be equivalent at least in the matter of scale of pay. It is stated that a decision to sanction three tier scale of pay to full time teachers teaching in higher school was taken by the State Government. According to it if the direction of the High Court is given effect to, the same would violate the conditions of service of the employees concerned working in the Education Department and only in that view of the matter 2005 Rules have been framed. E

11. Respondents herein were holders of posts on which they were employed. The posts carried the scales of pay prescribed therefor. F

12. The terms and conditions of their service, thus, unless altered expressly, would be governed by the rules which were in existence at the time when the impugned orders were passed. It is true that the State has the power to alter the terms and conditions of service even with retrospective effect by making rule framed under proviso appended to Article 309 of the Constitution of India, but it is also well-settled that the rules so made ordinarily should state so expressly. G

13. It has been contended that 2005 are retrospective in nature or have H

A retroactive operation.

14. By reason of the said rules the effect of the judgment of the High Court is not sought to be taken away. It was not given retrospective effect. Rules framed by the State had also not been brought to the notice of the High Court.

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15. The orders of transfer were passed by Authority in purported exercise of its executive power. Executive power can be exercised only in terms of the extant rules. It is well-settled that where executive order results in civil consequences, principles of natural justice are required to be complied with prior thereto. It is not a case where an order of transfer was passed by way

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of change of place of employment within an organization simpliciter. An order of transfer ordinarily should be in terms of the existing rules. Transfer may even be incidental to the conditions of service, but thereby nobody can be deprived of his existing right. Existence of a power and exercise thereof are two different concepts. An Executive power in absence of any statutory rules

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cannot be exercised which would result in civil or penal consequences. Such exercise of power must, moreover, be *bona fide*. It cannot be done for unauthorized purpose. An Executive order passed for unauthorized purpose would amount to malice in law. An order of transfer cannot prejudicially affect the status of an employee. If orders of transfer substantially affect the status

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of an employee, the same would be violative of the conditions of service and, thus, illegal. Transfers must be made to an equivalent post. [See *Ramadhar Pandey v. State of U.P. & Ors.*, [1993] Supp. 3 SCC 35 *Hussain Sasan Saheb Kaladgi v. State of Maharashtra*, [1988] 4 SCC 168 and *P.C. Wadhwa v. Union of India and Anr.*, [1964] 4 SCR 598]

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16. In *Vice-Chancellor, L.N. Mithila University v. Dayanand Jha*, [1986] 3 SCC 7, it was held :

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“...The true criterion for equivalence is the status and the nature and responsibility of the duties attached to the two posts. Although the two posts of Principal and Reader are carried on the same scale of pay, the post of Principal undoubtedly has higher duties and responsibilities. Apart from the fact that there are certain privileges and allowances attached to it, the Principal being the head of the college has many statutory rights, such as: (i) He is the ex officio member of the Senate. (ii) He has the right to be nominated as the member of the Syndicate.

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(iii) As head of the institution, he has administrative control over the college Professors, Readers, Lecturers and other teaching and non-

teaching staff. (iv) The Principal of a constituent college is also the ex officio member of the Academic Council of the university. (v) He has the right to act as Centre Superintendent in the university examinations. It is thus evident that the High Court was right in holding that the post of Reader could not be regarded as an equivalent post as that of Principal in the legal sense. Maybe, when the affairs of a college maintained by the university are mismanaged, the Vice-Chancellor may, for administrative reasons, transfer a Professor or Reader of any department or college maintained by it to the post of the Principal of such college, but the converse may not be true. While the Professors and Readers by reason of their learning and erudition may enjoy much greater respect in society than the Dean or Principal of a college, it does not follow that the post of Principal must be treated as equivalent to that of a Reader for purposes of Section 10(14) of the Bihar State Universities Act, 1976, as amended.”

17. The orders of transfer impugned before the Tribunal in any event could not have been passed without complying with the principles of natural justice.

18. We are not oblivious of the decision of this Court in *Prasar Bharti & Ors. v. Amarjeet Singh & Ors.*, [2007] 2 SCALE 486, wherein order of transfers, if not otherwise arbitrary and irrational and thus violative of Article 14 of the Constitution of India, was upheld.

19. In this case we are not concerned with enforcement of the Rules. They were brought in force at a latter stage. It is for the State to apply the provisions of the said rules only if any occasion arises therefor but keeping in view the fact that the said rules have not been given a retrospective effect, the impugned orders cannot be supported by reason thereof or otherwise.

20. We, therefore, do not find any merit in this appeal. It is accordingly dismissed with costs. Counsel's fee assessed at Rs. 10,000/-.

N.J.

Appeal dismissed.