

[2019] 7 S.C.R. 962

A STATE OF KARNATAKA & ANR.

v.

KRISHNA KUMAR & ORS.

(Civil Appeal Nos. 4089-4241 of 2019)

B APRIL 23, 2019

[ARUN MISHRA AND NAVIN SINHA, JJ.]

- Education/Educational Institutions: Government primary schools – Implementation of Sarava Shikshana Abhiyana Scheme – Upgradation of certain primary schools with 8th standard to give effect to the Scheme and referred as Higher Primary Schools – Appointment of teachers in the schools – Issuance of Office Memorandum by the State Government in the matter of transfer of teachers of Higher Primary Schools on ‘mutual basis’ – Challenge to – Office Memorandum relating to mutual transfer quashed by the tribunal and the High Court – On appeal, held: SSA Scheme was to deal with the primary objective of broad basing education – Clause 13 of the Office Memorandum dealt with the mutual transfer – There is no provision in the Act and rules with respect to mutual transfers – When the provisions of ‘mutual transfer’ which is made in Office Memorandum, depends on the volition of an employee, there is no compulsion, it cannot be said to be arbitrary – It is ordered only when two incumbents opt for mutual transfer – Thus, the provisions of mutual transfer does not militate against the provisions of the Act and rules framed thereunder and particularly, when it was with respect to SSA Scheme, it was open to making certain provisions by way of Office Memorandum – In the absence of statutory provision, the executive instructions would have force of law, more so when the SSA is an independent scheme – Thus, the tribunal and the High Court erred in law in quashing the same – Orders passed by the tribunal as well as by the High Court set aside – KCS (Regulation of Transfers of Teachers) Act, 2007.*

G CIVIL APPELLATE JURISDICTION : Civil Appeal Nos. 4089-4241 of 2019.

From the Judgment and Order dated 09.01.2013 of the High Court of Karnataka at Bangalore in Writ Petition Nos. 13334 of 2012 and 14461-612 of 2012 (S-KAT).

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Basava Prabhu S. Patil, Sr. Adv., V. N. Raghupathy, Ms. Rachitha Hiremath, Parikshit P. Angadi, Chinmay Deshpande, Manendra Pal Gupta, Advs. for the Appellants. A

Mahesh Thakur, Vijay Kumar, Ms. Vipasha Singh, Dr. Sushil Balwada, Nandakumar, Palanivehi, Ms. Deepika Nanda Kumar, Naresh Kumar, Shailesh Madiyal, Sudhanshu Prakash, Advs. for the Respondents. B

The following Order of the Court was passed

O R D E R

1. The State of Karnataka has filed appeals aggrieved by the Judgment and Order passed by the Tribunal and affirmed by the High Court quashing in part the Memo dated 7.4.2010 issued by the State Government in the matter of transfer of teachers of Higher Primary Schools on “Mutual Basis”. C

2. The respondents are the teachers appointed in the year 2004-2005 in the Government primary schools where ‘Sarava Shikshana Abhiyana’ Scheme (in short, “the SSA Scheme”) was being implemented. The objective of the SSA Scheme is to provide easy access to 8th standard in the context of universalization of elementary education. In order to give effect to the scheme certain Government primary schools have been upgraded with 8th standard and they are referred to as “Higher Primary Schools”. 65% of the salary used to be provided by the Central Government. Under the said scheme, in order to make the education broad-based certain Government primary schools were permitted to impart 8th standard for the benefit and the improvement of educating children in the rural areas, particularly at the places where very few high schools were existing. This decision was taken by the Government to encourage the students to continue the 8th standard education in the rural areas itself, though 8th standard was part of the high school for which Trained Graduate Teachers used to be appointed. D E F

3. On 07.04.2010, an Office Memorandum was issued *inter alia* to transfer and posting of teachers in the schools where the SSA Scheme has been implemented. One of the policy decisions is that those teachers appointed as primary teachers in the upgraded Government higher primary schools will continue to work in the SSA Scheme. The primary teachers appointed under the SSA Scheme shall be transferred to the G H

- A post of Teachers of the same subject under the same project. It is also provided that the teachers can submit their applications for ‘mutual transfer’ with Teachers of the State Zone with the same pay-scale and other benefits.
4. Certain teachers, aggrieved by clause 13 relating to ‘mutual transfer’ contained in Office Memorandum, dated 07.04.2010 filed an original application to the Karnataka Administrative Tribunal, Bangalore. The application has been allowed and the said clause of the Office Memorandum has been quashed and it has been ordered that transfers/postings be made strictly in accordance with the KCS (Regulation of Transfers of Teachers) Act, 2007 (in short, referred to as “the Act of 2007”) and rules framed thereunder. The State preferred Writ Application in the High Court. The same has been dismissed. Hence, the appeal has been preferred by the State of Karnataka, by way of Special Leave.
5. Mr. Basava Prabhu Patil, learned senior counsel, appearing on behalf of the State of Karnataka, urged that under the SSA Scheme, certain primary schools were upgraded to higher primary schools, by inclusion of 8th class which was not included in the primary schools. The hybrid category of higher primary schools was created in order to make the education broad-based. The respondents-teachers had been appointed with a specific condition that it would be permissible to post them in the schools where the SSA Scheme has been implemented and if workload of teaching is less considering the number of students, they can be asked to teach 6th and 7th classes also. The specific condition mentioned in the order of appointment is as under: -
- “if the workload in the Higher Primary School where appointed is less, the candidate has to teach Science and Mathematics subjects for 6th and 7th standards, to make up the workload.”*
6. The learned senior counsel has further pointed out that since the hybrid category of higher primary schools was created, the matter was strictly not governed by the provisions of the Act of 2007 and the rules framed thereunder and moreover, in order to implement the Sarva Shiksha Abhiyan, an independent scheme containing the provisions for mutual transfer in Clause 13 of Memo dated 7.4.2010 had been carved out, which is based upon the volition of an incumbent in case he opt for mutual transfer, then it is permissible for him to avail the aforesaid facility.
- H The other service conditions were not to be adversely affected. The

salary, as well as the seniority, are not to be adversely affected by mutual transfers in case an incumbent avails the provisions of clause 13. Office Memorandum dated 07.04.2010 has been issued by the State Government taking care of the exigency of the SSA Scheme, particularly when such higher primary schools were not strictly governed by the provisions of the Act merely on the basis of analogy, the provisions of clause 13 could not have been struck down by the Tribunal and the same has been illegally affirmed by the High Court.

7. The learned counsel appearing on behalf of the respondents has contended that considering the findings recorded by the Tribunal in Paragraphs 17 and 18 of the order, the High Court has found justification with the same and rightly ordered that the transfer of such teachers could have been ordered in accordance with the provisions of the Act and the Rules framed thereunder, and not as per the Office Memorandum, clause 13 of which has been rightly struck down by the Tribunal. Thus, no case for interference in the order of the Tribunal, as affirmed by the High Court, is made out. The matter of transfer is governed by the provisions of the Act of 2007 and the rules framed thereunder. It was not permissible to the State Government to issue memo dated 7.4.2010, same cannot hold the field in view of the statutory provisions.

8. After hearing the learned counsel for the parties, we are of the considered opinion that the SSA Scheme is an independent scheme and considering its imperative, certain primary schools were upgraded to and styled as higher primary schools. The Class 8 was also added in such schools. The hybrid category of primary schools was created to make the education broad-based in rural areas. Considering the aforesaid scheme, the matter was strictly not governed by the provisions of the Act of 2007 and the rules framed thereunder with respect to "higher primary schools". The SSA Scheme was to deal with the primary objective of broad basing education. Clause 13 of the Office Memorandum deals with the mutual transfer. The same is extracted herein below: -

"13 MUTUAL TRANSFERS:

- a) If the pre-confirmation service period is declared as satisfactory, mutual transfer requests of such Teachers will be considered. While doing mutual transfer, it should be given effect only when cadre and subjects tally.*

- A *b) All the mutual transfer at District, Division, and State level to be done at a time.*
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- B *c) Teachers who have computerized information through internet seeking mutual transfer has to be personally present at the Office of the B.E.O. concerned, for the verification of their service details. But for No.1. Teachers transfer, both of them have to be present before the Transfer Authority for counseling.*
- C *d) Primary and T.G.T. Teachers appointed under SARVA SHIKSHANA ABHIYAN shall be transferred to Teachers post of the same subject and appointed under the same project.*
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- E *e) S.S.A. and T.G.T. Teachers working under SARVA SHIKSHAN ABHIYAN, YOJANE, submit an application for mutual transfer with Teachers of state zone with the same basic pay or less may be considered for mutual transfer.*
- F *f) If S.S.A. and T.G.T. Teachers submit an application for transfer to vacant posts it may be considered.”*
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- G 9. Even assuming that the provisions of the Act of 2007 and rules thereunder are applicable, since there is no provision to the contrary therein, the provision in question providing for mutual transfer could have been carved out by issuing executive instructions contained in Memo dated 7.4.2010. No such provision in the Act and rules has been pointed out with respect to mutual transfers. Particularly when the provisions of ‘mutual transfer’ which is made in Office Memorandum of 2010, depends on the volition of an employee, there is no compulsion, it cannot be said to be arbitrary. It is ordered only when two incumbents opt for mutual transfer. Thus, Office Memorandum dated 07.04.2010 could not be said to be in violation of the provisions of the Act of 2007 and rules. The Tribunal and the High Court both have misdirected themselves in this regard.
- H 10. In our considered opinion, the provisions of mutual transfer does not militate against the provisions of the Act and rules framed thereunder and particularly, when it was with respect to SSA Scheme, it was open to making certain provisions by way of Office Memorandum dated 07.04.2010. Mere reference to the Act and the rules framed in the same does not mean that the provisions have been adopted for all the purposes. In the same Memo the provisions have been carved out for

mutual transfer. In the absence of statutory provision, the executive instructions would have force of law, more so when the SSA is an independent scheme. The SSA Scheme is funded by the Central Government and considering its exigency, independent provisions could have been carved out which is not to be found in the Act of 2007 and the rules framed thereunder.

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11. Thus, we find that there is no violation of the provisions of the Act and the rules by Clause 13 of Office Memorandum dated 07.04.2010. The Tribunal and the High Court have erred in law in quashing the same. Thus, we have no hesitation in setting aside the orders passed by the Tribunal as well as by the High Court and in allowing the appeals. The appeals are, accordingly, allowed. There shall no order as to costs.

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Nidhi Jain

Appeals allowed.