

AFR

HIGH COURT OF CHHATTISGARH, BILASPUR

WPS No. 1554 of 2005

Mrs. Shubhara Kundu, W/o Shri Dilip Kumar Kundu, aged about 34 years,
Kumharpara, Maitri Sangh Lane, Jagdalpur, District Bastar (MP)

---- Petitioner

Versus

1. State of Madhya Pradesh through : the Secretary School Education Deptt.
Govt. of M.P. Bhopal
2. The Director, Public Instructions, Govt. of M.P. Bhopal
3. The Joint Director, School Education Deptt. Jagdalpur, District Bastar (MP)
4. The ADIS School Education Deptt. Jagdalpur Distt. Bastar (MP)
5. The Principal, Govt. Multipurpose Boys Higher Secondary School, Jagdalpur,
Distt. Bastar (MP)

---- Respondents

For Petitioner	:	Shri Akash Pandey, Advocate
For Respondent	:	Shri S. Majid Ali, Dy. Govt. Advocate

S.B. Hon'ble Shri Justice Manindra Mohan Shrivastava

Order On Board

11/01/2018

1. The petitioner had initially filed an Original Application before the State Administrative Tribunal (in short "*the Tribunal*"). Upon abolition of the Tribunal, the case was received on transfer by this Court.
2. The petitioner has assailed legality and validity of order dated 17.10.1996 (Annexure A-12) by which the period from 26.9.1986 to 20.5.1988 has been treated as *dies non*.

3. While the petitioner was posted as Upper Division Teacher in Middle School, Tarapur, she was transferred to Govt. Multipurpose Higher Secondary School, Jagdapur vide order dated 19.9.1986 passed by the Joint Director Public Instructions, Bastar Division, Jagdalpur.

The petitioner was duly relieved by the Head Master on 25.9.1986 vide relieving letter Annexure A-3. She submitted her joining before the Principal of the school where she was transferred, on 26.9.1986 vide Annexure A-4. However, the Principal did not accept her joining and vide his letter dated 30th September 1986, he informed the petitioner that the documents placed before him are not addressed to the Principal nor the petitioner has been relieved. The petitioner was required to get relieved from the Head of the Institution and then submit her joining because till date, the petitioner did not submit joining along with the proper order. The petitioner, however, maintained that she was duly relieved but she was not allowed to join.

In the meantime, an order was issued by the respondent- Joint Director, Public Instructions, Bastar Division, Jagdalpur on 28.9.1986 stating that the petitioner's transfer order has been modified and the petitioner should join at the place where from she was transferred and will get relieved only after Head Master submits joining. According to averments made in the petition, the petitioner again approached head of the Tarapur school but she was not allowed to join. In the meanwhile, an order of attachment of the petitioner was issued on 3.1.1987 under which the petitioner remained attached at the Middle School, Vivekanand Nagar, Jagdalpur till 29.4.1987. A notice was published in the newspaper (Annexure A-9) requiring the petitioner to join in the school at Tarapur failing which appropriate action would be taken. The petitioner's joining at Tarapur was accepted and recognized w.e.f. 20.5.1988. A departmental enquiry was also initiated against the petitioner by issuing a charge sheet dated 26.9.1988 alleging non-compliance of various order and directions. The departmental enquiry,

however, ended without imposition of any specific penalty or on any finding of proof of guilt though it contained certain warning. The petitioner thereafter started raising claim that her salary and other claims, in respect of intervening period during which she was not allowed to join at the transferred place and finally came back to Tarapur school, should be granted and period may be regularized. In this backdrop, the impugned order came to be passed declaring that period from 26.9.1986 to 20.5.1988 be treated as *dies non*. It is this order which is under challenge.

4. Learned counsel for the petitioner would submit that the impugned order of *dies non* has serious adverse consequences to flow. The said order has been passed without affording any opportunity of hearing. Reliance has been placed on order passed in the case of **Smt. Mrudula Rishi Vs. State of Chhattisgarh and Ors.** 2014 (1) MPHT 51. Learned counsel for the petitioner would further submit that the petitioner has been made to suffer for none of her faults. In the transfer order dated 19.9.1986, there was no stipulation that the petitioner should not be relieved till posting of the Head Master, though, this was one of the precondition for relieving in case of all other transferred employees. Therefore, there was no impediment in relieving of the petitioner. The petitioner was duly relieved on 26.9.1986 (Annexure P-4). She had submitted her joining at the transferred place and therefore, the Principal of the Govt. Multipurpose Higher Secondary School Jagdalpur had no justification to refuse petitioner's joining. Moreover, it is argued, the respondent No.4 had no authority, without proper delegation, to modify the order passed by respondent No.3 on 19.9.1986 and command the petitioner to go back to Tarapur school and wait till joining of Head Master. The petitioner had all the justification to insist for joining at Jagdalpur. However, even thereafter, because of insistence of respondent authority, the petitioner had again submitted her joining in Tarapur school but she was not allowed to join. In the meanwhile, she was also attached in the other office and finally the respondent accepted her joining at Tarapur school on 20.5.1988. Therefore, in this background, the petitioner cannot

be held responsible. The petitioner had acted only in compliance of valid and lawful orders of respondent No.3 and no blame could be laid on the petitioner in not complying with the order by respondent No.4 which was in modification of the order passed by the higher authority i.e. respondent No.3. Respondents, having failed to satisfy this Court regarding delegation in their return, the order passed by respondent No.4 (Annexure A-6) was not liable to be complied with. Lastly, it is submitted that on the same set of allegation, a departmental enquiry was instituted but there was no finding of guilt recorded against the petitioner. Warning given to the petitioner does not come within the purview of any of the penalty enumerated in Rule 10 of the M.P./CG Civil Services (Classification, Control & Appeal) Rules, 1966 (in short "CCA Rules"). Therefore, it was only in order to deny the petitioner, the benefit of salary and continuity, impugned order of *dies non* has been passed, therefore, the same may be quashed.

5. On the other hand, learned counsel for the State, supported the impugned order by submitting that there was a direction issued by the higher authority i.e. respondent No.4, requiring the petitioner to join back at Tarapur school vide Annexure A-6, the petitioner ought to have complied with direction but the petitioner insisted her joining at Jagdalpur and did not come back to Tarapur school until 20.5.1988, therefore, during this period, the petitioner having not worked, the petitioner is not entitled to any salary nor continuity of service and therefore the period has been treated as *dies non*, meaning thereby break in service.
6. I have considered the rival submissions made by learned counsel for the parties and perused the records.
7. As is reflected from the records, the petitioner was transferred vide order dated 19.9.1986 from school at Tarapur to school at Jagdalpur by the order passed by respondent No.3, Joint Director. In the notes under the transfer order, some of the incumbents were directed not to get relieved till Head Master of the school joins. However, this condition was not made

applicable in the case of the petitioner. Therefore, relieving of the petitioner vide order dated 25.9.1986 (Annexure A-3), was not in accordance with the instructions. The petitioner after having been relieved from school at Tarapur, submitted her joining in the Govt. Multipurpose Higher Secondary School at Jagdalpur. In these circumstances, the Principal of the school at Jagdalpur was not justified in refusing joining of the petitioner. The averments, as unfolded from the pleadings and documents on record, show that the District Inspector of School respondent No.4 was having some different opinion and he proceeded to pass an order in the matter of modification of the order vide order dated 28.9.1986 (Annexure A-6) in respect of the petitioner. The modification was that the petitioner should go back to the school where she was earlier posted and wait until the Head Master joins, whereafter, the petitioner may again get relieved and join at Jagdalpur. The petitioner has stated that this order was passed by respondent No.4 without delegation of any power by respondent No.3. The transfer order dated 19.9.1986 was passed by respondent No.3. In the reply, respondents have not come out with any specific plea or any document to show that respondent No.4 was either delegated power by respondent No.3 or respondent No.3 had directed respondent No.4 or that respondent No.3 approved the order Annexure A-6 passed by respondent No.4. This would clearly mean that the petitioner was fully justified in insisting on joining at Jagdalpur but because of the order dated 28.9.1986 (Annexure A-6), she was not being allowed to join at Jagdalpur and was being insisted to go back to same place where from she was duly relieved. For this state of affairs, therefore, blame cannot be laid on the petitioner.

8. It appears that the petitioner was pressurized by the higher authorities to join back at Tarapur. Therefore, she again joined at Tarapur though this order is not proper because the order passed by the respondent No.3 on 19.9.1986 was never modified by him. That means the petitioner was made to comply the order passed by the subordinate authority i.e. respondent No.4 who changed the order of respondent No.3 without authority.

9. A departmental enquiry was also initiated against the petitioner. In the departmental enquiry, there is no specific finding of proof of the misconduct alleged against the petitioner. Even then, some warning was issued to the petitioner. Warning is not specified as penalty under Rule 10 of the CCA Rules. Therefore, the petitioner's absence should not have been treated unauthorized and illegal considering that the order of *dies non* was passed without affording any opportunity of hearing to the petitioner. Once in the departmental enquiry, no misconduct was found proved, nor any penalty imposed directing the period from 26.9.1986 to 20.5.1988 as *dies non* is unsustainable in law. It has already been held by this Court in the case of **Smt. Mrudula Rishi** (supra) that an order of *dies non* could not be passed unless the concerned employee has been proceeded departmentally under the provision of Rule 24 (2) of the Civil Services (Leave) Rules, 1977 read with CCA Rules, 1966.
10. Viewed from any angle, action of the respondents in declaring the period of service from 26.9.1986 to 20.5.1988 as *dies non* is not justified, unfair arbitrary and *non est*. The impugned order, therefore, has to be set aside and is accordingly set aside.
11. The petition is accordingly allowed. The respondents shall proceed to pass appropriate orders regularizing the period of *dies non* to the petitioner, with all consequential benefits of seniority, pay, perks etc.

Sd/-
(Manindra Mohan Shrivastava)
Judge