

(2016) 07 PAT CK 0054

In the Patna High Court

Case No : Civil Writ Jurisdiction Case No. 4756 of 2009

Aditya Narayan Roy

APPELLANT

Vs

The State of Bihar

RESPONDENT

Date of Decision : 29-07-2016

Acts Referred:

Constitution of India, 1950 — Article 226

Citation : (2017) 1 PLJR 854

Hon'ble Judges : Mr. Navaniti Prasad Singh and Smt. Nilu Agrawal, JJ.

Bench : Division Bench

Advocate : Mr. Y.V. Giri, Sr. Advocate Mr. Rajendra Prasad and Mr. Ram Pravesh Kumar, Advocates, for the Petitioner; Mr. Khursheed Alam, AAG-12, Mr. Naseem Mokhtar, AC to AAG-12, for the State of Bihar; Mr. Satyavrat Verma, Advocate, for the State of Jharkhand

Final Decision : Allowed

Judgement

Mr. Navaniti Prasad Singh, J. (Oral) - This writ petition along with large number of other writ petitions were being taken up by the Division Bench of this Court from time to time. It appears that most of the writ petitions for one reason or the other got dismissed for default. One of them, which survives, is this writ petition.

2. With consent of the parties, as the pleadings are complete, we have heard the parties at length for final disposal of the writ petition at this stage itself.

3. The question involved is a tricky question and depends upon how one perceives the facts. By the time, we have taken up this case, there are four judgments on the issue. There is one judgment of the learned Single Judge of this Court taking a view against the stand of the petitioner being C.W.J.C. No. 1369 of 2013 (Surendra Prasad Mehta v. The State of Bihar and others) decided on 22.01.2013 against which we are told L.P.A. No. 511 of 2013 is pending. Then we have yet another judgment of the learned Single Judge of this Court, passed in C.W.J.C. No. 20968 of 2011 (Ashok Kumar Ranjan v. The State of Bihar and others) and analogous case decided on 17.09.2015, again against the stand of

the petitioner herein. Let it be noted that the second case i.e. Ashok Kumar Ranjan (supra) has merely followed the Division Bench judgment of the Jharkhand High Court in L.P.A. No. 511 of 2009 (State of Bihar v. Ravindra Prasad Singh and others) decided on 22.04.2014 which was decided against the stand of the petitioner herein.

4. The issue relates to the effect on seniority due to mutual transfer as between Bihar and Jharkhand cadre after bifurcation of the States. The facts are not in dispute.

5. On 15.11.2000 the erstwhile State of Bihar was bifurcated into two States; Bihar and Jharkhand, pursuant to Bihar Reorganization Act, 2000, as promulgated by the Parliament. Sections 72 and 73 of the said Act give the Central Government the power to make cadre bifurcation as between the State of Bihar and State of Jharkhand. We are concerned with the erstwhile Bihar State Agriculture Service cadre. Upon various considerations it seems that the Central Government in the Ministry of Personnel, Public Grievance and Pensions, Department of Personnel and Training made a cadre bifurcation. Still, it appeared that a large number of people wanted to migrate from one State to another, upon this cadre bifurcation, and, they started representing to the Central Government to amend the cadre bifurcation list. It appears, considering the same, instead of the Central Government continuing to amend the list, as prepared by it, it left the decision to be taken by the State Government. It, accordingly, by communication dated 15.09.2004 (Annexure-2) directed the State Government to take a decision in this regard on its own. The relevant clause of the communication thereof, is Clause 2 and quoted hereunder :

"2. Mutual Transfer Cases : A large number of representations have been received from personnel requesting for consideration of their mutual transfer with another consenting State Service personnel. Since the Central Government has already issued final allocation orders, it finds no reason to entertain such requests. However, it is open to the successor State Governments to consider requests of mutual transfer based on broad consensus arrived between the State Governments, inter alia either defining the terms and conditions for such consideration or by framing suitable rules for this purpose."

(emphasis supplied)

6. It is pursuant to the aforesaid that the State of Bihar and State of Jharkhand discussed the matter in a High Power Empowered Committee and pursuant thereto the Chief Secretary, State of Jharkhand was informed, by the letter of the State of Bihar dated 21.05.2005 (Annexure-3), referring to the earlier letter of the Central Government dated 15.09.2004, that as directed by the Central Government mutual transfers would be permitted only under six conditions. They were, inter alia, that the two persons should be from the same cadre and in the same rank; they should be in similar seniority and in the similar pay-scale; their marital status should be same, inasmuch as, if their spouses is also in

Government service they must move together; they should not have sought for mutual transfer earlier and such other conditions, but significant to note that there was no condition specified therein that a person seeking mutual transfer would lose his seniority. Accordingly, as all these were being done pursuant to the bifurcation of the State level cadre which was in progress upon bifurcation of the State. The petitioner consequent to the aforesaid, by his letter dated 12.05.2006 (Annexure-5) sought mutual transfer with one Amaresh Kumar Jha who had been allocated Bihar cadre whereas petitioner had been allocated Jharkhand cadre. They wanted to interchange the cadre. Petitioner in his letter clearly stated that he was requesting this transfer pursuant to decision of the State Government dated 21.05.2005, as referred to above, but made it clear that in case this mutual transfer was to have an adverse effect on his seniority, then his offer would stand withdrawn or his request would stand cancelled. He, thus, wanted mutual transfer only on the condition of retaining his seniority. It appears, having spent sometime in Jharkhand, on 11.07.2006 (Annexure-6A) he informed the State of Bihar, that having originally being allocated to Jharkhand cadre and having joined there he is not interested for mutual transfer any more and wanted to continue at Jharkhand. It may be noticed here that the other person i.e. Amaresh Kumar Jha, who at that time was Sub-Divisional Agriculture Officer at Chatra in the State of Jharkhand and who had been allocated State of Bihar was neither relieved from Jharkhand nor did he join Bihar. It appears that on 25.07.2006 the Director, Agriculture accepted the request for mutual transfer as made by the petitioner and subsequently on 22.12.2006 (Annexure-7) mutual transfer order was issued. The petitioner was surprised, not because of the mutual transfer was accepted by the State, but by a condition that was attached to this mutual transfer order, being that the petitioner would neither be paid any travelling allowance nor he would claim his seniority. Such a condition was never contemplated before or was not there from before and, as such, immediately on 26.12.2006 (Annexure-8) petitioner protested, clearly stating that imposition of the condition of loss of seniority should be withdrawn. Immediately thereafter, on 02.01.2007 (Annexure-9), in view of the transfer order petitioner was relieved from Jharkhand, to join services in the State of Bihar.

7. It appears, on 26.04.2007 the High Power Empowered Committee met and took a decision, which is contained in Annexure-15 to the writ petition, insofar as it relates to the present case, material thereto would be that, it was decided in respect of mutual transfers, that as the earlier decision of the State Government dated 21.05.2005 (Annexure-3) did not contain any stipulation about loss of seniority, all departments be informed, accordingly. It appears that notwithstanding these decisions, there were a lot of applications for mutual transfer still being received by the Central Government, who had earlier made the cadre bifurcation. The Central Government again referred these matters by its communication dated 21.06.2007 (Annexure-23) to the State Governments clearly stating as follows :

"The Central Government has no objection if the requests of personnel for

mutual transfer may be considered by both the State Governments of Bihar and Jharkhand on the terms and conditions agreed between the two State Governments in terms of this Ministry's No. 14/279/2002-SR(S) dated 15th September, 2004 and 8th June, 2006. However, seniority of the personnel should be maintained in their gradation list. The action taken in this regard may please be sent to this Ministry urgently."

(emphasis supplied)

8. We may notice that it is specifically mentioned by the Central Government, the cadre bifurcation authority, that the seniority should be maintained in the gradation-list, while acceding to the request of mutual transfer. Surprisingly, notwithstanding its earlier decision, on 27.06.2007 the High Power Empowered Committee, once again constituted, this time it ignored the letter of the Central Government. It ignored the fact that when conditions were laid down for allowing mutual transfer vide letter dated 21.05.2005 (Annexure-3) of State of Bihar, no condition was put about loss of seniority. It suddenly for the first time decided, that if a person applies for mutual transfer he would lose his seniority. This decision was taken on 27.06.2007, but what we find surprising is, if we refer to the subsequent letters of the State of Jharkhand under Memo No. 5404 dated 28.09.2007 (Annexure-18) and that of the State of Bihar, under Memo No. 10806 dated 09.10.2007 (Annexure-19), in relation to mutual transfers, both clearly state that mutual transfers are to be allowed without loss of seniority. It appears that the States were not sanguine enough to enforce the decision of the High Power Empowered Committee. Ultimately, by the impugned order dated 03.02.2009 as contained in Annexure-17 it was finally decided by the Bihar State Government that in view of the decision of the High Power Empowered Committee dated 27.06.2007 in all cases of mutual transfer there would be loss of seniority. Accordingly, when petitioner was threatened and notified to be reverted, not by one or two post but to the basic grade, having in the meantime got promotions, he came to this Court challenging the action, depriving him of his seniority.

9. Now, we may refer to the three decisions as noted earlier on this aspect. The first is the case of Surendra Prasad Mehta (*supra*) wherein the learned Single Judge, merely held that in the order of mutual transfer, a condition had been specified that he would lose his seniority. Accordingly, reduction in rank i.e. loss of seniority was logical consequence and, as such, dismissed the writ petition. All the facts we have noted in detail were not considered. Then we may come to the decision of another Single Judge of this Court in the case of Ashok Kumar Ranjan (*supra*). Here, the learned Single Judge has merely followed the Division Bench judgment of the Jharkhand High Court on the issue, in the case of State of Bihar v. Ravindra Prasad Singh (*supra*) and held that by mutual transfer loss of seniority could not be challenged as that was a condition for mutual transfer. We may now refer to the Division Bench judgment of Jharkhand High Court. Primarily, the reason and the rationale we can find is that the High Power

Empowered Committee had on 27.06.2007 taken a decision that who ever is opting for mutual transfer would lose his seniority, because if this is not done it would be demoralizing on the persons who had not opted for mutual transfer on fear of losing his seniority. Even though we hold the judgment of the High Court of Jharkhand in high esteem, we are unable to subscribe to that, but it may not be necessary for us to finally take a different view of the matter, as we can allow the writ petition on other grounds. However, we would note our dissent. The reason being, if the sequence of events as we have taken into account, it would show that the mutual transfers that were being contemplated were with a reference to the cadre bifurcation and the exercise being conducted in relation thereto. It was a part of the cadre bifurcation exercise continuing. We are cognizant of the legal position that whenever a person wants a cadre transfer, on his own volition, he would ordinarily lose his seniority. This is a settled law as decided in the case of P. Satyanarayana Rao and another v. S.V.P. Sarvani and others since reported in (2009) 1 SCC 419 and Renu Mullick (Smt.) v. Union of India and another since reported in (1994) 1 SCC 373 but the present is not such a situation. Here the preliminary exercise was done by the Central Government as envisaged under Sections 72 and 73 of the Bihar Reorganization Act, 2000. Naturally, there were a lot of people who were dissatisfied because, some may be residing in Bihar, who were allocated Jharkhand, some were residing in Jharkhand were allocated Bihar, and, immediately representations were filed. It is in that perspective that the Central Government referred the matter vide their communication dated 15.09.2004 (Annexure-2) to the State Government and it is pursuant thereto that the State Government vide Annexure-3 dated 21.05.2005 laid down six conditions for allowing mutual transfer without specifying loss of seniority as one of the consequences thereof. Even on 21.06.2007 (Annexure-23) the Central Government informed both the State Governments that there was no objection to mutual transfers and specifically directed that there would be no loss of seniority. The reason was simple. Because this was in continuation of the exercise of cadre bifurcation, and Sections 72 and 73 if read together clearly specify that the service conditions can not be altered to the detriment of the employees, therefore, upon cadre bifurcation they were to retain their seniority. What the employees were wanting was modification in the cadre bifurcation itself. If it was in independent exercise, the State should have clarified it. The State was also, for sometime proceeding that there would be no loss of seniority. In fact, as late as 26.04.2007 even the High Power Empowered Committee was of the view that there would be no loss of seniority. On 21.06.2007 (Annexure-23), already quoted earlier, even the Central Government said that there should be no loss of seniority. The reason was simple. This was an exercise in furtherance of the cadre bifurcation, which did not contemplate loss of the seniority. It was not in isolation and an independent transaction. The Central Government was referring the matter to the State Government to take a decision. If seen in this perspective, then to impose a condition of loss of seniority while ordering mutual transfer certainly cannot be upheld, especially when prior to this there was no mention of loss of seniority at

all. But as noted above, we do not rest our decision solely on this ground alone, for in our view, there is another fundamental principle on which we can rest our decision. As we have noted, till the time petitioner made application for mutual transfer there was no concept of loss of seniority. However, he took a precaution while making an application for mutual transfer on 12.05.2006 (Annexure-5). He clearly mentioned that he would not be interested in mutual transfer if it would adversely affect his seniority. Then when on 22.12.2006 the State ordered for his mutual transfer and stipulation that he would lose his seniority such a condition could not have been put therein and, as such, Annexure-7 dated 22.12.2006 to the extent it places the petitioner to the disadvantage of losing his seniority cannot be accepted to be valid. State had a choice, either to accept his mutual transfer without loss of seniority or reject his request for transfer. If State intended to make him lose his seniority on either counts he could not be made to lose his seniority as he did not intend to lose his seniority and he had occasion to state that while making an application for mutual transfer. Thus, when the State chose to accept his transfer State could not have put disadvantageous terms which would virtually ruin his entire career and which were contrary to his request earlier made.

10. We may also notice one another fact. Long before the mutual transfer was ordered and the petitioner was relieved from Jharkhand to join Bihar which he did on being relieved, he had already intimated to the State Government that he would not be interested in pursuing his mutual transfer from Jharkhand to Bihar, even then State ordered his mutual transfer and that too with condition of loss of seniority. That to our understanding is clearly arbitrary. The State Government, as noted above, had two courses open. As the petitioner had requested mutual transfer without loss of seniority and if the Government had decided otherwise it should not have accepted mutual transfer and should not have ordered mutual transfer or if it accepted mutual transfer pursuant to request of the petitioner then it had to give up the concept of loss of seniority. Thus, the condition of loss of seniority as inserted in the order of mutual transfer cannot be said to be valid. More so, because till then there was no decision of the High Powered Committee or even the Central Government with regard to loss of seniority, rather to the contrary even after a year thereafter the Central Government was indicating to the State Government that there should not be loss of seniority. The High Powered Committee on 26.04.2007 (Annexure-15) was also of the same view which changed only later. Thus, the condition put on the transfer order with loss of seniority in the order dated 22.12.2006 (Annexure-7) cannot be sustained and has to be struck down.

11. It is for this reason that we cannot approve the judgment of the learned Single Judge in either of the two decisions as noted above.

12. We, accordingly, do not approve of the decision of the State Government as contained in Annexure-17 as also we do not approve the action of the State Government in downgrading the petitioner, as is evident from memo No. 2836

dated 24.06.2016 (Annexure-26). We accordingly, hold that the petitioner has to be restored to his original seniority, as prior to the bifurcation of his cadre and further he would continue to be in the Bihar State cadre.

13. With these observations, the writ petition is allowed.