
(2007) 07 JH CK 0046
In the Jharkhand High Court

Bidya Nand

APPELLANT

Vs

State of Jharkhand and Others

RESPONDENT

Date of Decision : 04-07-2007

Acts Referred:

Constitution of India, 1950 — Article 14, 16, 21, 309

Citation : (2007) 4 JCR 19

Hon'ble Judges : Narendra Nath Tiwari, J

Bench : Single Bench

Final Decision : Allowed

Judgement

Narendra Nath Tiwari, J.—In this writ petition, the petitioner has sought quashing of Notification No. 337(S) dated 18th January, 2007 (Annexure-4) issued under the signature of the Deputy Secretary, Road Construction Department, Government of Jharkhand, so far as it relates to the petitioner, whereby the petitioner, who has been holding the post of Assistant Engineer, National Highway, Sub-Division, Chandil, sought to be posted in Rural Engineering Organisation Department.

2. According to the petitioner, he is a Class-II officer. He was appointed as an Assistant Engineer, Road Construction Department, Government of Bihar, in the year 1987. The petitioner, in course of his service, was transferred to different places. He was ultimately transferred and posted as Assistant Engineer, National Highway, Sub-Division Chandil, by Notification No. 2574(s) dated 28th June, 2006, after keeping him waiting for posting for two years. Annual transfers were made on the recommendation of the Establishment Committee in the month of December, 2006. Order was issued by notification, being Memo No. 6155(s) dated 29th December, 2006, whereby altogether 176 persons were transferred to different places. The petitioner, who was transferred to Chandil only six months ago, was not touched in the said chain transfer. Later on, an amendment was made in the said annual transfer order and a Notification No. 337(S), contained in Memo No. 347 dated 18th January, 2007 (Annexure-4), was issued. In that

order the petitioner has been sought to be transferred to Rural Engineering Organisation Department in anticipation of posting by the said impugned notification. While the petitioner was transferred to Rural Engineering Organisation Department, one Rabindra Singh, Respondent No. 5, who was transferred as Assistant Engineer, Road Sub Division, Chatra-2 just about 15 days back, was sought to be accommodated in place of the petitioner at Chandil. The petitioner has challenged the said impugned notification on the ground that the same is wholly arbitrary, unfair and contrary to the circulars and guidelines issued by the State Government and is violative of Articles 14 and 21 of the Constitution of India. The petitioner, who joined the place just six months ago, cannot be disturbed in whimsical manner in order to accommodate the respondent No. 5, Rabindra Singh. The transfer order is premature and without justification inasmuch as there is no material to show any administrative exigency or public interest or any reason to justify the said arbitrary order.

3. Counter-affidavit have been filed on behalf of respondent Nos. 1 to 4 as also on behalf of respondent No. 5 with almost common purport, and ground, stating, inter alia, that the transfer is an incident of service and the employee has no right to remain at a place for any fixed period. The petitioner is an ad hoc Assistant Engineer, whose appointment was made for Rural Engineering Organisation and not for Road Construction Department and his services have been merely sent back to Rural Engineering Organisation. It has been stated that the respondent No. 5 has given his joining on 22nd January, 2007 pursuant to his transfer order, but the petitioner did not hand over the charge to him. The service of the petitioner has been handed over to the parent department i.e. Rural Engineering Organisation, which cannot be said to be illegal. There is, thus, no illegality or mala fide on the part of the respondents and the writ petition is liable to be dismissed.

4. Mr. Rajendra Prasad Singh, learned senior counsel, appearing on behalf of the petitioner made the following submissions:

The petitioner was posted at Chandil only six months ago. There is no valid or legal ground or any administrative exigency, nor any other reasonable ground for premature transfer of the petitioner and as such, the impugned transfer order is wholly illegal and arbitrary and the same has been issued with ulterior motive to accommodate the respondent No. 5, who was earlier transferred and posted at Chatra only 15 days back. The petitioner is an employee of the Road Construction Department and it is wholly false to state that the petitioner has been repatriated to his parent department i.e. Rural Engineering Organisation. Necessary approval of the Cabinet, which is mandatory pre-requisite in the case of premature transfer of Class-II Officer, has not been obtained. The impugned transfer order has been issued in the month of January contrary to the policy decision, framed for transfer and posting of Government Servant, which is wholly illegal and malicious. The said chain transfer order was made on the recommendation of the Establishment Committee in the month of December,

2006 in which the petitioner's name was not mentioned, whereas the respondent No. 5 was transferred and posted at Chatra. The respondent No. 5 did not obey the said order of transfer and defaulted in joining the post and by undue efforts successfully got the impugned order issued, accommodating himself at Chandil i.e. in place of the petitioner. Premature disturbance of the petitioner is prejudicial to him and by way of punishment. The said respondent No. 5, during the pendency of the writ petition, falsely claims to have unilaterally assumed the charge, which is sheer violation of Rule 59 of the Bihar Service Code. The petitioner has not been relieved and has not handed over the charge and he is continuing on the same post i.e. at Chandil.

5. It is true that the transfer is an incident of service, yet the Government has framed policy and issued circular so as to follow the same and an out of turn or premature transfer order, not supported by any reason, such as administrative exigency or public interest, is illegal, arbitrary and violative of Articles 14 and 16 of the Constitution of India and the same is not sustainable.

6. Mr. S.B. Gadodia learned Advocate General, appearing on behalf of the State-respondents, on the other hand, made the following submissions:

Petitioner's transfer is neither arbitrary nor illegal. There is no fixed period for the Government Servant for his stay at one place. Transfer, being the incidence of service, can be made at any point of time, if it is so required. The petitioner's transfer has been made on the basis of the recommendation and approval of the competent authority. The petitioner was appointed for Rural Engineering Organisation and not for Road Construction Department and his services have been, accordingly, sent back to the Rural Engineering Organisation. Respondent No. 5, who has been transferred at the place of the petitioner, has already assumed partial charge. The petitioner has been sent to the Rural Engineering Organisation and he will be given due place of posting after giving information to the headquarters, which was also assured by the Secretary of the concerned department, who had appeared before this Court. There being no illegality or arbitrariness in the impugned transfer order, it is not a case of interference by this Court in exercise of writ jurisdiction and the writ petition is liable to be dismissed.

7. It is an admitted position that the petitioner was posted as Assistant Engineer, National Highway, Sub-Division, Chandil by order dated 28th June, 2006 (Annexure-2). It is also admitted fact that the respondent No. 5, who was posted as Assistant Engineer, Road Sub-Division No. 2, Chatra by notification dated 29th December, 2006 (Annexure-3), did not join the said place. The respondents have not brought any order on record, showing relieving of respondent No. 5 from Chatra. However, they emphatically stated that the respondent No. 5 has been allowed to take partial charge during the pendency of the writ petition.

8. The circumstances appearing on the record go to support the petitioner's allegation that he has been sought to be shifted from the place by the impugned

order of transfer in order to accommodate the respondent No. 5 and the petitioner's services have been sent to Rural Engineering Organisation, which, according to the respondents, is his parent department. They have termed the said order as repatriation of the petitioner to the parent department. However, the appointment letter, bearing memo No. 2481(s) dated 27.6.1987, produced by the petitioner on record, clearly shows that he has been appointed by the Road Construction Department.

9. Learned Advocate General submitted that though the petitioner was appointed by the Road Construction Department, but after his appointment, his services were handed over to the Rural Development Department and in that view, the petitioner's parent department is Rural Development Department. He, however, has not denied that the appointing authority of the petitioner is Road Construction Department and the appointment letter had been issued by the said department. The petitioner has been appointed by the Road Construction Department. The impugned transfer order cannot be said to be repatriation of the petitioner to his parent department, as he has been sent to Rural Engineering Organisation.

10. The said being the factual position, I find substance in the submission of the learned Counsel for the petitioner that the impugned transfer order (Annexure-4), shifting the petitioner from National Highway, Sub-Division, Chandil, is simply a premature transfer within a period of six months from the date of his said posting. It has been further submitted that the said premature transfer is neither for any administrative reason nor for any special or compelling circumstance. The same has also not been done in the month of December. The order is contrary to the policy decision, guideline and circular of the State Government. There is no justification for deviation from the said policy decision.

11. Learned Advocate General emphatically contended that even if there are such circulars and guidelines for transfer of the Government Servants, the same are directory and not mandatory and any deviation therefrom cannot render the transfer order illegal or without jurisdiction.

12. Policy and procedure regarding transfer and posting of a Government Servant have been published by the Government Resolutions. Relevant provisions of the said resolutions run thus:

(A) General policy regarding transfer and posting. - (1) Transfer and postings will generally be done twice i.e. in May-June and November-December of each year:

Provided that in special circumstances, e.g. death, illness, vacancy or other administrative reasons transfer and posting could be made at any other time subject to the following conditions:

(i) In respect of officers whose transfer/posting is done with the approval of Minister or by council of Ministers, specific prior approval of the Chief Minister has to be obtained; and

(ii) In respect of such officers and Government employees whose transfer and posting is done by subordinate officers under delegated powers of transfer, specific prior approval of the immediate superior officer is obtained.

(2) The duration of posting on any post and at any particular place will generally be for a period of 3 years. For some posts of places, the period posting may, however, be kept for 2 years which should be specified by the departments by Standing Orders.

xxx xxx xxx (B) Procedure for transfer and posting.-

xxx xxx xxx (2) Proposals regarding transfer, posting and deputation of such officers, whose maximum pay in the pay scale exceeds Rs. 810 but does not exceed Rs. 1,200 should be placed before the Minister-in-charge for orders after the recommendation of the Establishment Committee. Proposals regarding transfer, posting and deputation of such officer whose maximum pay in the pay scales exceeds Rs. 1,200 shall be placed before the Cabinet after obtaining the recommendation of the Establishment Committee and approval of the Minister-in-charge.

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13. Such Government Circulars, governing transfer of the Government employees, came to be considered before a Division Bench of the Patna High Court in the case of *Man Singh v. State of Bihar* and Ors. reported in 1982 PLJR 368. The Division Bench, after having considered different aspects, held that such circulars are directory and not mandatory. However, the conclusions recorded by the Division Bench in Paragraph-16 of the judgment are as follows:

(a) The executive instructions contained in Annexure 5 are directory.

(b) Although directory they are nevertheless to be followed.

(c) Where an order of transfer is made without scrupulously following the procedure laid down therein, and there is substantial compliance of the instructions. It cannot be held that the order is invalid for vitiated.

(d) A total failure to comply with a significant part of the requirement of the instructions cannot be regarded as substantial compliance with the total requirement.

14. There is no statutory rule framed under the provisions of Article 309 of the Constitution of India, regulating transfer and posting of Government Servants in the State of Jharkhand. The said resolution/ policy decision, is thus, norms and guidelines which has been issued by the Government to regulate the transfer and posting of the Government employees.

15. It is now well established that the appropriate Government has got powers under the constitutional scheme within the limitation of its executive power to issue instructions to cover the gap where there is any vacuum or lacunae, if such

guidelines/instructions are not contrary to the statutory rules. The same are valid and required to be valid. Reference may be made to the decision of the Apex Court in the case of State of Gujarat Vs. Akhilesh C. Bhargav and Others, .

16. The Supreme Court in the case of Suresh Kumar Awasthi v. U.P. Jal Nigam reported in : (2003)11SCC740 . clearly held that the transfer of officers is required to be effected on the basis of set norms or guideline and the power of transferring the officer cannot be wielded arbitrarily and maliciously with oblique motive. The Apex Court emphasized that "for better administration the officers concerned must have freedom from fear of being harassed by repeated transfers...."

17. In the light of the above discussions and consideration, it may be concluded that though the circulars/guidelines are directory and not mandatory, the same are required to be followed. The transfer, even if an incidence of service, cannot be made arbitrarily and with oblique motive. Any arbitrary transfer order contrary to the set norms/policy decision or guidelines or tainted with malice and oblique and offends public interest by creating a fear psychosis in the mind of the public servant of being harassed by repeated transfers and in that way impedes due administration. Deviation from the policy, norms and guidelines without any justification amounts to discrimination and the same is arbitrary, against the rule of fair play and violative of Articles 14 and 16 of the Constitution of India.

18. Tested on the established principle of law, the impugned order of petitioner's transfer (Annexure-4) has no strength to stand. The petitioner has been sought to be transferred within a short span of time i.e. six months, contrary to the policy decision and guidelines regulating the transfer and posting. There is no material to show any special circumstance, as required for premature transfer according to the said policy decision. The respondents have failed to show any cogent administrative reasons for transferring the petitioner from the said place of posting. The ground vehemently argued by the learned Advocate General that the petitioner has been sought to be repatriated in his parent department, could not be substantiated in view of the appointment letter of the petitioner, which is not disputed. Admittedly, the Road Construction Department is the appointing authority of the petitioner and his transfer to the Rural Engineering Organisation cannot be said to be his repatriation to the parent department.

19. For the reasons aforesaid, the transfer order issued vide Notification No. 337(s) dated 18th January, 2007 (Annexure 4), so far it relates to the petitioner, is held to be unsustainable and is, hereby, quashed. This writ petition is allowed.

20. Since the petitioner has not handed over the charge and no document has been brought on record to show that he has been relieved pursuant to the impugned order and the Respondent No. 5 has taken the full charge, the petitioner will be deemed to have continued to the post of Assistant Engineer, National Highway. Sub-Division, Chandil, without any break and is entitled to get his salary and allowances for the intervening period.

21. There is no order as to costs.