

(2012) 10 GAU CK 0055
In the Gauhati High Court
Case No : Writ Petition (C) No. 274 of 2012

Mangsatabam Imomacha Singh

APPELLANT

Vs

State of Manipur and Others

RESPONDENT

Date of Decision : 05-10-2012

Acts Referred:

Constitution of India, 1950 — Article 166(3)

Citation : (2013) 1 GLT 267

Hon'ble Judges : T. Vaiphei, J

Bench : Single Bench

Advocate : A. Romenkumar Singh, for the Appellant; Ibohal Singh, Sr. GA and Mr. H. Debendra Singh, GA, for the Respondent

Final Decision : Allowed

Judgement

T. Vaiphei, J.—In this writ petition, the petitioner is aggrieved by the order dated 11.5.2012 issued by the respondent No. 2 transferring him to the post of Secretary (Technical), Public Health Engineering Department ("PHED" for short), Government of Manipur. The facts of the case, shorn of unnecessary details, are that on the recommendation of the Manipur Public Service Commission, the petitioner was promoted to the post of Additional Chief Engineer/PHED on regular basis on 24.12.2011. At that time, he was holding the post of Chief Engineer, PHED on an in-charge basis after the retirement of the incumbent. At this stage, it may be noted that the State Government in the Department of Public Health Engineering issued a standing order bearing dated 20.6.2009 allowing the Additional Chief Engineer, PHED to hold the charge of and function as Chief Engineer, PHED in the absence of the Chief Engineer either on leave or training or on tour. Contrary to this standing order, the private respondent, who is merely holding the substantive post of Superintending Engineer and is an officer, who is the subordinate of and junior to the petitioner, was allowed to hold the charge of Chief Engineer, PHED in terms of the order dated 21.2.2012. As the petitioner was overlooked and sidelined by his junior, he approached this Court in WP (C)

No. 120 of 2012 challenging the legality of the order dated 21.2.2012. This Court by the order dated 29.2.2012 issued an interim order staying the order dated 21.2.2012. This order was apparently not complied with by the State-respondents whereupon the petitioner filed Cont. Case (C) No. 42 of Court for initiating contempt proceedings against the respondent authorities. It is the case of the petitioner that in order to frustrate the contempt petition, the respondent authorities issued the order dated 11.5.2012 creating one temporary post of Secretary (Technical)/PHED and another order i.e. the impugned order herein bearing the same date appointing the petitioner to this post.

2. The legality of the order dated 11.5.2012 appointing the petitioner to the post of Secretary (Technical)/(PHED) is now called into question in this writ petition. The petitioner contends that the impugned order is mala fide, and is issued in order to render the earlier writ petition and contempt petition filed by him redundant, and is also in violation of the standing order dated 20.6.2009 allowing the Additional Chief Engineer to hold the charge of Chief Engineer/PHED in the absence of the Chief Engineer for any reason. It is also contended by the petitioner that the impugned order is not issued in public interest and that the petitioner is neither a Secretary nor is he the head of the Department and, as such, the Department of Personnel and Administrative Reforms has no authority under the Rules of Business, 1972 framed under Article 166(3) of the Constitution of India to issue the impugned transfer order. It is also contended by the petitioner that the newly created post of Secretary (Technical)/PHED is an ex-cadre post, and the transfer of the petitioner to this post amounts to deputation, which cannot be done without the consent of the petitioner, which is the case here. It is also the contention of the petitioner that the concept of transfer means change of place of employment within an organization, and no transfer can be made to a higher post. It is, therefore, submitted that the impugned transfer order to an ex-cadre post and, that too, to a higher post is illegal and cannot be sustained in law.

3. The writ petition is resisted by the State-respondents by filing their affidavit-in-opposition. The private respondent also contested the writ petition by supporting the case of the State-respondents through their counsel: no separate counter-affidavit is, however, filed by him. The State-respondents defend the impugned order by pointing out that similar arrangement was made earlier when he was allowed to hold the charge of Chief Engineer/PHED far smooth and efficient disposal of works even though the then incumbent, namely, Shri H.S. Verypam, who was holding the higher post of Additional Chief Engineer/PHED on regular basis, was appointed Officer on Special Duty to the Principal Secretary/PHED. The petitioner has, therefore, no legitimate grievance to make in this behalf. Creation of the post of Secretary (Technical), PHED was found to be long overdue to strengthen the technical wing of the Department and to scrutinize and examine various DPRs and other technical aspects of all the projects of the Department. This prompted the State Government to create the post of Secretary (Technical). As the petitioner has sound technical knowledge and

possesses considerable experiences and engineering skills, he has been transferred and posted as Secretary (Technical/PHED on in-charge basis in his own grade pay by the impugned order. They, therefore, deny that the impugned order is arbitrary or mala fide or capricious and assert, on the contrary, that the same was done in public interest due to exigency of works. As transfer and posting are incidence of service, the petitioner has no right to challenge the impugned order, which is otherwise perfectly legal and, therefore, requires no interference by this Court. These are the main contentions of the State-respondents.

4. On the undisputed facts on record, the first and foremost duty of this Court is the determination of the exact nature of the impugned order, namely, whether it is a case of transfer pure and simple or whether the impugned transfer order is in the nature of transfer to outside the normal cadre and will, therefore, amount to deputation or a foreign service. According to Mr. A. Romenkumar Singh, the learned counsel for the petitioner, the impugned transfer order is in substance a transfer on deputation to a foreign service/outside the cadre. He contends that the post of Secretary (Technical) in the PHED was recently created just to accommodate the petitioner to make way for Shri H. Sunil Singh, who is merely holding the substantive post of Superintending Engineer and is not apart of the cadre posts of Chief Engineer in the PHED: the post is included in the recruitment rules. As the impugned transfer order is nothing but transfer on deputation, the consent of the petitioner ought to have been obtained prior to issuing the impugned transfer order, and having not obtained the same, such transfer is illegal and is liable to be quashed. In support of his contentions, the learned counsel relies on the following decisions:-(i) Th. Lokendro Singh Vs. State of Manipur, 2012 (3) GLT 897 (DB); (ii) Shri Deepak Kumar Ghosh Vs. State of Assam and Others, ; (iii) High Court of Judicature Vs. Veena Malik, (2009) 14 SCC 734 and (iv) Shri Anil Kumar Chowdhury Vs. State of Assam and Others, .

5. It is, however, contended by Mr. Th. Ibohal, the learned Senior Government Advocate appearing for the State-respondents that the petitioner is having sound technical knowledge, experience and engineering skills and has to be transferred and posted as Secretary (Technical) on in-charge basis in his own grade pay to utilise his valuable services in the Secretariat to assist the Principal Secretary, PH ED, and there is no mala fides or arbitrariness or capriciousness in the impugned transfer order, which has been done purely in public interest due to exigency of work. The learned State counsel points out that the recruitment rules for the post of Secretary (Technical) is yet to be framed, and whether the post is to be categorized as Head of Department or not, is, therefore, yet to be ascertained, but it is deemed to be a cadre post for the time being. Moreover, argues the learned State counsel, it is a settled proposition of law that transfer is a policy matter, which is exclusively within the legitimate function of the Government, and no employee has any right to insist that he should be given a particular posting or place of posting. He also contends that this is not a case in which there is violation of statutory provisions or where the transfer order is issued by

an authority not competent to issue or where mala fides loom large in the impugned transfer upon any of those parameters alone this Court, in exercise of its extraordinary jurisdiction, can interfere. Maintaining that there is no merit in this writ petition, the learned Senior state counsel strenuously urges this Court to dismiss the writ petition with costs.

6. The concept of "deputation" came up for consideration before the Apex Court in *State of Punjab and Others Vs. Inder Singh and Others*, . After considering the various case-laws of the past, the Apex Court observed as under:

18. The concept of "deputation" is well understood in service law and has a recognised meaning. "Deputation" has a different connotation in service law and the dictionary meaning of the word "deputation" is of no help. In simple words "deputation" means service outside the cadre or outside the parent department. Deputation is deputing or transferring an employee to a post outside his cadre, that is to say, to another department on a temporary basis. After the expiry of deputation, the employee has to come back to his parent department to occupy the same position unless in the meanwhile he has earned promotion in his parent department as per the Recruitment Rules. Whether the transfer is outside the normal field of deployment or not is decided by the authority who controls the service or post from which the employee is transferred. There can be no deputation without the consent of the person so deputed and he would, therefore, know his rights and privileges in the deputation post.....

(Underlined for emphasis)

Again, in *Umapati Choudhary Vs. State of Bihar and Another*, , the concept was explained by the Apex Court in similar terms. This is what it said:

8. Deputation can be aptly described as an assignment of an employee (commonly referred to as the deputationist) of one department or cadre or even an organisation (commonly referred to as the parent department or lending authority) to another department or organisation (commonly referred to as the borrowing authority). The necessity of sending on deputation arises in public interest to meet the exigencies of public service. The concept of deputation is consensual and involves a voluntary decision of the employer to lend the services of his employee and a corresponding acceptance of such services by the borrowing employer. It also involves the consent of the employee to so on deputation or not. In the case at hand all the three conditions were fulfilled. The University, the parent department or the lending authority, the Board, the borrowing authority and the appellant, the deputationist, had all given their consent for deputation of the appellant and for his permanent absorption in the establishment of the borrowing authority.

(Underlined for emphasis)

7. In the instant case, the post of Secretary (Technical) in the PHED is not included in the cadre strength of Chief Engineer, PHED, and is concededly outside

the cadre of the Recruitment Rules for the post of Chief Engineer, PHED. Therefore, it can be safely assumed that the post of Secretary (Technical), PHED is nothing but an ex-cadre post. The term "ex-cadre post" normally means a post outside the cadre of the posts comprised in the service. Posts can be created dehors the cadre of a service, and these are known as ex cadre posts. In the case at hand, it is not the case of the respondent authorities that the post of Secretary (Technical) is a cadre post. Nor is it the case of the respondents authorities that either the Recruitment Rules have been amended to include this post as one of the cadre posts of the Chief Engineer in the PHED. In any case, the fact that this post is created outside the cadre of the posts comprised in the service of Chief Engineer in the PHED is borne out by the proposed payment of salary for the post from the Head of Account of the General Administration Department as evident from the post creation order dated 11.5.2012 (Annexure-C/1 to the writ petition), and not from the Head of Account of the PHED and also from the admission of the respondent authorities that the posting of the incumbent is made by transfer from the PHED. On the basis of the aforesaid facts and circumstances, there is no difficulty in holding that the post of Secretary (Technical), PHED is not a cadre post, but is in pith and substance an ex-cadre post. Once it is found that this post is an ex-cadre post, the inevitable and logical conclusion that follows is that the petitioner cannot be transferred to the post of Secretary (Technical), PHED, which is demonstrably outside his cadre or Department without first obtaining his consent. Indisputably, the consent of the petitioner was never obtained by the respondent authorities before transferring him to the post of Secretary (Technical), PHED. In that view of the matter, the impugned order of transfer is illegal and cannot be sustained in law. This warrants the interference of this Court. Since the impugned order of transfer can be quashed on this ground alone, it is not necessary for me to deal with the other contentions raised by the learned counsel for the petitioner on the principle that Courts do not decide more than what is necessary. For what has been stated in the foregoing, this writ petition succeeds. Resultantly, the impugned order of transfer dated 11.5.2012 (Annexure-A/13 to the writ petition) is hereby quashed. However, the parties are directed to bear their respective costs.