

(2022) 02 CAL CK 0014
In the Calcutta High Court
Case No : W.P.A No. 19243 Of 2021

Sanghamitra Ghosh

APPELLANT

Vs

State Of West Bengal & Others.

RESPONDENT

Date of Decision : 04-02-2022

Acts Referred:

West Bengal Service Rules Part I, — Rule 5(10b), 5(27), 5(37)

Citation : (2022) 02 CAL CK 0014

Hon'ble Judges : Arindam Mukherjee, J

Bench : Single Bench

Advocate : Sakya Sen, Sunil Gupta, Dipanjan Biswas, S. N. Mookherjee, Anirban Ray, T. M. Siddiqui, Nilotpal Chatterjee, Rivu Dutta

Final Decision : Disposed Of

Judgement

Arindam Mukherjee, J

1. On 21st February, 2003, the West Bengal State Health & Family Welfare Samity (hereinafter referred to as the said Samity) was

constituted with the dissolution of all existing State level Registered Societies for proper monitoring, supervision, planning and implementation of all the

National Health Programme as well as different public health programmes under the West Bengal Societies Registration, 1961. The object for which

the said Samity was incorporated has been enumerated in clause 3 of its Memorandum of Association. Clause 3 (12) empowers the Samity to appoint

or engage any person temporarily either on deputation or on contractual basis for the performance of programme related activities.

2. The said Samity issued a recruitment notice on 2nd August, 2012 inviting applications for various posts as enumerated therein for contractual

appointment in the State/District Programme Management Unit. One of such post

was that of Statistical Manager (HQ). The place of posting as indicated in Serial no. 1 of the said recruitment notice is 'headquarter' and the educational qualification for the applicants have also been specified therein in a separate column against the said serial. There were others to be recruited as mentioned in Serial no. 2 to 5 of the said recruitment notice.

3. The petitioner on being successful was engaged as State Statistical Manager in the State Programme Management Unit of National Rural Health

Mission (in short 'NRHM') under the said Samity by an order of engagement dated 1st January, 2013 on contractual basis up to 31st March,

2013 on a consolidated monthly remuneration. The engagement order was to take effect from the date the petitioner joined in that post. The period of

contract as per such engagement order would automatically be terminated after expiry of 31st March, 2013. The petitioner's service as per the

engagement order could be terminated by one month's notice from either side.

4. The tenure of the petitioner's contractual employment was subsequently renewed and/or extended from time to time. The petitioner's

engagement has been lastly extended for a period of four months with effect from 1st September, 2021 on the existing terms and conditions by an

order dated 1st December, 2021. This order has been issued subsequent to the filing of the writ petition which was filed on 30th November, 2021. The

said order has been brought on record by the petitioner by way of a supplementary affidavit.

5. Prior to the last extension, the petitioner was served with an order dated 26th November, 2021 by which the petitioner was withdrawn from her

place of posting on administrative ground and detailed to District Programme Management Unit, Nandigram (HD).

6. The petitioner has challenged this order dated 26.11.2021 on the ground that being in contractual engagement against a particular post at a particular

place, the petitioner cannot be transferred to anywhere else from the post wherein she was initially engaged and has continued thereat on subsequent

extensions. The petitioner further says that the qualification for the post in which she was engaged is different from the post where she is being sought

to be transferred apart from the fact that the nomenclature of the two posts are also different. The contract according to the petitioner does not

provide for transfer and there is no implied condition embedded in the contract

for appointment permitting transfer of the petitioner for her post of initial engagement to any other place. The petitioner, therefore, proceeds on the basis that she has been sought to be transferred treating detailment to be transfer. The petitioner has relied upon a judgment reported in AIR 1960 SC 650 (M/s Kundan Sugar Mills vs. Ziyauddin & Ors) in support of her contention that she cannot be transferred. Relying upon Kundan Sugar Mills (supra) the petitioner says that the idea of transfer was not in contemplation at the time of engagement of the petitioner as the Statistical Manager (Head Quarters) because the post wherein she is sought to be transferred now i.e., District Programme Management Unit, Nandigram HD did not figure in the advertisement for recruitment or in the order of recruitment by and under which the petitioner was engaged. It has to be held according to the petitioner that the District Programme Management Unit, Nandigram HD was not in existence like the mill at Bulandshahr in the case of Kundan Sugar Mills (supra) and as such the transfer is impermissible as held in that case.

7. On behalf of the State respondents it is submitted that the petitioner has not been transferred but detailed to Nandigram on administrative ground to meet the exigencies. The detailment is for a limited period and the petitioner like others will be brought back to the original post or designation after a certain while. In this context transfer of two other officers and that they were brought back to their original place of engagement has been relied upon by the State. The respondents also say that the petitioner's salary and appraisal of annual confidential report will be respectively disbursed and done at her parent unit and not in her new unit as in case of transfer. It is further submitted that although detailment is not transfer yet transfer is an incidence of public service. Even if the contract does not specifically provide for transfer but implied transfer is part of public service and can be done at any stage for administrative purpose. The ratio of Kundan Mills (supra) according to the State respondents is not applicable in the instant case as in 1946 Kundan Mills only had an unit at Amroha and the Bulandshahr unit was acquired in 1955. In such factual matrix the Hon'ble Supreme Court according to the State respondents held that transfer to Bulandshahr which was not existent in 1946 cannot be done. The Supreme Court according to the respondents did not rule out implied transfer depending upon the need of the

hour. However, it is not been submitted that the project/programme at Nandigram was in existence when the petitioner was initially engaged. No interference is, therefor, called for according to the State respondents. The performance of the petitioner despite the detailment has been clearly spelt out to be made not by the unit to which she is detailed. This will according to the State respondents is further classified from the order of renewal of contract made on 1st December, 2021 and the order of detailment dated 26th November, 2021 on a conjoint reading of the two. The renewal order according to the State respondents is on appreciation of petitioner's satisfactory performance till 30th September, 2021 and the detailment is on administrative ground. There is as such no mala fide approach on the part of the State. The detailment is the need of the hour for which the petitioner has been asked to work at Nandigram on administrative ground. The renewal order dated 1st December, 2021, therefor, according to the State respondents does not negate the order of detailment dated 26th November, 2021 or stultify the same in any manner.

8. The word detailment in ordinary parlance means utilization of service of an employee in any job for a temporary period in the public interest. The word detailment has been introduced in West Bengal Service Rules Part I by an amendment dated 9th January, 2014 which in Rule 5 (10 B) provides as follows:

Detailment means utilization of service of an employee in any job for a temporary period in the public interest under any Department or Office of the Government or in any Company, Corporation, Undertaking and Statutory Body etc., which is wholly or substantially owned or controlled by the State Government or by any body which is funded by the State Government.

The other definitions in the said service rules which are germane for the adjudication of the issues involved are:

5 (29) Permanent Post: Permanent post means a post carrying a definite rate of pay rate of pay sanctioned without limit of time.

5(37) Temporary Post: Temporary post means a post carrying a definite rate of pay or monthly honorarium sectioned for a limited time.

5(40) Transfer: Transfer means the move of a Government employee from one place to another or from one post to another, either-

(a) To take up the duties of a new post; or

(b) in consequence of a change of his headquarters.

9. The said rules, though are not applicable to the petitioner primarily because she has been appointed by the said Samity and not by the State

Government as also for the reason that the petitioner's appointment is on contractual basis for a fixed tenure with fixed salary not as per scale of

pay of a sanctioned post but the definitions analogous to these referred to hereinabove can be applied to petitioner's case. By applying the same, I

find that the words "transfer" and "detailment" are different particularly in the context of the facts of the instant case. In case of transfer,

if it is not, at the request of the employee it has to be to an equivalent post within the same cadre in general so that seniority of an employee on joining

a post as required in law can be reckoned from the date of initial appointment and not from the date of assuming office on transfer. In the instant case

the petitioner has been appointed on temporary basis as the Samity has the power only to appoint temporarily either on deputation or on contractual

basis. Admittedly, the petitioner has not been appointed on deputation so the petitioner's appointment has to be contractual one which is indeed the

case as borne out from record. The post wherein the petitioner was engaged initially is also not a statutory post as per the ratio laid down in State of

Karnataka & Ors vs. Ameerbi & Ors reported in 2007 (11) SCC 681. Keeping in mind the issues involved, it does not fall for consideration at this

stage whether the petitioner's post is a temporary post within cadre or unclassified and isolated ex-cadre temporary post as differentiated in the

judgment reported in G.K. Dudani & Ors. vs. S.D. Sharma & Ors. and State of Gujrat vs. S.D. Sharma and Ors. 1986 (Suppl) SCC 239. It is,

however, a confirmed state that the petitioner had been holding the post on substantive capacity following the ratio laid down in Baleshwar Dass &

Ors vs. State of U.P. & Ors. and Arhant Prasad Jain & Ors. vs. State of U.P. & Ors. 1980 (4) SCC 226. I am also not called upon to decide at this

stage as to whether the petitioner holds a civil post or not. Yet assuming without admitting that the petitioner is holding a civil post then also it is a

temporary post going by the definition in rules 5(27) and 5(37) of the said rules. Unless the petitioner is in a permanent post the petitioner cannot be

transferred even if the proposition that transfer is an incidence of a public service or that the authority empowered to appoint is also authorised to

transfer is accepted. Once I hold that the petitioner's service cannot be transferred, the interpretation sought to be given either by the petitioner or

the respondents to M/s Kundan Mills (supra) has no relevance, though there is no dispute as to the ratio laid down therein.

10. Now comes the question whether the petitioner can be detailed as submitted by the State respondents. Clause 3(12) of the Memorandum of

Association of the said Samity permits the said Samity to engage any person temporarily either on deputation or contractual basis for the performance

of programme related activities. Record, however, does not reveal which are the posts to be filled in by deputation and which on contractual basis but

the fact remains that the appointment has to be on programme/project basis unit-wise. The petitioner has to be engaged as the State Statistical

Manager in State Programme Management Unit of NRHM under the Samity. The place of posting of the petitioner is Headquarter as per the

recruitment notice dated 2nd April, 2012. In the same recruitment notice Serial Nos.2 to 5 clearly indicate the posting at Any District/Health

District which is absent in respect of Serial No. 1 against which the petitioner was engaged. In the subsequent orders wherein the petitioner's

tenure as a contractual employee has been extended, there is no change in designation or place of posting. The petitioner's designation cannot be

now changed by an office order as sought to be done by the order dated 26th November, 2021. The petitioner cannot also be detailed at District

Programme Management Unit, Nandigram HD from State Programme Management Unit, NRHM simply because she had been initially engaged in a

particular programme/project and on subsequent extensions the petitioner was directed to work in the same project/programme under the same unit.

By the detailment sought to be made, the petitioner's unit is being changed from State to District which was not the intention in the recruitment

notice, otherwise against Serial No. 1 the same endorsement as in Serial Nos. 2 to 5 would have been made. Even subsequent extensions were

against the same programme/project. The definition analogous to the definition of detailment as in West Bengal Service Rules, Part-I is applied to the

instant case then also detailment is not permissible as the petitioner is neither an ad hoc nor a temporary or a casual State Government employee on

having been appointed by the Samity on contractual basis. The petitioner also does not hold a statutory post. The petitioner, therefor, cannot be brought

within the coinage of an "employee" who can be detailed as in rule 5 (10b) of the said rules or on the principles analogous there to.

Initially I thought of hearing the matter on affidavits after considering the petitioner's entitlement to an interim order as the petitioner's service

had been lastly extended till 31st January, 2022. The matter was, therefor, fixed "for orders" on 13th January, 2022. However, situation was

beyond my control to deliver and order prior to 31st January, 2022 as I suffered from Covid-19 and was unable to attend Court on and from 13th

January, 2022.

The State has used an affidavit though against the Supplementary Affidavit filed by the petitioner. In the said affidavit the State respondents have

categorically explained their stand which I have considered in details in the foregoing paragraphs. I, therefor, see no justification in calling for further

affidavits to decide the main issue involved i.e., whether the petitioner can be transferred or detailed.

The order impugned dated 26th November, 2021 is set aside. The writ petition is accordingly disposed of.

Urgent photostat certified copy of this judgment and order, if applied for, be supplied to the parties on priority basis after compliance with all necessary

formalities.