

(2009) 10 SHI CK 0015
In the High Court Of Himachal Pradesh

State of H.P. and Another and Anil Mehta	APPELLANT
Vs	
L.R. Bhardwaj and Another	RESPONDENT

Date of Decision : 07-10-2009

Acts Referred:

Fundamental Rules — Rule 15

Citation : (2010) 1 ShimLC 69

Hon'ble Judges : V.K. Ahuja, J;Deepak Gupta, J

Bench : Division Bench

Final Decision : Allowed

Judgement

Deepak Gupta, J.—These two appeals are being disposed of by a one judgment since they are both directed against one judgment delivered by a learned Single Judge of this Court in CWP (T) No. 1561 of 2008.

2. Briefly stated the facts of the case are that Shri L.R. Bhardwaj, hereinafter referred to as the petitioner was working as Assistant Engineer (Mechanical) in the department of Irrigation and Public Health, H.P. The petitioner was promoted to the post of Executive Engineer (Mechanical) on 20.10.1999. He was then posted as Executive Engineer (Mechanical) in the I & P H Division No. 2, Shimla. He remained there till 20.9.2003. He was then transferred to Tube Well Division Gagret, District Una and joined as such on 1.10.2003. It appears that the petitioner made a request for his transfer to Shimla. He was transferred to P & I Unit-II Shimla vide notification dated 10.10.2007. He joined the said post on 15.10.2007. He thereafter made a representation that though he had been posted at Shimla he had been wrongly adjusted against a post meant for Civil Engineer and he prayed that he may be posted as Executive Engineer (Mechanical) in I & PH Mechanical Division, Shimla.

3. The Engineer-in-Chief on 6.6.2008 sent a communication to the Secretary of IPH that there are two separate cadres of Mechanical Engineer and Civil Engineer in the IPH Department. According to him, the Mechanical Engineers and Civil

Engineers are recruited, promoted and posted against their cadre posts only. Resultantly, the petitioner was transferred to Mechanical Division No. 2 vice Shri Anil Mehta, who is referred to as respondent No. 3. His transfer was later cancelled on 20.6.2008 in the public interest. This order was challenged by him in the original application, which was transferred to this Court. The main ground raised by the petitioner was that since he is a Mechanical Engineer he can only be posted against a post falling in the cadre of Mechanical Engineers and could not have been posted outside his cadre. The learned Single Judge accepted this contention and held that the Mechanical Engineer has to discharge the work of mechanical work whereas the Civil Engineer has to look after the civil works. The learned Single Judge also held that the orders of transfer which were issued on 13.6.2008 could not have been modified within a week on 20.6.2008 without showing what was the public interest or administrative exigency involved. According to the learned Single Judge no reasons have been given by the State to show why the earlier order was reversed. He, therefore, set-aside the order dated 20.6.2008.

4. The Judgment of the learned Single Judge has been challenged both by the State as well as by Shri Anil Mehta.

5. The main ground raised by the State that it is the prerogative of the employer to decide where a particular employee should be posted. It has also been urged that the learned Single Judge has not taken into consideration the supplementary affidavits which were filed in the writ petition pursuant to the directions issued by a Division Bench. Reference has been made to the order dated 25.9.2008 passed by a Division Bench prior to the admission of the writ petition wherein the State was directed to file a supplementary affidavit. This supplementary affidavit was filed on 17th October, 2008 in which reasons have been given for the transfer of the petitioner. In this supplementary affidavit, it has been clearly stated that Civil as well as Mechanical Engineers have been posted in Shimla Division No. II since its inception in 1983. It is denied that Division No. II is exclusively meant for Mechanical Engineers. It is submitted that initially the post of Executive Engineer was created vide notification dated 22.1.1999 by upgrading the post of Assistant Engineer (Civil) from Survey and Investigating Division. At that time, the justification for creation of the post on the Mechanical side was that the Officer-in-charge holding the said post was to monitor the Pumping Station at Gumma from where the pumping of water is done to Shimla. According to the State, the Officer was to look after the maintenance of the pumping machinery and hence it was necessary to post a Mechanical Engineer against the said post. The State has further averred that now the work of maintenance of pumping machinery is not being done by the Department but is being got done through a contractor. There is, therefore, no workshop at Gumma under the department. In fact, according to the State there is virtually no work of mechanical nature in this division and almost all the work in this Division is of civil nature. In the affidavit, names of various officials belonging to the civil side as well as the mechanical side have been given who have worked in IPH Division No. II to show that the

work in this division is both of Civil and Mechanical nature. Another supplementary affidavit was again filed by the State on 23.10.2008. In this affidavit, it was stated that there are only two posts of Mechanical Engineer in the entire Irrigation and Public Health Department. Though there are only two posts of Executive Engineer (Mechanical) no division has been declared to be Civil or Mechanical and as such Executive Engineer from both the cadres are posted in their division keeping in view the administrative convenience and interest of work.

6. The State has placed reliance upon fundamental Rule 15 and the decision of the Government under Article 26 of the Civil Services Regulations in support of its contention that posting can be made outside the cadre.

Fundamental Rule 15 reads as follows:

(a) The President may transfer a Government servant from one post to another provided that except:

- (1) on account of inefficiency or misbehaviour, or
- (2) on his written request,

a Government servant shall not be transferred to, or except in a case covered by Rule 49, appointed to officiate in a post carrying less pay than the pay of the post on which he holds a lien.

7. It is thus clear that the President has the power to transfer a Government servant from one post to any other post and it is not necessary that the post should be one under the same cadre. The only caveat is that the Officer cannot be appointed to officiate in a post carrying less pay than the pay of the post on which he holds the lien but this does not mean that he cannot be posted outside the cadre.

8. Reference may also be made to the Government of India's decision dated 24th March, 1955 under Article 26 of the Civil Services Regulations. Relevant portion of the decision reads as follows:

3. A question has been raised whether a central Government servant may be transferred compulsorily to a post outside the cadre of his own department or service. The question has two aspects, namely:

- (a) whether such transfers can be made without the officer's consent and;
- (b) in so, in what circumstances they should or should not be made.

The object of this Office Memorandum is to clarify the legal position and to indicate the general consideration to be borne in mind in dealing with individual cases.

2. Fundamental Rule 11 declares that unless in any case it is otherwise distinctly provided, the whole time of a Government servant is at the disposal of the

Government which pays him and he may be employed in any manner required by proper authority without claim for additional remuneration whether the services required of him are such as would ordinarily be remunerated from the Consolidated Fund, or from a Local Fund. Under F.R. 110 a Government servant's transfer to "foreign service" cannot be effected against his will. That restriction does not, however, apply to transfer of a Government servant from one post under Government to another which is permissible under F.R.15. This rule clearly contemplates that transfers may be to any post within or outside the parent department or service and also that the appointment to the new post may be of any description, e.g. temporary, officiating, substantive, etc. The only restriction laid down is that save in the circumstances specified in the rule, the transfer shall not be made to post carrying less pay than the pay of the permanent post on which the Government servant holds an actual or suspended lien. If the transfer is at the officer's own request or on account of inefficiency or misbehaviour, even a reduction in pay is permissible. This will, of course, be subject to the safeguards laid down in the Constitution, and the disciplinary rules applicable to officer. Fundamental Rule 15, read with Fundamental Rule 12-A, make it clear that a substantive transfer from a permanent post in any service or department to a permanent post in any other service or department can be so made as, to abolish the lien on the original post and to create a lien on the new post. In other words, even a permanent transfer from one service or department to another service or department can be made irrespective of the wishes of the Government servant concerned.

It is evidently in the public interest that in order to bring about all round national development, Government should be free to utilize the available man-power to the best advantage. The Ministries etc. area, therefore advised to examine whether in the recruitment rules or terms of service governing the department cadres, with which they are concerned, there is anything which hampers this freedom and if so, whether any amendments of the rule, etc., can be made.

9. It is apparent that in terms of the fundamental rules and the Civil Services Regulations, an employee can also be transferred outside the cadre. The only caveat is that this should not result in reduction of pay or change the promotion avenues of the person transferred. Power has been given to the State to post an officer outside his cadre subject to the condition that the emoluments or promotion avenues of the employee are not adversely affected.

10. In the present case, the petitioner has not been posted outside his cadre but at best can be said to have been posted on a post which is not in his cadre. He is still in the Mechanical cadre but has been asked to man another post. Where public interest is involved the individual interest of the employee must give way to the larger public interest. It may be true that normally an employee should not be posted out of the cadre but if justification is provided for the same, the same can be done. It would be appropriate to refer to the judgment of the Apex Court in National Hydroelectric Power Corporation Ltd. Vs. Shri Bhagwan and

others, which reads as follows:

5. ...It is by now well settled and often reiterated by this Court that no Government servant or employee of a public undertaking has any legal right to be posted forever at any one particular place since transfer of a particular employee appointed to the class or category of transferable posts from one place to other is not only an incident, but a condition of service, necessary too in public interest and efficiency in the public administration. Unless an order of transfer is shown to be an outcome of mala fide exercise of power or stated to be in violation of statutory provisions prohibiting any such transfer, the Courts or the tribunals cannot interfere with such orders as a matter of routine, as though they are the appellate authorities substituting their own decision for that of the management, as against such orders passed in the interest of administrative exigencies of the service concerned. On the facts and circumstances of the cases before us, we are also unable to agree with the learned Counsel for the respondents that Rule 4.1.1 of the Seniority Rules interdicts any transfer of the employees from one office or project or unit to any one of the other as long as the seniority of such an employee is protected based on the length of service with reference to the date of promotion or appointment to the grade concerned irrespective of the date of transfer.

11. It is, therefore, apparent that this Court can interfere only when it find that the transfer is mala fide and is against the statutory provisions. No violation of any statutory provision has been pointed out and no mala fides are alleged.

12. Normally, the department may not post an employee out of his cadre but nobody can deny the right of the employer to post a person out of the cadre if reasons are given. The learned Single Judge erred in holding that no reasons were given. It appears that by inadvertence the learned Single Judge failed to note that pursuant to the orders passed by a Division Bench, the supplementary affidavits had been filed which justified the passing of the orders. The justification given in the affidavits is perfectly valid. At the time when the post of Executive Engineer (Mechanical) in Shimla Division No. 2 was created the work of looking after the pumping machinery at Gumma was with this division. Now this working has been given out on contract. Therefore, it was not necessary to post a person belonging to Mechanical cadre only to the said post. We also find that the petitioner was only posted within Shimla town from one division to another. This posting in no manner has caused any prejudice to him. He remained at Shimla, where he wanted to come.

13. In view of the above discussion, we find that the learned Single Judge erred in not taking into consideration the supplementary affidavits which give full justification for the transfer of the writ petitioner.

14. Consequently, both the appeals are allowed. The judgment of the learned Single Judge is set-aside and the original application (transferred writ petition) filed by Shri L.R. Bhardwaj is dismissed.

No order as to costs.