

IN THE HIGH COURT OF JUDICATURE AT PATNA

Civil Writ Jurisdiction Case No.13963 of 2015

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1. Dr. Rajendra Prasad Son of Late Prakash Chandra Prasad Resident of Mohalla - Tatma Toli, Mokama, P.S. - Mokama, District - Patna.
 2. Dr. Sudhir Kumar Son of Late Dr Bhagwan Das resident of Village - Akbarpur, P.S. Akbarpur, District - Nawada.
 3. Dr. Sri Bhagwan Sudhanshu Son of Late Jamuna Ram resident of Village - Fatepur, P.S. - Didarganj, District - Patna.
 4. Dr. Vijay Kumar Singh Son of Late Mahadeo Singh Resident of Mohalla - Gardanibagh, H.No. B/10, Road No 6, P.S. - Gardanibagh, District - Patna.

.... Petitioner/s

Versus

1. The State of Bihar.
2. The Principal Secretary, Health Department, Government of Bihar, Patna.
3. The District Magistrate, Rohtas, Sasaram.
4. The Civil Surgeon cum Chief Medical Officer, Rohtas (Sasaram).

.... Respondent/s

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Appearance :

For the Petitioner/s : Mr. Satish Chandra Jha-3
For the Respondent/s : Mr. P.N.Shahi, AAG 10
Mr P.N.Sharma, AC to AG

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CORAM: HONOURABLE MR. JUSTICE AJAY KUMAR TRIPATHI

ORAL JUDGMENT

Date: 29-01-2016

By virtue of Annexure- 1, dated 27.7.2015 petitioners along with some others have been transferred in the same district from one Primary Health Centre to another. They decided to file the present writ application challenging the order of transfer notified at the level of Civil Surgeon-cum- Chief Medical Officer, Rohtas at Sasaram.

The first submission on behalf of the petitioners is that the petitioners are holders of higher post and pay scale, therefore, their order of transfer can only be effected at the level of the headquarters

of the Health Department and Civil Surgeon has no powers to exercise in matters of transfer. Certain notifications have been annexed to show that the petitioners are holders of the post of Chief Medical Officer because they have earned that status by virtue of grant of Dynamic ACP.

It is also contended that such transfers cannot be effected beyond 30th of June of the year. Transfers are supposed to be made only once a year. Annexure- 3 is the guidelines issued by the State as to how transfers are to be effected of employees including gazetted employees and the level at which it is required to be done.

Reference has also been made to Rule 11 of the Bihar District Medical Cadre/ Bihar Health Service Cadre (Appointment on Regular/ Contract basis and Service Conditions) Rules 2008 to show that grant of Dynamic ACP is an up-gradation of post and since petitioners are at par with the Civil Surgeons, the Civil Surgeon cannot exercise authority over them or ordering their transfer.

Learned Additional Advocate General 10 representing the State has belied all the contentions and submissions made on behalf of the petitioners. His submission based on the pleadings and counter affidavit is that with the object of decentralization of power, in matters of transfer within a district, a conscious resolution was taken by the Department of Health, which has been brought on record



by the petitioners themselves as Annexure- 4. This is dated 22.8.2008. The power has been vested in the Civil Surgeons to effect transfer within the district except for identified posts and the identified post indicated are the post of Civil Surgeon- cum- Chief Medical Officer, ACMO, Deputy Superintendent and prescribed officer in a district.

A reading of Annexure- 1 will also indicate that the order of transfer may have been notified at the level of Civil Surgeon but this is in background of a directive, which has been issued at the level of the Department of Health which the opening part of the notification indicates.

Counsel for the State has also drawn the attention of this Court to an identical kind of issue earlier raised in the case of Dr. Dilip Kumar Sinha v. the State of Bihar & others, which was CWJC No.13527 of 2013, decided on 18.7.2013. The matter or submission of similar kind was dealt with and answered by the learned Single Judge as follows:

“When this case was taken up Yesterday learned counsel for the State was directed to take instruction and clarify as to whether grant of dynamic ACP to a Medical Officer would amount to promotion for the Medical Officers. Learned counsel for the State having obtained instruction has taken a stand that it is not a promotion rather the person concerned on grant of ACP has been only given the higher pay scale with up-gradation of that very post that he was holding. He has, therefore, taken a stand that the petitioner remains basically a Medical Officer with the benefit of dynamic ACP and he cannot claim to be equivalent to be in the rank of the Chief

Medical Officer cum Civil Surgeon, a rank which was being held by respondent no.5 while passing the order of transfer. He has further submitted that such power of transfer has been delegated in all over Bihar to all Civil Surgeon and therefore, any view taken by this Court in isolation as with regard to the case of the petitioner will create an administrative problem for functioning of the cadre of the Medical Officer.

In the considered opinion of this Court the transfer order of the petitioner cannot be held to be without jurisdiction. The Medical Officers under the Bihar Health Services Cadre Rules the post of Medical Officer. The lowest rank/ feeder post for the higher promotional post in the Bihar Health Service are, namely, In-charge Medical Officer, Superintendent, the Civil Surgeon/ Deputy Director and its equivalent post, Director/ Regional Director and the Director-in-Chief. The promotion of a Medical Officer, therefore, has to be given on a higher post, namely, in the rank of Deputy Superintendent and its equivalent post. The fact, however, remains that the petitioner still is a Medical Officer though with a benefit of grant of dynamic ACP he is entitled to draw salary in the higher pay scale which may be equivalent to the promotional post.

As the concept of ACP itself is, it is never a promotion rather a substitute of regular promotion because there are no vacant higher posts of promotion and since an incumbent on the post cannot be allowed to stagnate, ACP is granted by way of anti-stagnation removal measure. Thus on grant of ACP a person cannot claim that he was regularly promoted on the higher post. Once this aspect becomes clear there will be no difficulty in holding that the petitioner's post remains that of Medical Officer though that on grant of ACP he gets the pay and benefit up-gradation of the post.

The up-gradation of post and promotion in service jurisprudence are not the same thing. The promotion whenever it is given it will have the impact of giving higher responsibility of post. In the case of dynamic ACP a person even after grant of such benefit of ACP still remains on the same post and has to function on the same place as the Medical Officer. The Medical Officers, however, are posted by the State Government districtwise and the posting of the petitioner also in Jehanabad District was made by the State Government whereafter he has been given the actual place of posting in the District by the Civil Surgeon. The power of such transfer, therefore, was vested earlier in a Committee headed by the Divisional Commissioner and by the resolution as contained in Annexure 5 the same has been now vested with a Committee headed by the Civil Surgeon. Therefore, this Court would not find that the order of transfer is

without jurisdiction.” (emphasis mine)

Obviously, an effort has been made by the petitioners to create a smokescreen as to how they are at par with the Civil Surgeon by virtue of grant of benefit of up gradation or pay scale under the Dynamic ACP. The service jurisprudence in this regard has been very aptly laid down by the learned Single Judge in the earlier part of the quoted order and this Court cannot place it any higher than what has already been stated by the learned Single Judge.

Obviously, the effort of the petitioners through the present writ application is to circumvent the decision of transfer taken for administrative reasons because they all have interest in getting posted on a particular station since they do develop some vested interest over a period of time, for many a reasons.

Writ application is, therefore, dismissed being devoid of merit.

(Ajay Kumar Tripathi, J)

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