

IN THE HIGH COURT OF JUDICATURE AT PATNA
Civil Writ Jurisdiction Case No.22281 of 2018

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Pritam Kumar, Son of Sri Satya Narayan Singh, Resident of Village-Khalgaon
Tola, P.O.-Khawaspur, P.S.-Pirpanti, Distt.-Bhagalpur.

... .. Petitioner/s

Versus

1. The State Of Bihar through the Secretary, Rural Works Department,
Government of Bihar, Patna.
2. The Principal Secretary, Urban Development @ Housing Department,
Government of Bihar, Patna.
3. The Engineer-in-Chief, Rural Works Department, Government of Bihar,
Patna.
4. The Special Secretary, Rural Works Department, Government of Bihar,
Patna.
5. The Chief Engineer-3, Rural Works Department, Government of Bihar,
Patna.
6. The Superintending Engineer, Works Circle Sitamarhi, Rural Works
Department, District-Sitamarhi.
7. The Executive Engineer, Work Division Pupri, Rural Works Department,
Pupri, District-Sitamarhi.

... .. Respondent/s

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Appearance :

For the Petitioner : Mr. Ashok Choudhary, Advocate.
For the Respondents : Mr. Kumar Alok- Sc7

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CORAM: HONOURABLE MR. JUSTICE ASHUTOSH KUMAR
CAV JUDGMENT

Date : 15-03-2019

Heard the learned counsel for the petitioner
and the State.

2. The petitioner who had been working as an
Assistant Engineer at Pupri under the Rural Works
Department has been transferred to a different cadre
viz. Urban Development Housing Department vide
order dated 31.10.2018, contained in Memo No.



11032 issued under the signature of Special Secretary to the Government.

3. The aforesaid order of transfer is under challenge on the ground that the transfer of the petitioner is a deputation to a different cadre and therefore the consent of the petitioner had per force to be taken.

4. Though the initial challenge to the aforesaid transfer was on the ground that the petitioner was transferred out of turn when some part of the work in the Rural Works Department viz. Damage Relief had been left incomplete and that he ought not to have been transferred without letting him complete the aforesaid work. However, during the course of argument, Mr. Ashok Choudhary, learned counsel for the petitioner limited his challenge to the ground that the petitioner had been working in the Rural Works Department, which is his cadre and for the transfer, even on demand by other department viz. Urban Development and Housing Department, his consent was required to be taken.

5. The learned Standing Counsel No. 7, while defending the order of transfer, submitted that under the provisions of Section 267 of the Bihar Service



Code, no consent of an employee is required if he is transferred or deputed in another cadre under the Government. The requirement of taking consent arises only when an employee is sent to a Foreign Service viz. a service outside the Government, even though wholly owned by the Government.

6. From the supplementary counter affidavit filed on behalf of the State, it has been admitted that the petitioner has been deputed to the Urban Development and Housing Department on an equivalent post which the petitioner was holding under the Rural Works Department. The order was sought to be further defended by stating that the cadre has not been changed and the parent cadre of the petitioner would remain the Rural Works Department.

7. In order to appreciate the contention of the petitioner, it is necessary to first understand as to what is the meaning of the word "Cadre".

8. According to Section 12 of the Bihar Service Code, cadre means the strength of the service or a part of a service sanctioned as a separate unit. It is a matter of common knowledge that a cadre has to be expressly created as it is of vital importance for conferring any right upon an employee.



9. The Supreme Court in ***State of Punjab vs. Inder Singh*** reported in ***1997 (8) SCC 372*** has explained the concept of “deputation” as a service outside the cadre or outside the parent department. It basically postulates that the deputation is for a temporary period and after the expiry of the period of deputation, an employee may 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. The Supreme Court has gone on to explain that whether the transfer outside the normal field of employment would amount to deputation would depend upon various factors and variables but one aspect of the same would be necessary viz. the consent of the persons so deputed would be required so that he knows his rights and privileges on the deputation post.

10. The necessity for sending on deputation may arise in public interest to meet the exigencies of the public service but a deputationist cannot be kept in dark regarding his place of deputation.

11. There is a basic distinction between deputation and transfer.



12. It would be apposite to refer a judgment of the Gujarat High Court in ***Bhagwati Prasad Govardhandas Bhatt vs. the State of Gujarat*** reported in ***1977 (2) SLR 551*** wherein it was held that deputation and transfer basically differ from each other in that the transfer can be only to an equivalent post in the same cadre whereas deputation must be in department other than the parent department where even equivalence may not be determined. Transfer is a right of the master and it is an incidence of service which could only be challenged on the grounds of malafide or violation of statutory rule relating to transfer. Deputation can only be with the consent because the employee joins a department to render service in that department and he cannot be made to serve somewhere else even if it be on the same post.

13. It would further be relevant here in this context to refer to provisions of Section 267 contained in Chapter 8 of the Bihar Service Code-

267. (a) *No Government servant may be transferred to foreign service without his consent:-*

[Provided that this sub-rule shall not apply to the transfer of, a Government servant to the service of a



body incorporated or not which is wholly or substantially owned or controlled by the State Government, or by the Government of India, when the body operates or would operate in Bihar even though its head quarters may be outside the State.]

(b) A transfer to foreign service requires the sanction of the State Government.

14. The aforesaid rule mandates a condition in case of transfer of a Government servant to a foreign service viz. taking his consent. However the aforesaid rule shall not apply to transfer of a government servant to the service of the body incorporated or not which is wholly or substantially owned or controlled by the State Government or by Government of India when the body operates or would operate in Bihar even though its headquarters may be outside the State.

15. If this rule is seen in a wider context, the State as a whole would be taken to a cadre in normal sense and an employee, say an Assistant Engineer can be posted in any one of the departments of the State and in that case consent of such an employee would not be necessary. This presupposes that the cadre of



an employee is taken to be the State service as a whole or that a unified cadre of engineers working under the government is created.

16. There are some pitfalls in the aforesaid proposition. Transfer, it has by now been settled beyond doubt, is an incidence of service which means posting of one person from one place to another, from one post to another and from one department to another which is effected only in public interest. Transfer of an employee from one department to another department may be at the discretion of the employer but only if the terms and conditions of a transferred employee is not affected to his disadvantage. Therefore, in public service, a transfer from one department to another under different cadre controlling authorities, consent would be required to be taken. The consent, more often than not, is in the nature of an option of an employee. If such transfer is of a permanent nature, the employee then ceases to have his connection with his parent cadre and consequently he loses his lien i.e. his right to come back with all connected benefits then his consent would be of utmost importance and would be required for sure. When any transfer outside cadre takes place,



such transfer can be understood to have been made on deputation terms with retention of the right of the employee to come back. It is also a known fact and accepted proposition that all transfers are made in public interest but an employer also cannot be oblivious to an uncomfortable situation or discomfiture attached to a transfer. Thus a balance has to be struck between public interest and the interest of an employee. An effective control over such administrative decision would be that in cases of transfer to another cadre, consent is taken of the employee.

17. In a deputation, there is a lending authority, a requisitioning/borrowing authority and the employee who is made to shuttle from one cadre to another. It may also be made clear that in an ex-cadre transfer, consent is necessary but not vice versa in repatriation to the parent cadre.

18. This Court is conscious of the fact that transfer, if effected in administrative interest and there being no malafide or any colorable exercise of power, courts are loathe to interfere with the same, as they normally do not sit as appellate authority, questioning the correctness of the order of transfer. However if the transfer is mala fide, against public interest and de



horse the rules made in that regard, courts do come to the rescue of the transferred employee.

19. After having said that, this Court recounts that the petitioner was appointed as Assistant Engineer in the Rural Works Department, Government of Bihar, after having being selected in open competition conducted by Bihar Public Service Commission. After the petitioner was transferred to the Works Division, Pupri at Sitamarhi, he was entrusted with carrying out damage relief work for which advance money was given to him. It is the claim of the petitioner that against 15% of the amount so advanced, the work was still left to be executed and in the meantime, without any reason and prior to the tenure, the petitioner was transferred.

20. The petitioner has also brought to the notice of this Court that a general instruction was issued for completing the work or else a serious view would be taken. Apart from this, it has also been pointed out by the petitioner that there has been a decision in the Rural Works Department of re-engaging retired Assistant Engineers on contractual basis for smooth functioning of the department. The aforesaid fact has been brought to the notice of the Court,



perhaps for impressing upon the point that there is still need for the posting of an Assistant Engineer in the department.

21. The aforesaid grounds do not weigh with the Court at all for looking at the impugned order of transfer with suspicion.

22. The only ground which has weighed with the Court is that the petitioner, right from the inception of his service, has been working in Rural Works Department as an Assistant Engineer. This Court has not been informed whether there are any cadre rules for Assistant Engineer/Engineers in the Public Works Department but it can safely be assumed that since the work under the department is of executing construction/repair work, engineers would be required and therefore there must be some rules governing the service conditions of the cadre of engineers. Otherwise also, the expression cadre reflects the strength of the department. The transfer of the petitioner to Urban Development and Housing Department can safely be taken to be an ex-cadre transfer.

23. This Court has also taken into account that pursuant to the order of transfer and during the



pendency of the writ petition, the petitioner has already joined the post on which he has been transferred. Now the only issue open for adjudication before this Court is whether the transfer of the petitioner to a different department is deputation or transfer simplicitor.

24. The notification under challenge clearly indicates that the aforesaid transfer, as a temporary measure, has been made on the request of Urban Development and Housing Department, Government of Bihar. The order of transfer is specific about the temporary nature of posting. This Court, therefore has no difficulty in holding the aforesaid order of transfer as a deputation.

25. If this be so, the petitioner ought to have been consulted for him to know what would be the nature of work in the new place of posting in a different cadre/department and whether the petitioner would be afforded the same pay which he was getting as an officer of the cadre in which he was appointed. A reference to the statement contained in the second supplementary counter affidavit can be made with profit. Paragraph 6 of the counter affidavit clearly states that the petitioner has been deputed to the



Urban Development and Housing Department on an equivalent post which was being held by the petitioner under the Rural Works Department and the Rural Works Department shall remain his parent department.

26. With the aforesaid disclosure by the employer, there remains no doubt that the order impugned is transfer by way of deputation, necessitating taking of consent from the employer.

27. Under the aforesaid circumstances, this Court, taking into account that the petitioner has already joined the place of posting in a different department does not wish to interfere with the order but would like to and does give an opportunity to the petitioner to make a representation before the Secretary, Rural Works Department, Government of Bihar, Patna within a period of four weeks from today seeking further clarification about the tenure of the petitioner on such deputed post. The concerned respondent shall also seek the consent of the petitioner, even post decisional, regarding his deputation in a different department and which representation shall be disposed of within a further period of six weeks.



28. With the aforesaid direction/observation,
the writ petition is disposed of.

(Ashutosh Kumar, J)

krishna/-

AFR/NAFR	AFR
CAV DATE	NA
Uploading Date	16.03.2019
Transmission Date	

