
(2016) 11 KL CK 0055

In the High Court Of Kerala

Case No : WA. NO.586 of 2011 and in RP.1104 of 2009

G. Radhakrishnan

APPELLANT

Vs

State of Kerala

RESPONDENT

Date of Decision : 17-11-2016

Acts Referred:

Constitution of India, 1950 — Article 14

Citation : (2017) 1 ILRKerala 347 : (2017) 1 KerLJ 171

Hon'ble Judges : Mr. M. Shantanagoudar, C.J. and Mr. Sathish Ninan, J.

Bench : Division Bench

Advocate : Senior Government Pleader Sri. V. Tekchand, for the Respondent; Sri. K. Ramakumar (Sr.) and Smt. Smitha George, Advocates, for the Petitioner

Final Decision : Dismissed

Judgement

Mr. Mohan M. Shantanagoudar, C.J. - This writ appeal is filed against the order dated 15.03.2011 passed in R.P. No.1104 of 2009 and the judgment dated 01.10.2009 in W.P.(C) No.12213 of 2008 by the unsuccessful review petitioner, the first petitioner in the writ petition.

2. Records reveal that the appellant, while working as Excise Guard in Wayanad District, sought transfer to Kottayam Division because of some personal problems. Acceding to his request, the State Government transferred him from Wayanad to Kottayam Division. In otherwords, his prayer for inter district transfer was accepted with a specific condition that he will be the junior most in Kottayam Division from the date of joining duty there. The appellant accepted the said condition and joined at Kottayam. After joining there, he approached the Government, seeking restoration of his seniority to the same position where he was placed at Wayanad District. The said request was refused by the State Government and hence, he approached this Court in the aforesaid writ petition. After hearing, the said writ petition came to be dismissed on 01.10.2009, against which, a review petition came to be filed by him, which was also dismissed.

3. The only question to be decided is as to whether the appellant's seniority in the Wayanad District is to be maintained in Kottayam District also or not.

It is not in dispute that the excise guard is a District level officer. Inter district transfers are carried out only with the permission of the State Government. The State Government can suo motu transfer excise guards from one district to another due to administrative exigencies. So also, the State Government can transfer excise guards from one District to another if the request made by any of them is suitable to be accepted.

4. Admittedly, the appellant made application dated 3.6.1992 for transfer from Excise Range, Sultanbatheri, Wayanad District to Kottayam District on the ground of some personal problems. Accepting the prayer of the appellant, the Board of Revenue (Excise) ordered on 28.08.1992 to transfer him to Kottayam Division, with a specific condition that he would be the junior most in the said Division from the date of his joining duty there. A copy of the said order is produced as Annexure R1(a) in the review petition along with statement of objections.

5. The appellant accepted the said transfer order, which means that he agreed with the specific condition stated therein that he would be the junior most among the excise guards in the Kottayam Division from the date of his joining duty there. After having joined duty as junior most excise guard, he made a representation to restore his seniority on the ground that 19 persons, who were transferred from one district to another, at their request, were given all the benefits, including seniority. He relies upon Annexure A order dated 12.01.1993 to contend so. The said order makes it clear that the 19 persons, who were transferred from one district to another, have retained their seniority as was available in their parent district, though such transfers were made at their request.

6. In this context, the learned Government Pleader draws the attention of this Court to the affidavit filed by the Under Secretary to State Government dated 27.09.2010 in the review petition, making it clear that Annexure A order was issued by the then Secretary of the Board of Revenue (Excise) transferring and posting 19 excise guards from Kannur Division to various other divisions. Similarly several other orders were also issued thereby artificially creating 151 vacancies of Excise Guards in Kannur District with dishonest intention to accommodate 151 candidates from the rank list published by the Public Service Commission on 9.1.1989. In that regard, the Vigilance Department has ordered an enquiry in the matter as VC 2/97/KNR under Section 13(2) read with 13(1)d of the P.C. Act, 1988 and Section 120B I.P.C. against various officials. Charge sheet was laid and the matter is being considered in CC No.43 of 2003 before the Enquiry Commissioner and Special Judge, Kozhikode.

7. Thus, it is clear that Annexure A order is a tainted one, which is stated to have been issued by the concerned officer with the connivance of certain other personalities. In view of the above, it is not open for anybody, including the

appellant, to take advantage of such a tainted order. Even assuming that Annexure order is issued innocently, without any malice or motive or is untainted otherwise, the appellant cannot take advantage of the same, inasmuch as it is illegal. An illegality cannot be allowed to be perpetuated. Virtually, the appellant presses the doctrine of discrimination to contend that his case ought to have been considered at par with Annexure A order under which, certain excise guards, though transferred and posted as excise guards to another district, at their request, were given seniority in the transferred district. As mentioned supra, admittedly, Annexure A order relied upon by the appellant is a tainted one and a vigilance enquiry is going on against various personalities, who are allegedly involved in the said scam. Hence, if the appellant is not shown the same concession as in Annexure A order, the same does not amount to discrimination. The doctrine of discrimination is founded upon existence of an enforceable legal right.

8. Article 14 of the Constitution would apply only when invidious discrimination is meted out to equals and similarly circumstanced without any rationale basis or relationship in that behalf. Since the appellant has no right whatsoever to claim maintenance of his seniority in the district to which he was transferred based on his request, he cannot be given the relief wrongly given to some others. We cannot allow a wrong to perpetrate. If we cannot allow a wrong to perpetrate, can an employee, who is dismissed from service after committing misappropriation of money, claim seniority under Article 14 for reinstatement, in case similarly dismissed employees were reinstated in some other cases. The answer is obviously "no". A wrong order cannot be the foundation for claiming equality for enforcement of the same order. As mentioned supra, the appellant's right must be founded upon enforceable right to entitle him to the equality treatment for enforcement thereof. A wrong decision by the Government does not give a right to enforce the wrong order and claim parity or equality. Two wrongs can never make a right.

9. The concept of equality, as envisaged under Article 14 of the Constitution is a positive one, which cannot be enforced in a negative manner. When an authority is shown to have committed any illegality or irregularity in favour of any individual or group of individuals, others cannot claim the same illegality or irregularity on the ground of denial thereon to them. The Apex Court in the case of Gursharan Singh v. New Delhi Municipal Committee [(1996) 2 SCC 459] has held that citizens have assumed wrong notions regarding the scope of Article 14 of the Constitution, which guarantees equality before law to all citizens. The Court observed thus:

"Neither Article 14 of the Constitution conceives within the equality clause this concept nor Article 226 empowers the High Court to enforce such claim of equality before law. If such claims are enforced, it shall amount to directing to continue and perpetuate an illegal procedure or an illegal order for extending similar benefits to others. Before a claim based on equality clause is upheld, it

must be established by the petitioner that his claim being just and legal, has been denied to him, while it has been extended to others and in this process there has been a discrimination."

10. Again in *Secretary, Jaipur Development Authority v. Daulat Mal Jain* [(1997) 1 SCC 35], the Apex Court has considered the scope of Article 14 of the Constitution and reiterated its earlier position regarding the concept of equality holding :

"Suffice it to hold that the illegal allotment founded upon ultra vires and illegal policy of allotment made to some other persons wrongly, would not form a legal premise to ensure it to the respondent or to repeat or perpetuate such illegal order, nor could it be legalised. In other words, judicial process cannot be abused to perpetuate the illegalities. Thus considered, we hold that the High Court was clearly in error in directing the appellants to allot the land to the respondents."

11. In *State of Haryana v. Ram Kumar Mann* [(1997) 3 SCC 321], the Apex Court has held thus:

"The doctrine of discrimination is founded upon existence of an enforceable right. He was discriminated and denied equality as some similarly situated persons had been given the same relief. Article 14 would apply only when invidious discrimination is meted out to equals and similarly circumstanced without any rationale basis or relationship in that behalf. The respondent has no right, whatsoever and cannot be given the relief wrongly given to them, i.e., the benefit of withdrawal of resignation. The High Court was wholly wrong in reaching the conclusion that there was invidious discrimination. If we cannot allow a wrong to perpetrate, an employee, after committing misappropriation of money, is dismissed from service and subsequently that order is withdrawn and he is reinstated into the service. Can a similarly circumstanced person claim equality under Section 14 for reinstatement? The answer is obviously "No". In a converse case, in the first instance, one may be wrong but the wrong order cannot be the foundation for claiming equality for enforcement of the same order. As stated earlier, his right must be founded upon enforceable right to entitle him to the equality treatment for enforcement thereof. A wrong decision by the Government does not give a right to enforce the wrong order and claim parity or equality. Two wrongs can never make a right."

12. From the above, it is clear that a party cannot raise a claim of equality to perpetuate a wrong. Direction cannot be given for continuing a wrong on the doctrine of equality. It would not be setting a wrong right, but would be perpetuating another wrong.

In such matters, there is no discrimination involved. The concept of equal treatment on the logic of Article 14 of the Constitution cannot be pressed into service in such cases. What the concept of equal treatment presupposes is the existence of similar legal foothold. It does not countenance repetition of a wrong action to bring both wrongs on a par. Even if it is accepted that a wrong has been

committed in some other case, as committed by Annexure A order, by introducing a concept of negative equality, the appellant cannot strengthen his case. He will have to establish strength of his case on some other basis and not by claiming negative equality. Hence, the order at Annexure A is of no way helpful to the appellant to put forth his case based on the doctrine of equality or discrimination. Accordingly, the appeal fails and the same stands dismissed.