

(1974) 08 DEL CK 0021

In the Delhi High Court

Case No : Civil Writ Appeal No. 137 of 1973

Makhan Singh

APPELLANT

Vs

Union of India and Others

RESPONDENT

Date of Decision : 05-08-1974

Acts Referred:

Citation : (1975) ILR Delhi 227

Hon'ble Judges : S.I. Rangarajan, J

Bench : Single Bench

Advocate : S.A.K. Dhar and S.S. Dalal, for the Appellant;

Judgement

S. Rangarajan, J.

(1) The petitioner admits that he was appointed as a Constable in the Delhi Police force on 12-10-1953; he underwent the full course of training prescribed for Police Constables and was confirmed in the pay scale of 75-1-85-2-95 as a Police Constable. He holds a civil Heavy Driving license. From the year 1958, as per his service book (not 1957 as stated) he has been driving police vehicles for which he received a special pay of Rs. 20.00 per mensem. He reached the maximum of his grade, namely Rs. 95.00 in the year 1968.

(2) It is further averred by the petitioner that he had made a request for his being sent for training which would entitle him for promotion to a rank higher than that of a Constable, but this was not allowed to him on the plea that no training was necessary for Drivers; he, was told he would be promoted in his turn-these allegations have been denied coupled with the assertion that his request was "dealt with on merits".

(3) The present petition under Article 226 of the Constitution was filed in February, 1973 when he was required to undergo a departmental test for Constable Drivers for the purpose of preparing a promotion list. The departmental test is to consist of (1) turnout, squad drill and armed drill; (2) practical test in driving ability, care and maintenance and professional

knowledge. The petition contains various prayers; it is sufficient, however, to notice two main reliefs which the petitioner has claimed :

(1)that since he is working as a Driver in the Union Territory of Delhi which is being administered by the President through the Lt. Governor he must be treated in the same category as other drivers working in the Central Government offices at Delhi and be paid as per Central Government pay scales applicable to such drivers; (2) that, in any case, no test is necessary for his being promoted as Head Constable Drive as he has been driving police vehicles for about 16 years; since he does not have to discharge duties intended to be carried out by Police Officers carrying out executive functions he could not be subjected to any test intended for such officers especially when the rules do not provide for such a test being held before he is placed in the promotion (C) list.

(4) The first question is not one of difficulty either on the facts or on the law. Having been appointed only as a Constable in 1953, though later on asked to work as a driver, he cannot claim he was "appointed" as a driver. There is no want of power on the part of the Police Administration to allot to him the duties of a driver; section 12 of the Police Act gives the power to the Inspector General of Police, subject to the approval of the State Government, to frame such orders and rules relating to that organisation, classification and distribution of the Police force, the places at which the members of the Force shall reside and the particular services to be performed by them. This power could of course be controlled by the State Government by making rules and regulations and giving instructions, when the need arises. The services of more persons than needed for strictly constabulary work-like fitters, welders, wireless operators and other kinds of technically qualified persons-were required to meet the growing needs of an expanding police force. In this situation it became necessary to invest even technical persons recruited for police purposes with the rank of police officer to ensure that they could be brought within the pale of the Police Act and Police Regulations. But such posts are not interchangeable with executive posts; consequently the power u/s 12 of the said Act could not be used for allotting executive functions to such technical personnel.

(5) The present Inspector General of Police himself ordered (vide Annexure ZI filed along with the rejoinder) on 10-11-1972 that the question of promotion prospects in the various cadres of the police establishment should be examined and that every cadre should provide for built-in avenues of promotion on a fixed percentage basis; the M.T. (Motor Transport) unit was also one of those to be so structured. Pursuant thereto the above-said instructions were given for holding departmental tests-in this case, for Constable drivers-to prepare promotion lists, in respect of them two (additional) posts of Head Constable Drivers and 22 Constable Drivers had also been sanctioned earlier by the Ministry of Home Affairs's Memorandum dated 25-11-1967 (Annexure Z-3 to the rejoinder). All these were part of the effort to modernise the communications and patrol car system of the Delhi Police with telephone communications and Radio network etc.

(6) As a fact the petitioner has not been able to show that he has been "appointed" as a driver; all that he is saying is that though appointed as a police constable in 1953 he has been discharging the duties of driver since 1958 and for this reason he must be deemed to have ceased to belong to the cadre of constables and belongs to the cadre of drivers. The relevant issue, Therefore, is not whether the petitioner is a Central Government servant or not but whether he was appointed as a driver or can be deemed to be so appointed in order to enable him to claim the pay scales applicable to drivers appointed by the Central Government offices

(7) As a question of law it does not seem to be possible for the petitioner to contend that he and other constable drivers of Delhi like him are being discriminated in the matter of their pay. A similar question fell for consideration in *Binoy Kumar Mukherjee v. Union of India* (1973) 1 ILR Delhi 427. In that case a number of persons were appointed as surveyors in the All India Soil and Land Use Survey Scheme under the Ministry of Food and Agriculture. Their scale of pay was originally fixed as Rs. 60-150, whereas the surveyors in other organisations of the Government of India were given a pay scale on Rs. 100-185 despite their qualifications and duties being similar. As a result of the revision of pay scales by the Second Pay Commission with retrospective effect from 1-1-1959 the payscale of those "Scheme" employees was raised to Rs. 110-200; the payscale of other surveyors in other organisations was also raised to Rs. 150-240. As a result of further representation to the President the payscale of the "Scheme" surveyors was raised to Rs. 150-240, to take effect from 1-7-1966, thus placing them at par with other surveyors. They made further representations that they should get the benefit of revised pay scales retrospectively; when that was denied the above Writ Petition was filed and it was dismissed by a single Judge of this Court. Dismissing the appeal against that decision T. P. S. Chawla, J., speaking for a Division Bench of this Court, observed that "the abstract doctrine of equal pay for equal work has nothing to do with Art. 14. As between members of separate and independent classes there need not be equality, as Articles 14 and 16 of the Constitution do not require the same". The said decision is binding on me. Shri Dar distinguished the above said decision on the ground that in that case a separate scale of pay had been prescribed for the surveyors who agitated the question of higher pay scales whereas no payscale has been fixed for the petitioner as a driver of motor vehicles. It is worth repeating that the petitioner was not appointed as a driver though he has been driving police vehicles since 1958. He was not recruited as a technical hand on whom a rank of a police officer was conferred only to bring him within the purview of the Police Act and regulations made there under. For this reason Shri Dar cannot seek to take advantage of the notification (which has not even been pleaded) in the Gazette of India dated 26-3-1974 publishing the Central Civil Services (Revised Pay) (Sixth Amendment) Rules, 1974 prescribing scales of pay for various posts including those for certain categories of posts common to all or many departments of the Union Territory of Delhi. Sr. No. 20 in

respect of Class Iii posts relates to drivers (heavy vehicles) giving the present scale as Rs. 110-3-131-4-155-EB-4-175-5-180 and revision of the same as Rs. 260-6-290-EB-6-326-8-366- EB-8-390-00. Before the petitioner can get the benefit of this notification he must be able to show that the petitioner was recruited as a driver and appointed as such. It is common ground that he having been appointed as police constable in 1953 was asked to perform the duties of a driver since 1958; as such he cannot claim to get the benefit of the above-said notification, even in the view that he belongs to the category of Central Government servants functioning at Delhi to whom the said notification applies.

(8) The rest of the arguments of Shri Dar were all directed toward showing what is described as inequity done to the class of constables driving police motor vehicles in Delhi whose duties could be even more arduous than those of other Central Government servants working in the Union Territory of Delhi either driving heavy vehicles or other kinds of transport; these are, as I said, matters for the Government to consider. It is not the province of the Court to be detained by these considerations except to examine the controversy from a legal standpoint. The only permissible contention for the petitioner is of being discriminated against under Articles 14 and 15 of the Constitution, but it seems clear that he cannot plead such discrimination when it is one between separate and independent classes.

(9) Shri Dar relied upon the entries in the service book of the petitioner showing that the pay scale was fixed as per the rules and as per the approval of those rules granted by the Delhi Administration; this would not materially help the petitioner because he is not entitled to any pay scale fixed for those appointed as drivers.

(10) At the request of Shri Dar the respondents also produced the service book of a cook (Nanak Chand) who according to his service book is seen to be not governed by the Punjab Police regulations. This has hardly any relevance because it is not stated that the above cook was given the rank of a police constable; obviously the Police Act and the police regulations would not apply to him. It is needless to say more on this aspect except to point out that the petitioner does not advance his case further by relying on this instance.

(11) It is needless for the purpose of this petition to decide whether the petitioner is a Central Government employee; he can even be assumed to be one for the purpose of this petition. The question, Therefore, is not whether the petitioner is a Central Government employee or not, but whether he is a driver appointed by the Delhi Administration. In order to remove anomaly and hardship that undoubtedly exists in the case of constables who were recruited as such but later on made to drive police vehicles Is the need for it became felt, the petitioner could legitimately ask for a new channel of promotion, one not open to him as an executive police constable. The petitioner states (though this has been denied in the return) that he had asked for opportunities for advancement as a police constable and they were denied to him on the ground that the kind of

training and other opportunities he asked for were not necessary in the case of drivers. The petitioner has no doubt reached the maximum of his scale in 1968, but luckily for him the present Inspector General of Police has recently set afoot efforts to enable the petitioner and persons like him to have an in-built channel of promotion. He has also suggested that these should be made part of the police regulations as well. Even in the view that the petitioner had been declined any opportunity for advancement as a constable he cannot ask the Court to treat him as one "appointed" as a driver. He would have a legitimate grievance if promotion opportunity is completely denied to him. For the mere reason that he could not advance his career opportunities, as a constable, he cannot at this distance of time turn round and say that since he has been driving police vehicles for 17 years he must be treated as having been appointed as a driver of heavy vehicles and be paid on the same footing as any other Central Government-heavy-vehicle driver working in the Union Territory of Delhi.

(12) Concerning the second contention it is now settled that the Government cannot issue executive instructions, altering the conditions of service laid except by holding examinations as permitted by rules framed under Article 309 of the Constitution. As pointed out by Hegde, J., in the State of Haryana, Vs. Shamsheer Jang Bahadur, etc. etc., the Government can only issue instructions to hold examinations or tests for promotion by way of filling up the gaps in the rules; for this reason it has to be seen whether the rules can be implemented as they stand. In the above case the Supreme Court was unable to see any gap in the rules and hence none could be filled up by the issue of executive instructions.

(13) It was also held by a Division Bench of this Court in Smt. Kailash Wati Baja v. Union of India & Ors. 1973 (1) S.L.R. 249 that a certain Standing Order (No. 238) issued by the Inspector General of Police prescribing departmental qualification test for drawing up a promotion list "D" for the women police was in total conflict with the procedure prescribed for the maintenance of that list by Rule 13.9 of the Punjab Police Rules; it did not have the effect of merely supplementing the provisions of the said rule. The Division Bench followed a Full Bench decision of the Punjab and Haryana High Court in Sardul Singh v. Inspector General of Police 1970 S.L.R. 505 where it was pointed out that once a Head Constable is admitted to list "D" he is, given officiating promotion to the rank of A.S.I, by rotation to find out his suitability for the higher rank; after this test of suitability he is to be given a substantive promotion in accordance with the provisions of Rule 13.1. So far as efficiency and honesty are concerned they are to be assessed on the basis of service record of the Head Constable.

(14) V. S. Deshpande, J. had held in Union of India v. Hans Raj 1969 S.L.R. 782 that Rule 13.1(1) of the Punjab Police Rules did not bar holding a test as a fair method of judging efficiency. It was assumed that the power to prescribe a test was implied in the power to judge efficiency. Consequently it was held that the executive instructions could be given to supplement statutory rules when the power to issue such executive instructions is implied in the power given by the

statutory rules. In view of the later observations of Hegde, J. it is needless to be detained by the observations of Deshpande, J. in the matter of when executive instructions could be issued. What is pertinent turn the present case is the observations of Hegde, J. that if the rules can be implemented without any difficulty no gap in the rules can be said to exist.

(15) In the light of the above principle the relevant Punjab Police Rules may have to be seen to ascertain whether there is scope for issuing instructions concerning the holding of the impugned test for preparing a list for promoting a police constable driver as a head constable. Rule 13.18 prescribes that all police officers promoted in rank shall be on probation for two years; while on probation officers may be reverted without departmental proceeding, and such reversion shall not be considered a reduction in rank (vide rule 16.4 which deal with the situation when a police officer may be reduced to a lower rank and other details pertaining to it). The petitioner, in the event of his being promoted as Head Constable, would have to be on probation for a period; if he is not found fit for being confirmed as such he can always be reverted to his original post without departmental proceedings. No specific reference need be made to the other rules which refer to the test to be undergone by the police officers to carry on duties of an executive nature as distinct from clerks, technicians etc. for they do not apply to the petitioner; we are not concerned about what would happen in the case of promotion to selection grade constables. The Punjab Police Rules are naturally silent about Motor Transport (M.T.) personnel since this happened later than the rules. The rules do not provide for the holding of any examination as such for police officers as a condition precedent to their promotion. According to Rule 13.1(3) for the purpose of regulating promotions among Police officers six promotion lists A to F will be maintained. The rules speak of the persons concerned being "suitable" for inclusion in the concerned list. Rule 13.8-A(2) directs the gazetted officers to look out for, and instruct their inspectors and sub-inspectors to bring to notice, constables who, by reason of their general character and ability or of special acts, are suited for inclusion in lists A, B or C, and shall, after satisfying themselves by necessary enquiries, make suitable recommendations to the Superintendent. Such a provision clearly precludes the idea of any further examination or any special test for this purpose except to the extent specifically laid down. The efficiency in the matter of driving police vehicles is hardly one to be tested afresh in the case of one like the petitioner who has driven police vehicles for 16 years. He must be expected to be familiar with the maintenance of motor vehicles and have the necessary professional knowledge also in the absence of anything to suggest the contrary. His service records are bound to show any lapse or deficiency in this respect. The service book of the petitioner was also produced for my perusal. It is seen there from that. as early as on 12-4-1958 he was posted to the M. T. Section. From a perusal thereof it does not appear that he has precluded himself, during his service, for being promoted as Head Constable driver. The only question is that whether the impugned test is warranted by the rules and is in fact justifiable.

(16) It has not been explained in intelligent terms how the turnout, squad drill and armed drill tests are necessary in the case of one, though a constable, who has been driving police vehicles for such a long period. It is not suggested that the petitioner has to perform the duties of a constable (executive). Even if any of these drills or turnout squad drill have any bearing on his capability as a driver of a police motor vehicle there does not appear to be any need for subjecting him to any test now especially when even after promotion he has to be on probation for a period of two years; if he is not found suitable he can always be reverted. In such a situation it is a matter for anxious consideration whether there should be any necessity for a test at all before being considered for being placed in list C. The courts have been chary of departmental officials seeking to introduce examinations or tests for the purpose of promotion unless the same are warranted by the rules or they are by way of filling gaps in such rules. The reason for this is not far to seek. There is a certain amount of unavoidable subjectivity in any examination in even a so-called test which it would be better to avoid to preclude favoritism, nepotism etc. and to give the needed assurance to the subordinates that there will be no occasion for their being affected by any favoritism, whim or even caprice. When statutory rules are made for holding examinations or tests for promotion it is assumed that much greater attention will be bestowed on such an occasion, than while issuing executive instructions in this regard. This has a far reaching legal significance, namely, that such examinations and tests already provided for in the rules become part of the conditions of employment; they can be even amended with retrospective effect under Article 309 of the Constitution (B.S. Vadera Vs. Union of India (UOI) and Others,). But what is possible to be done by way of statutory rules would not be permissible by way of executive instructions for that would be to give the administration the power of varying the conditions of service.

(17) In Smt. Kailash Wati Bajaj the Division Bench of this Court struck down the attempt to impose a test not warranted by the rules in respect of promotion in case of women constables; the Full Bench of the Punjab and Haryana High Court in Sardul Singh struck down an attempt to test candidates before they were sent for training programmes it is needless to multiply instances.

(18) On a careful consideration of the relevant rules, in the light of the aforesaid decisions and in the context of what would have to be expected from a police constable (driver) who is being considered for promotion as Head Constable (Driver) it seems to me that the introduction of the above test is not warranted. The instructions contained in Standing Order No. 236 with reference to the holding of the departmental test of confirmed constable (drivers) in order to admit them to list "C" are hereby quashed.

(19) The Writ Petition is accepted accordingly only to the above extent. The other prayers in the Writ Petition are not granted.

(20) Though the petitioner has not succeeded fully it is seen that he has had to come to Court at least for the purpose of getting the impugned test quashed. As

such I consider this is a fit case for allowing to the petitioner at least his counsel fee, which is fixed at Rs. 150.00 .