

(2020) 01 DEL CK 0342

In the Delhi High Court

Case No : Civil Writ Petition No. 8076 Of 2019, Civil Miscellaneous No. 33390 Of 2019

Manish Rishishwar

APPELLANT

Vs

Union Of India & Anr

RESPONDENT

Date of Decision : 16-01-2020

Acts Referred:

Constitution of India, 1950 — Article 14, 16, 19(1)(g), 21, 226, 309
Custom Act, 1962 — Section 146(2)
General Clauses Act, 1897 — Section 6, 6(c)

Citation : (2020) 01 DEL CK 0342

Hon'ble Judges : Vipin Sanghi, J;Sanjeev Narula, J

Bench : Division Bench

Advocate : S. Wasim A. Qadri, Shakti Vardhan, Amiy Shukla, Tamim Qadri, Amit Bansal, Aman Rewaria, Vipasha Mishra

Final Decision : Dismissed

Judgement

Vipin Sanghi, J

W.P.(C) 8076/2019 & CM APPL. 33390/2019

1. The petitioner has preferred the present writ petition to assail clause 5(1)(h) (ii) of the Customs Brokers Licensing Regulations, 2018 framed vide notification No. 41/2018-Customs (N.T.) dated 14.05.2018, amended by notification No. 08/2019-Customs (N.T.) dated 06.02.2019. The petitioner also seeks the quashing and setting aside of clauses 6.4, 6.5 and 6.6 of the Customs Brokers Licensing Regulations, 2018 framed vide notification No. 41/2018-Customs (N.T.) dated 14.05.2018, amended by notification No. 08/2019-Customs (N.T.) dated 06.02.2019.

2. The petitioner incorporated his company named Rishishwar Logistics Pvt. Ltd on 09.11.2011; he obtained Certificate of Importer Exporter Code from Zonal Director General of Foreign Trade, Ministry of Commerce and Industry on

13.04.2012; the petitioner received Valuable Association Award for Category (Freight Forwarders) from Container Corporation of India for his excellent performance on 17.10.2016 and also received Certificate of Appreciation from Central Board of Direct Taxes for his excellent performance in bronze category in 2017.

3. The case of the petitioner is that the respondents had earlier framed regulations on the same subject i.e. Customs Brokers Licensing Regulations, 2013 vide notification No. 65/2013-Customs (N.T.) dated 21.06.2013. The petitioner states that impugned regulation i.e. Customs Brokers Licensing Regulations, 2018 was framed vide notification No. 41/2018-Customs (N.T.) dated 14.05.2018, amended by notification No. 08/2019-Customs (N.T.) dated 06.02.2019. Under the said impugned regulation, the written examinations for Customs Brokers License were held on 15.03.2019 and the result was declared on 20.03.2019, wherein the petitioner was declared qualified. On 30.04.2019, the petitioner was called for oral examination, which was conducted on 23.05.2019. The result of oral examination was published on 07.06.2019. The petitioner was not selected after the compilation of result. The petitioner made a representation that he should be called for second oral examination on 08.07.2019. However, the respondent has not accepted the said representation and consequently, the petitioner has preferred the present petition.

4. The submission of the learned senior counsel for the petitioner is that under the Customs Brokers Licensing Regulations, 2013, the applicants who were successful in the written examination, were entitled to be called for oral examination within two years from the date of declaration of the result of the related written examination. Therefore, the applicants who were successful in written examination had two chances of clearing the overall examination by attempting two oral examinations. Even if the applicant failed in the first oral examination and, consequently was declared failed, he could be called for another oral examination and, if, the applicant succeeded, he would be declared successful in the examination. In this regard, our attention is drawn to regulation 6 of the regulations framed in the year 2013, taken note of hereinabove. The relevant extract thereof reads as follows:

"6. Examination of the applicant.-

(1) An applicant, who satisfies the requirements of regulation 5, shall be required to appear for a written as well as oral examination conducted by the DGICCE:

Provided that an applicant who has already passed the examination referred to in regulation 9 of the Custom House Agents Licensing Regulation, 1984 and regulation 8 of the Custom House Agents Licensing Regulation, 2004 shall not be required to appear for any further examination.

(2) The written examination shall be conducted on specified dates in month of January of each year for which intimation shall be sent individually to applicants in advance before the date of examination and the result of the said examination

shall be declared by end May each year.

(3) The applicant who is declared successful in the written examination shall be called for an oral examination on specified dates in month of June of each year, the result of which shall be declared in the month of July of each year.

(4) The applicant shall be required to clear written examination as well as oral examination.

(5) An applicant who fails to clear the oral examination within two years from date of declaration of result of the related written examination shall be treated as having failed in the examination."

5. Though, it is not stated so in the writ petition, our attention has been drawn to the representation made by the petitioner on 11.06.2019, which discloses that the petitioner had made five attempts at taking the examinations under the erstwhile 2013 regulations and he appeared for the 6th time after the framing of 2018 regulations on 15.03.2019.

6. Further, the grievance of the petitioner is that under the 2013 regulations, the petitioner was entitled to seven attempts, whereas, under the 2018 regulations, he is entitled to only six attempts to clear the examination. The challenge to the 2018 regulations is premised on the foundation that the petitioner had a vested right to seven attempts, since the petitioner had appeared on five occasions under the 2013 regulations and that the vested right could not be taken away while framing the 2018 regulations. Similarly, the petitioner is entitled to two attempts at interview, under the 2013 regulations, which has been curtailed to one attempt under the 2018 regulations. In this respect also, a vested right has been claimed by the petitioner.

7. Mr. Qadri, learned senior counsel for the petitioner has placed reliance on the Supreme Court's decision in *Chairman, Railway Board And Ors. vs. C.R. Rangadhamaiah and Ors.*, (1997) 6 SCC 623, *Union of India v. Tushar Ranjan Mohanty*, (1994) 5 SCC 450 and *J.S. Yadav v. State of U.P.*, (2011) 6 SCC 570. He relies upon paragraph No. 24 of *Chairman, Railway Board (supra)*, which reads as follows:

"24. In many of these decisions the expressions "vested rights" or "accrued rights" have been used while striking down the impugned provisions which had been given retrospective operation so as to have an adverse effect in the matter of promotion, seniority, substantive appointment, etc., of the employees. The said expressions have been used in the context of a right flowing under the relevant rule which was sought to be altered with effect from an anterior date and thereby taking away the benefits available under the rule in force at that time. It has been held that such an amendment having retrospective operation which has the effect of taking away a benefit already available to the employee under the existing rule is arbitrary, discriminatory and violative of the rights guaranteed under Articles 14 and 16 of the Constitution. We are unable to hold

that these decisions are not in consonance with the decisions in Roshan Lal Tandon [AIR 1967 SC 1889 : (1968) 1 SCR 185 : (1968) 1 LLJ 576] , B.S. Vadera [AIR 1969 SC 118 : (1968) 3 SCR 575 : (1970) 1 LLJ 499] and Raman Lal Keshav Lal Soni [(1983) 2 SCC 33 : 1983 SCC (L&S) 231 : (1983) 2 SCR 287] ."

He further relies upon paragraph Nos. 14 and 15 of Union of India and Ors Ors. vs. Tushar Ranjan Mohanty (supra), which reads as follows:

"14. The legislatures and the competent authority under Article 309 of the Constitution of India have the power to make laws with retrospective effect. This power, however, cannot be used to justify the arbitrary, illegal or unconstitutional acts of the Executive. When a person is deprived of an accrued right vested in him under a statute or under the Constitution and he successfully challenges the same in the court of law, the legislature cannot render the said right and the relief obtained nugatory by enacting retrospective legislation.

15. Respectfully following the law laid down by this Court in the judgments referred to and quoted above, we are of the view that the retrospective operation of the amended Rule 13 cannot be sustained. We are satisfied that the retrospective amendment of Rule 13 of the Rules takes away the vested rights of Mohanty and other general category candidates senior to Respondents 2 to 9. We, therefore, declare amended Rule 13 to the extent it has been made operative retrospectively to be unreasonable, arbitrary and, as such, violative of Articles 14 and 16 of the Constitution of India. We strike down the retrospective operation of the rule. In the view we have taken on the point it is not necessary to deal with the other contentions raised by Mohanty."

He further relies upon paragraph Nos. 24, 25 & 26 of J.S. Yadav (supra), which reads as follows:

"24. The legislature is competent to unilaterally alter the service conditions of the employee and that can be done with retrospective effect also, but the intention of the legislature to apply the amended provisions with retrospective effect must be evident from the Amendment Act itself expressly or by necessary implication. The aforesaid power of the legislature is qualified further that such a unilateral alteration of service conditions should be in conformity with legal and constitutional provisions. (Vide Roshan Lal Tandon v. Union of India [AIR 1967 SC 1889], State of Mysore v. M.H. Krishna Murthy [(1973) 3 SCC 559 : 1973 SCC (L&S) 190 : AIR 1973 SC 1146] , Raj Kumar v. Union of India [(1975) 4 SCC 13 : 1975 SCC (L&S) 198 : AIR 1975 SC 1116] , K.C. Arora v. State of Haryana [(1984) 3 SCC 281 : 1984 SCC (L&S) 520] and State of Gujarat v. Raman Lal Keshav Lal Soni [(1983) 2 SCC 33 : 1983 SCC (L&S) 231 : AIR 1984 SC 161] .)

25. In Union of India v. Tushar Ranjan Mohanty [(1994) 5 SCC 450 : 1994 SCC (L&S) 1118 : (1994) 27 ATC 892] this Court declared the amendment with retrospective operation as ultra vires as it takes away the vested rights of the petitioners therein and thus, was unreasonable, arbitrary and violative of Articles

14 and 16 of the Constitution. While deciding the said case, this Court placed very heavy reliance on the judgment in *P.D. Aggarwal v. State of U.P.* [(1987) 3 SCC 622 : 1987 SCC (L&S) 310 : (1987) 4 ATC 272 : AIR 1987 SC 1676] wherein this Court has held as under: (SCC p. 639, para 18)

"18. ... the Government has the power to make retrospective amendments to the Rules but if the Rules purport to take away the vested rights and are arbitrary and not reasonable then such retrospective amendments are subject to judicial scrutiny if they have infringed Articles 14 and 16 of the Constitution."

26. In the instant case, the 2006 Amendment Act is not under challenge. However, the issue agitated by the appellant has been that the legislature never intended to apply the amended provisions with retrospective effect and therefore, the appellant could not be discontinued from the post. His rights stood protected by the provisions of Section 6 of the 1897 Act. The issue of applicability of the said provision has been considered by this Court in *State of Punjab v. Mohar Singh* [AIR 1955 SC 84 :1955 Cri LJ 254] , *M.S. Shivananda v. Karnataka SRTC* [(1980) 1 SCC 149 : 1980 SCC (L&S) 131 : AIR 1980 SC 77], *CIT v. Shah Sadiq and Sons* [(1987) 3 SCC 516 : 1987 SCC (Tax) 270 : AIR 1987 SC 1217] and *Vishwant Kumar v. Madan Lal Sharma* [(2004) 4 SCC 1 : AIR 2004 SC 1887] , wherein it has been held that the rights accrued under the Act/ Ordinance which stood repealed would continue to exist unless it has specifically or by necessary implication been taken away by the repealing Act."

8. He has also placed reliance on Section 6 (c) of the General Clauses Act, 1897, which provides that where the said act or any central act or regulation, made after the commencement of General Clauses Act, 1897 repeals any enactment hitherto made or hereafter to be made, then, unless a different intention appears, the repeal shall not affect any right, privilege, obligation or liability acquired, accrued or incurred under any enactment so repealed. He, therefore, submits that the right accrued in favour of the petitioner to have seven attempts at the examination under the 2013 regulations, could not be curtailed by the 2018 regulations. Similarly, the right to appear for interview in two years could not be curtailed to one.

9. Having heard the learned counsels and examined the record including regulations of 2013 and 2018, and Section 6 (c) of the General Clauses Act, 1897, we are of the view that there is no merit in this petition.

10. The main thrust of the arguments of Mr. Qadri, is premised on a well recognised principle of law that a vested right, which inheres in a party, could not have been taken away. Indeed, the Courts in several judgments have protected the vested rights which accrue in favour of a party, say under a legislation or by way of a promise given by the other party. However, we are completely perplexed as to how the petitioner is claiming that a vested right has accrued in his favour. The contention of the petitioner is completely misplaced, in our understanding. It seems that the petitioner comprehends that merely because

under the 2013 regulations, the petitioner was entitled to seven attempts to clear the examination for getting custom broker license, he has a vested right to claim such number of attempts, and the respondents could not have brought in the 2018 regulations which reduced the number of attempts only to six. Similarly, the petitioner is under a misconception that merely because under the 2013 regulations, he is entitled to two attempts at interview, the same could not have been cut down. His submission that-since under the 2018 regulations, a candidate has to clear the interview in a single attempt, the same violates his fundamental rights enshrined under Article 14, 19(1)(g) and 21 of the Constitution of India is completely untenable. Petitioner cannot question the curb put by the respondents in respect of the number of attempts for clearing the interview. In our considered opinion, the arguments of the petitioner are inherently flawed. The petitioner has concededly not cleared the examination whilst the 2013 regulations were in force. He did make five attempts, but was unsuccessful. Therefore, in that sense of the matter, no right whatsoever, much less vested right can be said to have accrued in favour of the petitioner under the said regulations. Thereafter, the 2018 regulations were framed, superseding the earlier regulations and petitioner made yet another attempt to clear the examinations for the 6th time. Though the petitioner qualified the same, however, he could not clear the oral interview. Now, since the 2018 regulations do not afford multiple opportunities to the candidates to clear the oral interview, the petitioner who has failed in this endeavour, has filed the present petition questioning the limiting of chances of clearing the oral interview under the 2018 regulations. In our view, since the petitioner did not clear the examinations whilst the 2013 regulations were in operation, the same cannot be the basis of impugning the fresh regulations, even if the same superseded certain clauses of the 2013 regulations, that enabled the Petitioner better opportunities. The principle of law being pressed into service that a vested right cannot be taken away, is not attracted in the present case. Merely because 2013 regulations provided for seven opportunities to clear the written examination, and two for oral examination, does not mean that such regulations have to remain effective in perpetuity, and that the respondents cannot introduce fresh regulations. If we were to construe that a right would accrue or vest in favour of a person merely because a particular rule, regulation or a legal provision enables him/her to avail of an opportunity as provided, and that the same cannot be modified or altered, it would amount to holding that no rule or regulation can be superseded or modified under any circumstances. The respondents are at freedom to bring a change in the regulations, if the circumstances and the need so arises, and the same has to be done in accordance with law. The provisions of such regulations cannot be declared to be ultra vires only for the reason that certain clauses which existed prior thereto have been modified. The respondents have the discretion to restrict the number of attempts for clearing the written as well as oral examination. Law is dynamic and the Central Board of Excise Customs is empowered by Sub Section (2) of Section 146 of the Custom Act, 1962 to frame regulations in supersession of the previous ones, having regard to the prevalent

circumstances. Thus, reducing the number of attempts to clear the oral examination for the candidates who have passed the written examination, in our view, cannot be said to be arbitrary or violative of Article 14 of the Constitution of India. In absence of any arbitrariness and any cogent legal proposition advanced to impugn the notifications, except for raising the plea that a vested right cannot be taken away, which we have rejected in the preceding paragraphs, we find no ground whatsoever to exercise our jurisdiction under Article 226 of the Constitution of India.

11. The judgments relied upon by Mr. Qadri, learned senior counsel for the petitioner, which have been extracted above have no application to the facts of the present case. As discussed above, the proposition of law relating to protection of "vested rights" or "accrued rights", is well recognized, however accrual or vesting of such rights is a sine qua non for the Courts to protect the same. The factual position in each of the cases cited by Mr. Qadri is distinguishable. The same have been passed in the context of a right flowing under the relevant rules which were to be sought to be altered with effect from an anterior date, thereby taking away the benefits available under the rule in force at that time. The courts have looked down upon the retrospective operation of the amendments that take away a benefit which is already available to a person. However in the present case, no right whatsoever has accrued in favour of the petitioner that permits him to avail seven attempts to crack the examination in question, and two chances to appear in the interview, even though the Rules have changed. Examinations held under the regulations of 2018 cannot be treated as those undertaken under the 2013 Regulation. They are strictly governed by their own regulations. The 2018 Regulations are prospective in their nature and have been applied prospectively.

12. In view of aforesaid reasons, we find no merit in the present petition. Accordingly the present petition and the pending application are dismissed.

No order as to costs.