

(1983) 10 BOM CK 0043

In the Bombay High Court

Case No : Special Civil application No. 15/6B of 1982

Prakash R. Borkar

APPELLANT

Vs

Union of India (UOI) and Others

RESPONDENT

Date of Decision : 11-10-1983

Acts Referred:

Constitution of India, 1950 — Article 226, 311

Citation : (1984) 1 BomCR 95

Hon'ble Judges : R.A. Jahagirdar, J;Kamat, J

Bench : Division Bench

Advocate : S.K. Kakodkar, for the Appellant; P. Mulgaonkar, Senior Government Counsel, for the Respondent

Judgement

R.A. Jahagirdar, J.—This petition raised a question of the interpretation of Fundamental Rule 15 governing the service conditions of the Central Government employees. The Circumstances leading to this petition may be now stated. The petitioner had applied for the post of a Lower Division Clerk in the Directorate of Transport in the Union Territory of Goa, Daman and Diu, hereinafter referred to as "the Union Territory". By a letter dated 14th of November, 1975, the Government offered him the said post which carried a pay of Rs. 260 to begin with, in the scale of Rs. 260 rising to Rs. 400. In this offer of appointment it has been specifically mentioned that the temporary post of lower division clerk is in the Directorate of Transport. It has however, been also mentioned that the appointment carries with it the liability to serve in any part of the Union Territory and other conditions of service will be governed by the relevant rules and orders in force from time to time. The petitioner having accepted the aforesaid offer of appointment, an order of appointment dated 13th January, 1976 was issued by the director of Transport in the Union Territory.

2. On 5th of January, 1982, that is nearly six years after the petitioner was appointed as a Lower Division Clerk in the Directorate of Transport, an order was passed transferring him to the Directorate of Civil Supplies and Price Control.

This order of 5th January, 1982 effects transfers of several persons under Fundamental Rule 15. It has been mentioned in this order that the said transfers are made in public interest. It may incidentally be mentioned that one U.P. Mangueshikar working at the relevant time in the Directorate of Civil Supplies and price Control, to which the petitioner has been transferred has been transferred to the Directorate of Transport where the petitioner was working. The said Mangueshikar is also holding the post of Lower Division Clerk. So the effect of his order is that one lower Division Clerk from the office of the Directorate of Transport has been transferred to the Directorate of Civil Supplies and Price Control while another Lower Division Clerk in the latter department has been transferred to the office of the Directorate of Transport. In other words, the petitioner and Mangueshikar have practically exchanged their posts.

3. The petitioner has approached this Court under Article 226 of the Constitution of India contending that the order of transfer purported to have been made under Fundamental Rule 15 is illegal and such a transfer cannot be made under Fundamental Rule 15. The petitioner has also contended that if Fundamental Rule 15 is interpreted to mean that the Government has got power to transfer a person from one cadre to another, then it contravenes the provisions contained in Article 311 of the Constitution. Such an interpretation should be avoided so that the rule itself is retained as a valid rule. We have heard Mr. Kakodkar, the learned Advocate appearing in support of the petition, and Mr. Mulgaonkar appearing for the Government. After doing so, we do not think it necessary to decide the question as to whether Fundamental Rule 15 should be read down for the purpose of upholding its validity. We are of the opinion that the rule as it stands does not permit the transfer of Government servant from one cadre to another.

4. Under the rules framed under the Motor Vehicle Act as applicable to the Union Territory, Motor Vehicles Department consists of the Director of Transport, Assistant Director of Transport. Inspectors of Motor Vehicles, Assistant Inspector of Motor Vehicle, Clerks, Peons and Weigh Bridge Operators. The duties powers and functions of the department have been set out in Chapter X of the Rules. The category of clerks forming part of the department naturally consists of Upper Division Clerks and lower Division Clerks. The petitioner is holding the post of Lower Division Clerk. We have already referred to the offer of appointment and also the order of appointment from which it is easily seen that the petitioner has been appointed to the post of Lower Divisional Clerk in the Directorate of Transport. His appointment itself is in temporary capacity. In paragraph 13 of the petition it has been mentioned that there is no common cadre of Upper Division Clerks in the Union Territory. Similarly it has been mentioned in paragraph 14 of the petition that there is no common cadre of Lower Division Clerks in the Union Territory. In other words, there is no common cadre of Lower Division Clerks or of Upper Division Clerks of the Government servants employed by the Union Territory as a whole. The post which the petitioner is occupying must, therefore, be held to be a post in the cadre belonging to the Motor Vehicle Department. The head of the Motor Vehicles Department is the director of Transport and,

therefore, often in the course of the arguments as well as in the petition the office itself has been referred to as the Directorate of Transport.

5. Mr. Kakodkar has canvassed the view that Fundamental Rule 15 is not applicable to a case where a person is to be transferred from a post in one cadre to a post in another cadre. Fundamental Rule 15 is in the following terms :---

"R.15. (a) The President may transfer a Government servant from one post to another provided that except---

(1) on account of inefficiency or misbehaviour ; or

(2) on his written request.

(a) Government servant shall not be transferred substantively to or except in a case covered by Rule 49, appointed to officiate in a post carrying less pay than the pay of the permanent post on which he holds a lien, or would hold a lien had his lien not been suspended under Rule 14.

(b) Nothing contained in Clause (a) of this Rule or in Clause (13) of Rule 9 shall operate to prevent the transfer of a Government servant to the post on which he would hold a lien, had it not been suspended in accordance with the provisions of Clause (a) of Rule ."

An analysis of the aforesaid provision must lead to the following propositions :---

(1) The President may transfer a Government servant from one post to another post ;

(2) A Government servant, however, shall not be transferred substantively or shall not be appointed to officiate in a post carrying less pay than the pay of the permanent post on which he holds a lien ;

(3) However, the President may effect a prejudicial transfer mentioned in proposition (2) above on account of inefficiency or misbehaviour of a Government servant ;

(4) Similar prejudicial transfer may also be made by the President on a written request made by a Government servant.

6. The question is, when there are several cadres of service under the Government, can the President transfer a person from one cadre to another ? Fundamental Rule 9(4) defines a cadre to mean "the strength of a service of a part of service sanctioned as a separate unit". In other words, the number of posts constituting a particular service must be held to be the cadre or it is so mentioned, a part of the service sanctioned as a separate unit. While interpreting an analogous rule under the U.P. Service Rules in *Baleshwar Dass and Others Vs. State of Uttar Pradesh and Others*, the Supreme Court pointed out that a cadre takes in temporary post. It was held that once we cease to be allergic to temporary posts as a component of a cadre we reach the next step that a cadre is, as it were, a layer in the Service. Rule 4 itself, while dealing with the strength

of the cadre, speaks of a holder of a post in a cadre as a member of the Service, may be the holder of a temporary or a permanent post".

7. In *A. Janardhana Vs. Union of India (UOI) and Others*, it was held that there was no universal rule, either that a cadre cannot consist of both permanent and temporary employees or that it must consist of both. This is primarily a matter of rules and regulations governing the particular service in relation to which the question regarding the composition of a cadre arises.

8. From what has been mentioned by us above and from what has been asserted by the petitioner, it is clear to us that the service in the Motor Vehicle Department of the Union Territory necessarily forms a separate cadre. The service in the Directorate of Civil Supplies and Price Control must also necessarily form a separate cadre. Since there is no material before us to say whether the service in the Directorate of Civil Supplies and Price Control forms a separate cadre or whether it forms a separate and larger part of the service under the Government of the Union Territory as a whole, we will not express any final opinion on the same. It is sufficient for us to hold, on the basis of the material before us and the uncontroverted averments made in the petition, that the service in the Motor Vehicle Department of the Union Territory forms a distinct and separate cadre.

9. The importance of the concept of cadre arises on account of several reasons. A person when appointed in a particular post in a cadre has the future career before him charted in one sense. He knows what is the strength of the cadre in which he has been appointed; he knows the post to which he can reasonably aspire in due course of time and the prospects of the aforesaid vertical promotion on the basis of the list of seniority prepared from time to time. The Rules of appointment to the said cadre will also tell him as to how many people will be entering the cadre from different sources, if appointments from different sources are provided for in the Rules. If he is transferred from one department to another in the same cadre he is not deprived of the benefits which he has acquired till such transfer by service in the same cadre. He will also not lose his place in the seniority list which will invariably be prepared on the basis of the cadre. A person cannot be transferred from one cadre to another because such a transfer will necessarily affect the other persons in the seniority list. Such an eventuality will necessarily arise when we bear in mind that seniority lists are necessarily prepared for different cadres. That this is so is borne out by the annexures to this petition. Annexure "F", for example, shows the seniority list of the lower Division Clerks in the Directorate of Civil Supplies and Price Control, Annexure "C", on the other hand, shows the seniority list of the Lower Division Clerks in the Directorate of Transport. In this latter seniority list, the petitioner is at Serial No. 19. This seniority list is dated 8th April, 1981. It has been mentioned by the petitioner in paragraph 9 of the petition that consequent to the promotion and appointment of Upper Division Clerks and Assistant Motor Vehicle Inspectors in the directorate of Transport, the petitioner has moved to the position at Serial

No. 5 in the seniority list of the Lower Division Clerks in the Directorate of Transport. If he is transferred to the Directorate of Civil Supplies and Price Control, then he will be practically at the end of the seniority list.

10. The seniority list of the Directorate of Civil Supplies and Price Control (Annexure "F") has necessarily been prepared on the basis of the date of appointment. If the petitioner's seniority is fixed in this list of the Directorate of Civil Supplies and Price Control by taking into consideration his date of appointment, then he will be very much below in this seniority list. It may be that apart from this his chances of promotion to the higher post will also be affected. It is true that chances of promotion are not a matter or right of a Government servant and we are not taking into consideration, while interpreting Fundamental Rule 15, the possibility that the chances of promotion of the petitioner may be affected by transfer made under the said rule. But in order to understand the rationale behind Fundamental Rule 15, it will definitely be permissible to consider the various eventualities that may occur as a result of the transfer made from one cadre to another. In the affidavit in reply to this petition it has only been contended that the Government has a right to transfer its employees under Fundamental Rule 15, in the public interest and that the order transferring petitioner from the Directorate of Transport to the Directorate of Civil Supplies and Price Control is fully consistent with the provisions of Fundamental Rule 15. The other facts relating to the separate cadre of the service in the Motor Vehicles Department have not been denied.

11. The question whether Government servant who is recruited to a particular cadre can be compelled to serve outside the cadre fell for determination before a Single Judge of the Delhi High Court in *Prem Praveen v. Union of India* 1973 (2) S.L.R. 659. It was held by the learned Single Judge of the Delhi High Court, that normally it is to be expected that the Government employees who join a particular cadre would have the range of their transferability determined within that cadre. Therefore, it did not stand to reason that a person who is recruited to a particular cadre should be compelled against his wishes to serve outside the cadre even when the permanent post to which he holds a lien exists within that cadre. According to the said judgment all the Fundamental Rule 15, remains is that even if a Government employee holds a lien on a particular post he has no vested right to continue to remain in one particular post all the time and could be transferred to another post of course within the said cadre, because his lien is only the title to hold substantively a permanent post to which he has been appointed substantively.

12. This question was more elaborately considered by D.A. Desai, J. (as he then was) of the Gujarat High Court in *Bhagwatiprasad v. State of Gujarat* 1979 (3) S.L.R. 805. Before the Gujarat High Court the question was whether the petitioner, who was a Police Inspector, could be, without his consent, deputed to the Civil Defence Organisation. The broad question was: Can a person holding civil post be sent on deputation outside the cadre or the parent department to

which he belongs without the consent? After discussing all the incidents of Government service it was observed as follows :---

"The person holding a civil post or being in civil service of the State is entitled to certain conditions of service prescribed for that post. If he is in a cadre of post he continues to be in that cadre or in post unless promoted or any penalty of dismissal or removal from service is imposed upon him. In the absence of imposition of such a penalty, such holder of a civil post is entitled to serve the Government till the date of superannuation, or till the date when he can be compulsorily retired under the relevant rules. That is too obvious to be mentioned and it is a guarantee which flows from Article 16 and Part XIC of the Constitution."

The fact that in the case of a member of the Indian Administrative Service a transfer could be effected only after satisfying a condition precedent did not escape the attention of the learned Judge in Bhagwati Prasad's case. It was also noticed that when a person is transferred from one cadre to another he is sent on deputation and always with his consent and even in such a case extra allowances as deputation allowances are given to the concerned Government employee. The learned Judge also noticed that the Government of Gujarat while appointing the Second Pay Commission had directed the Commission to inquire into and make recommendations about the deputation allowance. Thereafter it was mentioned as follows :---

"Probably deputation allowance has its origin in an inducement that may be offered to the employee to give his consent so as to serve outside the parent department or outside the cadre. Therefore, it is inconceivable that deputation can be ordered without the consent of the concerned employee."

The learned Judge, then of Gujarat High Court, referred to the judgment of the Delhi High Court in Prem Parveen's case (supra) and agreed with the same. Concluding the judgment, the learned Judge observed as follows :---

"Thus, on principle and authority, it appears clear that a person belonging to a cadre cannot be deputed or transferred outside the parent department and outside the cadre. He can be sent on deputation but that too with his consent. Deputation cannot be without the consent of the person to be deputed."

13. It is true that the provision before the Gujarat High Court was not Fundamental Rule 15, which is before us for interpretation. The provision relevant for the decision before the Gujarat High Court was one under the Bombay Police Act but, in our opinion, the reasoning contained in the said judgment in Bhagwati Prasad's case is fully applicable to a provision like Fundamental Rule 15 which deals with the same subject matter, namely powers of an appointing authority to transfer a Government employee from one cadre to another. We are in respectful agreement with what is stated in Bhagwati Prasad's case.

14. Mr. Mulgaonkar referred us to a judgment of a Division Bench of the Rajasthan High Court in G.K. Tandon v. Judicial Commissioner AIR 1957 Raj 230. We have, with the assistance of Mr. Mulgaonkar, gone very carefully through this judgment and find ourselves unable to agree with the view expressed therein. In paragraph 4 of the judgment it has been mentioned as follows :---

"We however, find that Fundamental Rule 12-A read with Fundamental Rule 15 authorises the transfer of a Government servant from a permanent post in any service or department to a permanent post in any other service or department so as to abolish the lien on the original post and to create a lien on the new post. This interpretation is also found in the clarification made by the Government of India in its memorandum No. 75/55/Ests. (ad) dated 24 March, 1955, copy whereof has been produced by the petitioner as Annexure B. It is explained in this Circular that such permanent transfer from one service or department to another service or department can be made, irrespective of the wishes of the Government servant concerned."

The detailed reasoning which we had the pleasure of noting in the judgment of the Gujarat High Court in Bhagwati Prasad's case is, unfortunately, absent in this judgment of the Rajasthan High Court. With respect, we prefer the view expressed in Bhagwati Prasad's case to the one that is found in G.K. Tandon's case.

15. In fact Mr. Mulgaonkar advanced an argument which found favour with the Rajasthan High Court by referring us to the Central Civil Services (Temporary Service) Rules, 1965. There is a distinction in these rules between temporary service, quasi-permanent service and permanent service. In our opinion, this distinction is not of any relevance to us while we are interpreting Fundamental Rule 15. As we have already mentioned above, a cadre may consist of several posts, temporary or permanent. It is true that the above-mentioned Central Civil Service (Temporary Service) Rules, 1965 provided for the termination of the service of a temporary Government servant who is not in quasi-permanent service at any time by notice in writing under certain circumstances. But that itself has nothing to do with the question of transferability that is contemplated under Fundamental Rule 15. The petitioner in the instant case is also a temporary employee appointed to the post of Lower Division Clerk. The fact that under the aforesaid rules his service can be brought to an end does not mean that they can be brought to an end in one cadre and resuscitated in another cadre. Considering all the relevant provisions of law and the facts, we are of the opinion that Fundamental Rule 15 does not permit transfer of a Government servant from one cadre to another cadre without his consent.

16. In the result, this petition must succeed. Order No. 2/1/79-PER dated 5th January, 1982 issued by the Government of Goa, Daman and Diu, in so far as it effect transfer of the petitioner from the Directorate of Transport to the Directorate of Civil Supplies and Price Control, is set aside.

There will be no order as to costs in this petition.