
(2011) 02 AHC CK 0110

In the Allahabad High Court

Case No : Special Appeal No's. 1808, 1837, 1906, 1980 and 1981 of 2010

State of U.P. and Others

APPELLANT

Vs

C.P. Ravindra Singh (1155/379) and Others

RESPONDENT

Date of Decision : 01-02-2011

Acts Referred:

Constitution of India, 1950 — Article 141, 142, 144, 313, 32

Government of India Act, 1935 — Section 243

Police Act, 1861 — Section 2

Police Regulations — Regulation 397, 398, 520

Uttar Pradesh Civil Police Constable and Head Constable Service Rules, 2008 — Rule 26

Citation : (2011) 2 ADJ 177 : (2011) 4 AWC 3975 : (2011) 129 FLR 609

Hon'ble Judges : Ashok Srivastava, J; Amitava Lala, J

Bench : Division Bench

Judgement

Amitava Lala, J.—Since all the aforesaid special appeals are identically placed as are arising out of similar orders of learned Single Judge, the same have been heard analogously and decided by this common judgment and order, which will have binding effect in all the special appeals.

2. The Appellants herein are either Constables and/or Head Constables and/ or Sub-Inspectors in the Uttar Pradesh Police. They, by means of their respective writ petitions challenged their orders of transfer taking a common plea that when the Police Establishment Board as per the direction of the Supreme Court in Prakash Singh and Others Vs. Union of India (UOI) and Ors, has not been properly constituted by the State, the transfer orders are illegal in nature, therefore, no effect of the same can be given. Learned Single Judge, by the respective orders impugned in these appeals, allowed the writ petitions and set aside the orders of transfer. Against such orders of learned Single Judge, the State of Uttar Pradesh has preferred these appeals before this Court.

3. At the initial stage, when no body appeared for the Respondents-writ Petitioners in the special appeals in spite of repeated calls, this Court was compelled to proceed on the basis of the materials available before it and was

about to pass a final order but in order to give further opportunity to the non-appearing parties, a reasoned interim order was passed with a direction to inform the other side that in case he or they do not appear on the next day, the Court will proceed independently. The order of this Court dated 16th November, 2010 passed at that stage is as follows:

Since all the aforesaid special appeals arising out of similar order of learned Single Judge are identically placed, the same are being taken up together. For the purpose of convenience, Special Appeal No. 1837 of 2010 is taken up as leading one and the order passed in such appeal will be applicable in other special appeals also.

This Special Appeal No. 1837 of 2010 is arising out of an order passed by the learned Single Judge on 7th October, 2010 in Civil Misc. Writ Petition No. 49988 of 2010 (1155/379, C.P. Ravindra Singh and Ors. v. State of U.P. and Ors. following the earlier order of the learned Single Judge passed in Civil Misc. Writ Petition No. 56648 of 2010, Sanjay Kumar Tripathi v. State of U.P. and Ors. dated 7th October, 2010. By the impugned order in this appeal the learned Single Judge set aside the transfer order of the incumbents/writ Petitioners, who are employed in the police establishment, from one place to other.

Normally, this Division Bench does not interfere with the order of transfer and usually passes the following order:

Transfer is an incident of service. It should not be interfered with unless there is apparent illegality, mala fide or cause of exceeding jurisdiction. This is not such a case. Therefore, we do not want to interfere with the same.

However, subject to joining of the Petitioner in the transferred place he/ she will be entitled to place his/her representation to the appropriate authority about his/ her personal inconvenience for the purpose of due consideration, who will do the same sympathetically and take a decision preferably within one month from the date of making such representation upon giving fullest opportunity of hearing and by passing a reasoned order thereon. For the purpose of effective adjudication a copy of the writ petition and its annexures can be treated as part and parcel of the representation.

The writ petition is, thus, disposed of.

No order is passed as to costs.

Learned Single Judge interfered with the order of transfer on the basis of ratio of the judgment of the Supreme Court in Prakash Singh and Others Vs. Union of India (UOI) and Ors, wherein the Supreme Court in disposing of the writ petition under Article 32 of the Constitution of India has held that there shall be a Police Establishment Board in each State which shall decide all transfers, postings, promotions and other service related matters of officers of and below the rank of Deputy Superintendent of Police. The Establishment Board shall be a departmental body comprising the Director General of Police and four other

senior officers of the Department. The State Government may interfere with the decision of the Board in exceptional cases only after recording its reasons for doing so. The Board shall also be authorised to make appropriate recommendations to the State Government regarding the postings and transfers of officers of and above the rank of Superintendent of Police, and the Government is expected to give due weight to these recommendations and shall normally accept it. It shall also function as a forum of appeal for disposing of representations from officers of the rank of Superintendent of Police and above regarding their promotions/ transfers/ disciplinary proceedings or their being subjected to illegal or irregular orders and generally reviewing the functioning of the police in the State.

Learned Single Judge has held that while the Board is to be constituted by the four senior officers of the Department headed by the Director General of Police, it is to be followed in toto. But the same having not been followed, the order of transfer is liable to be set aside. According to learned Single Judge, the State Government has constituted the Board of officers headed by Regional Inspector General of Police/ Deputy Inspector General of Police and the Deputy Inspector General of Police posted in the range/Senior Superintendent of Police/ Superintendent of Police (two of these by seniority) as Members. According to learned Single Judge, the Board constituted by the State is entirely different from the Board to be constituted under the directions of the Supreme Court.

We find that about the transfer and formation of the Board two Division Bench judgments of this Court are available before us. The earlier judgment dated 09th February, 2010, in *Shishu Pal Singh v. State of U.P. and Ors.* 2010 (3) ADJ 241 (DB), was delivered by the Division Bench presided over by one of us (Amitava Lala, J.) and the other judgment was delivered by another Division Bench of this Court on 28th May, 2010 in Special Appeal No. 850 of 2010, *State of U.P. Through Section Karmik Anubhag Lko. and Ors. v. Jagannath Prasad Gaur and Ors.* Since the second judgment i.e. *Jagannath Prasad Gaur (supra)* did not consider the ratio of the earlier judgment i.e. *Shishu Pal Singh (supra)*, ultimately the matter was taken up by a Full Bench of this Court, when the Full Bench in its judgment dated 18th August, 2010 in *Vinod Kumar (Constable 201) and Anr. v. State of U.P. and Ors.* 2010 (7) ADJ 315 (FB), held that the contrary view as taken by the Division Bench in *Jagannath Prasad Gaur (supra)* is overruled. At the time of considering the cause, the Full Bench has taken into account the ratio of the Supreme Court judgment in *Prakash Singh (supra)* and held as follows:

20. In our opinion, therefore, considering the fact that the Rule 26 of the Rules, 2008 makes applicable the rules pertaining to the Government servants, i.e. persons appointed to public services and posts in connection with the affairs of the State, and as Regulation 520 deals with the transfers of the police personnel, who are also a part of the public services of the State, therefore, insofar as the police are concerned, the Regulation pertaining to transfer would continue to

apply to them. Therefore, though one of the Boards constituted is not strictly in terms of the directions issued by the Supreme Court in *Prakash Singh (supra)*, nonetheless considering the exercise that has to be done and the provisions for transfer, as contained in the Police Regulations, there has been sufficient compliance.

21. In these circumstances, we are clearly of the opinion that, though we have found that the notification constituting the Board is not traceable to Section 2 of the Police Act, the same at the highest, amounts to an irregularity and not illegality and would not vitiate the transfers, if they have been done in terms of the Regulations and after the approval of the Board.

22. The State has substantially complied with the requirement by enacting legislation, the only area, not covered by the State by such legislation, is Constitution of Board in respect of which, they have constituted the Boards in exercise of the executive power. The notification will continue to apply till the State makes a rule u/s 2 of the Police Act or any other provisions by enacting legislation to constitute the Boards.

According to us, the specific direction of the Supreme Court in *Prakash Singh (supra)* is restricted with the officers below the rank of Deputy Superintendent of Police which may not be with regard to the Constables below the rank of the officers as it seems to be unfounded. Moreover, the Full Bench in *Vinod Kumar (supra)* held that when the State has formed a Board as per the rules, in constitution of the Board, if any, with the Chairman and Members there might be irregularity but not illegality. It is to be seen that not only there is a provision of appeal as per the Supreme Court judgment in *Prakash Singh (supra)* but if such type of disputes arise, it can be approved or ratified by the appropriate authority i.e. the Director General of Police, etc. In any event, direction given by the Supreme Court is in general but proper execution of the same will vary from State to State depending upon the number of staffs and other incidentals. Had it been a case that adjudication has been made by the members of the Board who are junior to the person, whose transfer has been adjudicated, it would have been the palpable illegality on the part of the authority. No such situation is contemplated hereunder. Moreover, in neither of the judgments it has been taken into account that ratio of the Supreme Court judgment is applicable to the officers below the rank of the Deputy Superintendent of Police alone or also upto the level of Constables, whose position cannot be equated with the officers.

Against this background, we were about to finally dispose of the matter, but since inspite of notice and upon being repeatedly called none of the Respondents/ writ Petitioners in any of the appeals appeared before this Court, instead of final disposal, we hereby give further opportunity directing the Appellants to serve notice upon all the Respondents, in all the aforesaid special appeals, immediately, so that there should not be any delay in disposal of the matters.

The appeals will once again appear for hearing on 30th November, 2010.

In view of the aforesaid circumstances, in all the aforesaid appeals there will be an order staying operation of the order impugned passed by the learned Single Judge till further order/s to be passed by this Court. It is further noted that in spite of notice on the next date if any of such Respondents is not present then it will be construed that such absence is intentional in nature and the Court will proceed finally in spite of their absence.

4. However, inspite of notice no one appeared on behalf of the Respondents-writ Petitioners even on the next day, as a result whereof upon hearing the Appellants the Court was pleased to conclude the hearing and reserved the judgment. Thereafter, on a subsequent date surprisingly, Mr. Vijay Gautam, learned Counsel appearing for the Respondents-writ Petitioners in Special Appeal No. 1808 of 2010, appeared and mentioned that he wants to file a written notes of arguments. Though there was no scope but since an important issue is involved in this case, we felt that leave can be granted and was granted to fulfil the principle of audi alteram partem. State did not oppose such prayer but also sought similar leave to file their written notes of arguments, to which Mr. Gautam did not oppose too.

5. The interim judgment, which has been passed by this Court on 16th November, 2010, has discussed basically two points. Firstly, whether Head Constables and Constables can be considered as "Officers" to attract the ratio of the judgment of the Supreme Court in Prakash Singh (supra). Secondly, whether the ratio propounded by the Full Bench in Vinod Kumar (Constable C.P. 201) and Anr. v. State of U.P. and Ors. 2010(7) ADJ 315 (FB), about formation of the Board can be ignored by this Division Bench in view of the interim judgment and order of the Supreme Court in Prakash Singh (supra).

6. A Constitution Bench of the Supreme Court in The State of Uttar Pradesh and Others Vs. Babu Ram Upadhyaya, has held that if a statute could be made by the Legislatures within the permissible limits, the rules made by an authority in exercise of the power conferred thereunder would likewise be efficacious within the said limits. Under Article 313 of the Constitution of India, the Police Act and the Police Regulations made in exercise of the powers conferred on the Government under that Act, which were preserved u/s 243 of the Government of India Act, 1935, continue to be in force after the Constitution so far as they are consistent with the provisions of the Constitution. Therefore, it can be safely construed that the Constitution Bench of the Supreme Court, by and large, held that the Police Regulations made for the State has a statutory force. Hence, it will be improper to say that there was no pre-existing law regulating the service of the police force available to the State. Sufficiency of such law and reformation or modernisation, if any, are different questions which have been dealt with by the Supreme Court in Prakash Singh (supra). The Respondents are exited to establish the implication of such interim judgment as per Article 142 of the Constitution of India read with other Articles. We shall do so but before that we have to clarify the scope of existing law and its applicability at first. Regulations

397, 398 and 520 of such Regulations deal with designation of the respective officers and/ or staff of the police force and transfer. Such Regulations are quoted hereunder:

397. The gazetted officers of the Force are:

- (1) Inspector-General.
- (2) Deputy Inspectors-General.
- (3) Superintendents.
- (4) Assistant Superintendents.
- (5) Deputy Superintendent.

398. The non-gazetted officers of the Force are:

- (1) Inspectors.
- (2) Sub-Inspectors.
- (3) Head Constables.
- (4) Constables.

520. Transfer of Gazetted Officers are made by the Governor in Council.

The Inspector General may transfer Police Officers not above the rank of Inspector throughout the province.

The Deputy Inspector General of Police of the range may transfer inspectors, sub-inspectors, head constables and constables, within his range; provided that the postings and transfers of inspectors and reserve sub-inspectors in hill stations will be decided by the Deputy Inspector-General of Police, Headquarters.

Transfers which result in officers being stationed far from their homes should be avoided as much as possible. Officers above the rank of constable should ordinarily not be allowed to serve in districts in which they reside or have landed property. In the case of constables the numbers must be restricted as far as possible.

Sub-inspectors and head constables should not be allowed to stay in a particular district for more than six years and ten years respectively and in a particular police station not more than three years and five years respectively. In the Tarai area (including the Tarai and Bhabar Estates) the period of sub-inspectors, head constables and constables should not exceed five years.

7. From the plain reading of Regulations 397 and 398, it appears to us that when first one deals with the Gazetted Officers, the second one deals with Non-Gazetted Officers. Non-Gazetted Officers include the posts of Head Constables and Constables. Though the Uttar Pradesh Civil Police Constable and Head Constable Service Rules, 2008 has been promulgated but there is no provision of

transfer under such Rules. Hence, it will only be governed by Regulation 398 of the Police Regulations which deals with non-gazetted officers. Therefore, when the word "Officers" has been used in the judgment of the Supreme Court in Prakash Singh (supra), it would not be proper for us to tell that they are not the officers to get attraction of the ratio of such judgment. Accordingly, we clarify our stand hereunder finally that the word "Officers" under the interim judgment and order of the Supreme Court in Prakash Singh (supra) seems to be made for entire police force. First point is answered accordingly.

8. So far as the second point is concerned, we have to visualise the existing law of transfer under Regulation 520 and suggestion of the Supreme Court under its interim judgment and order side by side. Out of various suggestions, one of the suggestions is to form the following Police Establishment Board:

Police Establishment Board

(5) There shall be a Police Establishment Board in each State which shall decide all transfers, postings, promotions and other service related matters of officers of and below the rank of Deputy Superintendent of Police. The Establishment Board shall be a departmental body comprising the Director General of Police and four other senior officers of the Department. The State Government may interfere with the decision of the Board in exceptional cases only after recording its reasons for doing so. The Board shall also be authorised to make appropriate recommendations to the State Government regarding the postings and transfers of officers of and above the rank of Superintendent of Police, and the Government is expected to give due weight to these recommendations and shall normally accept it. It shall also function as a forum of appeal for disposing of representations from officers of the rank of Superintendent of Police and above regarding their promotions/transfers/ disciplinary proceedings or their being subjected to illegal or irregular orders and generally reviewing the functioning of the police in the State.

9. At the first blush, we find from Regulation 397 of the U.P. Police Regulation that the post of Deputy Superintendent is the lowest post amongst the gazetted officers when "Inspectors" are holding the highest posts under Regulation 398. Hence, the suggestions in Prakash Singh (supra) making two classes i.e. "of and below the rank of Deputy Superintendent of Police" and "of and above the rank of Superintendent of Police" are in direct conflict with the statutory provision of the State law under Entry-2 of List II: State List of the Seventh Schedule of the Constitution, which reads as under:

2. Police (including railway and village police) subject to the provisions of entry 2-A of List I.

10. So far as Entry 2-A under List I-Union List of the Seventh Schedule of the Constitution, as per the Constitution (Forty-second Amendment) Act, 1976 w.e.f. 03rd January, 1977 is concerned, it speaks as follows:

2-A. Deployment of any armed force of the Union or any other force subject to the control of the Union or any contingent or unit thereof in any State in aid of the civil power; powers, jurisdiction, privileges and liabilities of the members of such forces while on such deployment.

11. Obviously, Entry 2-A of List I: Union List is arising out of contingency. However, on the basis of various suggestions three Judges' Bench of the Supreme Court wanted to control the inter-State activities by applying Entry 1 of the Union List as contemplated under Article 355 of the Constitution. Furthermore, the Supreme Court wanted comprehensive review at the national level about the police system since after independence radical changes have taken place in the political, social and economical condition of the country. This is obviously a pious desire on the part of the highest judiciary of the country. But subject matter herein is about the applicability of the existing law of the State till its existence. Therefore, it is required to be seen what the Full Bench of this Court has held on this issue. The Full Bench of this Court in Vinod Kumar (supra) has clarified that (a) Regulation 520, which deals with transfer of police personnel, is pre-existing; (b) a Board was constituted about the transfer, though it is not strictly in terms of the directions of the Supreme Court in Prakash Singh (supra) but the exercise has been done and the approval of the Police Regulation has been sufficiently complied with; (c) though no notification has been issued u/s 2 of the Police Act but the Board was constituted by exercise of executive power, therefore, if the order of transfer is issued in terms of the Regulation and after approval of such Board, non-formation thereof, if any, strictly in terms of the order of the Supreme Court is a mere irregularity but not illegality; and (d) the State will continue with the executive power till it makes appropriate rule in terms of Section 2 of the Police Act and/or any approval in connection thereto.

12. Against this background, firstly let us have a look towards the various pronouncements of the Supreme Court with regard to scope and applicability of Article 142 of the Constitution of India. To make a discussion with regard to applicability of Article 142 of the Constitution we have gone through the judgments of Supreme Court in Kalyan Chandra Sarkar Vs. Rajesh Ranjan @ Pappu Yadav and Another, Vineet Narain and Others Vs. Union of India (UOI) and Another, and Union Carbide Corporation, etc., etc. Vs. Union of India, etc. etc., . From the composite reading of all these cases we find that there are ample powers conferred by Article 32 read with Article 142 to make orders which have the effect of law by virtue of Article 141 of the Constitution and there is mandate to all authorities to act in aid of the orders of the Supreme Court as provided in Article 144 of the Constitution. This power has been recognised in a catena of decisions of the Supreme Court and it can be exercised, if need be, by issuing necessary directions to fill the vacuum till such times the legislature steps in, to cover the gap or the executive discharges its role. It is the duty of the executive to fill up the vacuum by executive orders because its field is coterminous with that of the legislature and where there is inaction even by the executive, for whatever reason, the Judiciary must step in, in exercise of its constitutional

obligations under the aforesaid provisions to provide a solution till such time as the legislature acts to perform its role by enacting proper legislation to cover up the field. Article 142 vests the Supreme Court with a repository of discretionary power that can be wielded in appropriate circumstances to deliver "complete" justice in a given case. While it is true that the Supreme Court in exercise of its jurisdiction under Article 142 of the Constitution would not pass any order which would amount to supplanting substantive law applicable to the case or ignoring express statutory provisions dealing with the subject, these constitutional powers cannot, in any way, be controlled by any statutory provisions but at the same time these powers are not meant to be exercised when their exercise may come directly in conflict with what has been expressly provided for in a statute dealing expressly with the subject. The plenary powers of the Supreme Court under Article 142 of the Constitution are inherent in the Court and are complimentary to those powers which are specifically conferred on the Court by various statutes, though are not limited by those statutes, These powers also exist independent of the statutes with a view to do complete justice between the parties and are in the nature of supplementary powers and may be put on a different and perhaps even wider footing than ordinary inherent powers of a Court to prevent injustice. The advantage that is derived from a constitutional provision couched in such a wide compass is that it prevents "clogging or obstruction of the stream of justice". The prohibition on the power under Article 142 should also be shown to be based on some underlying fundamental and general issues of public policy and not merely incidental to a particular statutory scheme or pattern. The proposition does not relate to the powers of the Court under Article 142, but only to what is or is not "complete justice" of a cause or matter and in the ultimate analysis of the propriety of the exercise of the power.

13. Now a question comes in the mind of the Court that apart from the modernisation of the police force, what was the specific event/s which came in the mind of the Supreme Court in *Prakash Singh* (supra) to form the Police Establishment Board. The Supreme Court in its interim judgment, as aforesaid, wanted to ensure setting up of a mechanism for selection/appointment, tenure, transfer and posting of not merely the Chief of the State Police but also all police officers of the rank of Superintendent of Police and above. The Court expressed its shock that in some States the tenure of a Superintendent of Police is for a few months and transfers are made for whimsical reasons, which has not only demoralizing effect on the police force but is also alien to the envisaged constitutional machinery. It was observed that apart from demoralizing the police force, it has also the adverse effect of politicising the personnel and, therefore, it is essential that prompt measures are to be taken. The Supreme Court further observed that the popular perception all over the country appears to be that many of the deficiencies in the functioning of the police had arisen largely due to an overdose of unhealthy and petty political interference at various levels starting from transfer and posting of policemen of different ranks, misuse of police for partisan purposes and political patronage quite often extended to

corrupt police personnel. It was also observed that not only the Minister In-charge, Home Affairs, but all the Commissions and Committees entrusted to give suggestion to the Court to come to an appropriate finding, have broadly come to the same conclusion on the issue of urgent need for police reforms. Convergent views are as follows:

- (a) State Security Commission at the State level;
- (b) Transparent procedure for the appointment of Police Chief and the desirability of giving him a minimum fixed tenure;
- (c) Separation of investigation work from law and order; and
- (d) a new Police Act which should reflect the democratic aspirations of the people.

14. According to us, pluralistic view in the place and instead of singular view is one of the devices to maintain transparency. It avoids possibilities of motivated action, biasness or influence in the cases of transfer, to that extent, there is no conflict between Prakash Singh (supra) and the steps taken by the State. The only issue is whether the State has strictly complied with or sufficiently complied with the direction of the Supreme Court in Prakash Singh (supra). According to the Full Bench of this High Court in Vinod Kumar (supra), direction has been sufficiently complied with. Learned Chief Standing Counsel has given an explanation by saying that the position of the State of Uttar Pradesh as regards its vastness and population may not be similar with various other States. Therefore, if the Board is constituted strictly in compliance with the direction of the Supreme Court then the State will not get full time engagement of such officers to maintain the law and order situation of the State. To that, it is desirable that the State should explain such position before the Supreme Court. It is expected that by now it has been done by the State. But so far as the existing position is concerned, this Division Bench will be governed by both, Prakash Singh (supra) and Vinod Kumar (supra) and a conjoint reading of both the judgments speaks that a mode or mechanism of plurality has been adopted by the State, in spite of the existing law. Therefore, this Court does not find any reason to negate the orders of transfer, as were impugned in the writ petition.

15. Thus, in totality, we do not find any reason to interfere with the orders of transfer. Hence, all the aforesaid special appeals are allowed upon setting aside the orders, impugned therein, passed by the learned Single Judge.

However, no order is passed as to costs.

Ashok Srivastava, J.

16. I agree.