(2010) 09 DEL CK 0027

In the Delhi High Court

Case No : Writ Petition (C.) No. 1624 of 2010

Union of India (UOI) and Others — APPELLANT

Vs

Ram Kishore and Others — RESPONDENT

Date of Decision : 10-09-2010

Acts Referred:
Constitution of India, 1950 — Article 14, 16

Citation : (2010) 09 DEL CK 0027

Hon'ble Judges : Pradeep Nandrajog, J;Mool Chand Garg, J

Bench : Division Bench

Advocate : R.V. Sinha and A.S. Singh, for the Appellant; Mahabir Singh, Madhusmita Bora and Gagandeep Sharma, for the Respondent

Final Decision : Dismissed

Judgement

Mool Chand Garg, J.—The respondents are selectees of Combined Main (Graduate Level) 2003 conducted by the Staff Selection Commission (SSC) for the post of Inspector, Central Excise.

2. They were appointed as Inspectors in the year 2005. As per the conditions of service as contained in Memorandum dated 12.7.2005 wherein they have to give the willingness to serve anywhere within the jurisdiction of Shillong Zone, the following Clause was also added:

(xi) He/She is liable to transfer/posting within this Zone to which he/she is nominated and under no circumstances his/her request for transfer to any other Commissionerate outside this Zone will be entertained.

3. This condition was contrary to the condition of service as had been applicable to the Inspectors who joined in Shillong zone earlier and who joined in other zones which provided for not only another zone transfer but also provided for transfer to any other Commissionerate on request.

4. According to the respondents, prior to 2003, the candidates chosen to the post

of Inspector in Central Excise had the privilege of choosing their zone of posting and the candidates chosen in the year 2004 and thereafter, have also been granted the option of choosing their zone of posting. It was their case that the respondents who are Inspectors, Central Excise are also under the control of Central Board of Excise and Customs and draw their salary from the Centre irrespective of the zone they are posted in and are not under the control of their zonal officers.

5. On being offered appointment, respondents were posted to different ranges under the Shillong zone. However, from the year 2005 to 2007 a transferability on all India basis has been interpreted as condition of service to the Inspectors recruited in Central Excise and one of the cited examples is of examination conducted by SSC in February 2006 whereas the candidates selected for appointment are liable to serve anywhere in India and the posts carrying all India transfer liability.

6. Aggrieved by absence of on all India transferability, a representation preferred by the respondents when not responded to by the respondents led to filing of OA-540/2007, which was disposed of by treating the OA as representation and disposal thereof on 30.3.2007. Non-compliance resulted in a contempt petition, being CP- 292/2007, where certain directions have been issued. Vide an order passed on 19.10.2007, petitioners rejected the claim of the respondents on the ground that as per the existing policy of the CBEC, inter-Commissionerate transfers have been discontinued as transfers allowed under the previous policy resulted in enormous litigation. However, on extreme compassionate grounds, such transfers could be allowed on deputation basis initially for a period of three years and upto a maximum of five years.

7. Assailing the order passed on their representation, the respondents filed OA No. 586/2008, which has been allowed by the impugned order dated 24.12.2008. The basic contention raised by the respondent, which has also been accepted by the Tribunal was that the inclusion of Clause (xi) in their appointment letter was a discriminatory exercise of power and was arbitrary inasmuch as, Inspectors appointed prior to them and who had been appointed later are not to bind themselves with Clause (xi) as aforesaid. It is also submitted that there was absolutely no justification for inclusion of Clause (xi) in their appointment letter. It was the grievance of the respondents that they have been posted in areas which are far away from their permanent addresses and the batch prior to 2003, who are identically placed as the respondents, had the option of serving in any part of the country which is being denied to the respondents and as a result of which the batch of 2003 is being denied equal opportunity with the batch of Inspectors prior to 2003 and those selected after 2003.

8. Before the Tribunal, it was contended on behalf of the respondents that that once all India recruitment has been ordered by the Apex Court, which was implemented from 2003 batch, isolating the batch of 2003 for all India transfer

liability even after decision of the petitioners to change the policy in 2004, yet following the all India transferability in subsequent batches right from 2006, the respondents being equal in all respects to the incumbents as they had also been appointed similarly, an option accorded to them to be posted on all India transfer liability, when not extended, constitutes an invidious discrimination, which is violative of Articles 14 & 16 of the Constitution of India.

9. However, according to the petitioners transfer on a policy laid down by the petitioners is their prerogative and as the respondents have accepted all the conditions of service, they are now estopped to challenge the policy. It is also stated that change of policy in 2004 cannot have any retrospective effect.

10. It was also stated that no enforceable and fundamental right had accrued in favour of the respondents to be issued mandamus and as to cut-off date, it is stated that when the same is reasonable, it does not require any interference by this Tribunal. The petitioners also relied upon a judgment delivered by the Apex Court in the case of P.U. Joshi and Others Vs. The Accountant General, Ahmedabad and Others,

11. It is stated that respondents were allocated to the Shillong Zone, which is as per laid down criteria. Learned Counsel would contend that in the light of administrative chaotic conditions caused due to all India transfer liability, now inter-Commissionerate transfer had been stopped and in exceptional circumstances, transfer on deputation basis has been adopted.

12. The Tribunal however did not find favour with the submissions made on behalf of the petitioners and having found that the inclusion of Clause (xi) in the appointment letter by challenging the terms and conditions of services which were in existence when the respondents took their examination even though the transfer liability in respect of subsequent appointment was similar to that of the appointees of 2003. Merely by changing the terms and conditions by adding Clause (xi) in the Memorandum of appointment was an act of discrimination which was arbitrary and thus violative of Article 14 of the Constitution of India. Reference has been made to the judgment of the Apex Court in the case of Sankari Cement Alai Thozhilalar Munnetra Sangam, Tamil Nadu Vs. Government of Tamil Nadu and Another, Purnendu Mukhopadhyay and Ors. v. V.K. Kapoor and Anr. 2007 (12) Scale 549 as well as other judgments on the subject including the judgment given in the case of Dhampur Sugar (Kashipur) Ltd. Vs. State of Uttranchal and Others, Union of India v. Pushpa Rani and Ors. (2008) 9 SCC 242.

13. To conclude, the Tribunal observed in paragraph 33 of the impugned order as under:

33. In nutshell, the ratio decidendi discerned shows that even on fixing conditions of service, it should be ensured by the Executive that such an action should not be arbitrary, unreasonable and arbitrariness is one where principle of equality is offended. We do not find any reasonableness, justification and apt reasons in law, as explained by the respondents to distinguish the batch of 2003

from batch of 2006 in the matter of all India transfer liability. It is certainly a decision, which is based on unreasonable classification and does not qualify the twin test laid down under Article 14 of the Constitution even if it is a policy decision, which is contrary to the Constitution of India as per pure theory of law propounded by the Apex Court in Government of Andhra Pradesh and Others Vs. Smt. P. Laxmi Devi, wherein it has been held that if a legal norm in a higher layer of this hierarchy conflicts with a legal norm in a lower layer, the former will prevail.

14. The Tribunal partly allowed the original application filed by the respondents holding that discrimination meted out to the respondents is not sustainable in law. Clause (xi) denying all India transfer liability is set aside and the matter was remanded back to the petitioners to reconsider providing all India transfer liability to the batch of Inspector, Central Excise of the year 2003 at par with 2006 batch of similarly placed officers by a speaking order to be passed within a period of three months from the date of receipt of a copy of this order.

15. The petitioners while assailing the impugned order have submitted that judgment is not only contrary to the law laid down by the Apex Court in the case of Mallikarjuna Rao and Others Vs. State of Andhra Pradesh and Others, and Purnendu Mukhopadhyay''s case (supra) but is also not sustainable because findings regarding discrimination of the respondents herein by the petitioner with reference to the subsequent batch of Inspectors has been based on misconception and misleading facts inasmuch as even the Inspectors appointed in 2006 and assigned a particular zone does not get the right of transfer to other Commissionerate/zone based on the particular Clause of the appointment letter. The inter-Commissionerate posting/transfer of the respondents as well as other Inspectors is regulated in terms of the policy decision dated 19.2.2004 of the Government which has been noted by the ld. Tribunal in para 5 of the impugned order. No Inspector is to be transferred on his/her request except on deputation basis after the aforesaid polity decision of the Government. Even if the appointment letter of the Inspectors of 2006 batch contained the Clause as regard all India transfer liability it does not imply that they will be transferred to other Commissionerate on their own based on such Clause contrary to the recruitment rule or the policy of the Government in this regard. It goes without saying that recruitment rules as well as policy of the Government governing the transfer of Inspectors is applicable in respect of all Inspectors belonging to the different Commissionerate under the CBEC.

16. It is also submitted that the Tribunal fell into error by failing to appreciate that it is not the decision but the decision making process which is subject matter of challenge in judicial review. It is also trite that when the executive action is challenged by way of judicial review, it is for the petitioner to show as to what statutory rule or fundamental right has been violated and it is not for the executive to justify its action.

17. We have appreciated the statement made on behalf of the petitioners as well

as by learned Counsel for the respondents. At the outset, we may observe the discrimination strikes at the root of equality and thus prima facie violative of Article 14 of the Constitution of India. Such legal proposition is reflected in a number of judgments delivered by the Apex Court in the case of E.P. Royappa Vs. State of Tamil Nadu and Another, Mrs. Maneka Gandhi Vs. Union of India (UOI) and Another, and Ramana Shetty as well as in the matters, some of which have been quoted by the Tribunal.

18. Some of the observations made in the judgment of the Tribunal referring to the legal position on the subject are also reproduced hereunder:

13. The other facet of Article 14 which must be remembered is that it eschews arbitrariness in any form. Article 14 has, therefore, not to be held identical with the doctrine of classification. As was noticed in Mrs. Maneka Gandhi Vs. Union of India (UOI) and Another, in the earliest stages of evolution of the Constitutional law, Article 14 came to be identified with the doctrine of classification because the view taken was that Article 14 forbids discrimination and there will be no discrimination where the classification making the differentia fulfils the aforementioned two conditions. However, in E.P. Royappa Vs. State of Tamil Nadu and Another, it was held that the basic principle which informs both Articles 14 and 16 is equality and inhibition against discrimination. This Court further observed as under:

From a positivistic point of view, equality is antithetic to arbitrariness. In fact, equality and arbitrariness are sworn enemies; one belongs to the rule of law in a republic while the other, to the whim and caprice of an absolute monarch. Where an act is arbitrary it is implicit in it that it is unequal both according to political logic and constitutional law and is, therefore, violative of Article 14 and if it affects any matter relating to public employment, it is also violative of Article 16. Articles 14 and 16 strike at arbitrariness in State action and ensure fairness and equality of treatment.

19. Applying the aforesaid principles to the facts of this case, we are unable to agree with the justification afforded by the petitioners in having distinct classes of Inspectors in the Customs and Excise Department who are selected on All-India basis in a combined test conducted by the SSC in relation to the terms and conditions of their service. If the subsequent batches have an All India transfer liability which position has also been in existence prior to the selectees of 2003 though appointed later as per office Memorandum dated 12.07.2005 and the selectees in the next years who have been permitted to have transfer liability with an availability of an option to be transferred even outside their zone on request, the other selectees earlier cannot be discriminated by changing the terms and conditions as has been done by the petitioners merely by a administrative decision and not by amending the rules. What the respondents had been arguing was nothing else but equality with others similarly situated. Eligibility to ask for transfer out of zone is always subject to willingness thereof shown by the respondents and thus, it is not that something additional would be

conferred upon the respondents than except equality.

20. In view of that, the directions of the Tribunal to consider providing all India transfer liability to the batch of Inspectors, Central Excise of the year 2003 at par with batch of 2006 who are similarly placed, cannot be faulted with.

21. The matter can be looked at entirely differently with a completely independent line of reasoning.

22. The offending clause, contents whereof have been noted in para 2 above, contain a negative stipulation that no request for transfer to a Commissionerate outside the zone would be considered or even entertained. This has been done in the year 2005. There is no justifiable reasons to do so and we cannot even think of one justifying the same. As is the case of the candidates appointed in the year 2005 even candidates appointed prior thereto had to serve in Commissionerate within their zone but could make a request to be transferred outside the zone and on case to case basis the department had retained the power to consider the request. We see no reason why should the department denude itself of the power to consider the requests by taking away the very entitlement to even make a request. By giving the power to make a request does not mean that in every case the request has to be allowed.

23. Accordingly, we find no merit in the writ petition. The same is accordingly dismissed with no orders as to costs.

CM No. 3279/2010 (Stay)

Interim order, if any, stands vacated. Application is dismissed as infructuous.