
(2010) 10 AHC CK 0410

In the Allahabad High Court

Case No : Civil Miscellaneous Writ Petition No"s. 59860, 55164, 57659 and 53803 of 2008

Vinod Kumar etc.

APPELLANT

Vs

Union of India and Others

RESPONDENT

Date of Decision : 27-10-2010

Acts Referred:

Constitution of India, 1950 — Article 14

Citation : (2011) 1 ADJ 373

Hon'ble Judges : Sudhir Agarwal, J

Bench : Single Bench

Advocate : A. Basheer, B.D. Pandey and S.K. Mishra, for the Appellant; Govind Saran, S.C., for the Respondent

Final Decision : Allowed

Judgement

Sudhir Agarwal, J.—List revised. None appeared for the petitioner. Sri Govind Saran, learned counsel for the respondents is present. I have perused the record and have also heard Sri Govind Saran at length. These four writ petitions involve common question of fact and law and, therefore, are being considered and decided finally by this common judgment under the Rules of the Court at this stage as agreed by learned counsel for the respondents.

2. The Writ Petition No. 59860 of 2008 has been filed by Vinod Kumar, Head Constable appointed in Railway Protection Special Force. It is not in dispute that the recruitment and conditions of service of the members of Railway Protection Force are governed by Railway Production Force Act, 1957 (hereinafter referred to as "Act, 1957") and the Railway Protection Force Rules, 1987 (hereinafter referred to as "Rules, 1987") framed thereunder and as amended from time to time. The petitioner was appointed as Constable on 14.2.1996. This appointment was made in Railway Protection Special Force, a force constituted under Act, 1957. This is admitted to the respondents also as is evident from para 9 of their counter-affidavit. The petitioner sought transfer to Railway Protection Force,

North Eastern Railway and the same was allowed vide order dated 23.4.2008 (Annexure-1 to the writ petition) passed by the Deputy Secretary/ABE Railway Board. The name of the petitioner, Vinod Kumar is at serial No. 78. The order of transfer states that "DG/RPF has approved the inter railway transfers of the following Head Constable/RPSF staff on bottom seniority and in the same rank of their batchmates (promoted under Rule 70 only). These transfers shall be on usual terms and conditions governing such inter railway transfer on request."

3. Pursuant to the aforesaid order the Commanding Officer No. 2 Bn. RPSF, Gorakhpur issued an order dated 29.4.2008 which also contains the same language as mentioned above in respect to transfer and the name of the petitioner, Vinod Kumar is mentioned at Serial No. 15 thereat. The petitioner was consequently issued a movement order dated 9.5.2008 by Commander ("B" Coy 2 Bn. RPSF, Gorakhpur). The petitioner ultimately joined the duty of Head Constable in RPF pursuant to the aforesaid transfer. Thereafter the petitioner received a letter dated 14.9.2008 asking him to exercise option for absorption on the post of Constable in the feeder cadre at the place of transfer or to go back wherefrom he has come. A copy of the said letter dated 17.9.2008 issued by the Chief Security Commissioner, Railway Protection Force, Gorakhpur is on record as Annexure-5 to the writ petition. The petitioner was informed that the aforesaid letter was issued in furtherance of the letter dated 4.8.2008 wherein a similar option was required to be given by all the persons who have come on transfer on request with the bottom seniority from Railway Protection Force from another zonal railway.

4. Aggrieved by these two orders which required the petitioner to give option for absorption of the feeder cadre, the petitioner has filed this writ petition.

5. Writ Petition No. 55164 of 2008 has been filed by eight petitioners, where also the facts and documents as referred to above are similar and the details of the date of appointment and date of transfer are as under:

6. Writ Petition No. 57659 of 2004 has been filed by thirty (30) petitioners, where also the facts and documents are similar as in Writ Petition No. 59860 of 2008 and the details of the date of appointment and date of transfer are as under:

7. Writ Petition No. 53803 of 2008 has been filed by eight petitioners, where also the facts and documents are similar as in Writ Petition No. 59860 of 2008 and the details of the date of appointment and date of transfer are as under:

8. In all these writ petitions the orders dated 4.8.2008 and 14.9.2008 are under challenge whereby the option has been required from the petitioners for absorption as Constable (Feeder cadre) at the place of transfer or to go back.

9. The respondents have filed counter-affidavits which are similarly worded. It is said that a policy pertaining to transfer of RPF/RPSF personnel was formulated and circulated by Standing Order No. 70 dated 27.9.2004 by the Director

General, Railway Protection force, Railway Board and it clearly mentions that the instructions contained in the said policy will be supplementing the provisions contained in Rules, 1987. Some further executive orders relating to modification etc. of the Standing Order No. 70 have also been placed on record alongwith the counter-affidavit. It is further said that the request for transfer made by the petitioners in the prescribed format contains a declaration that the petitioners are aware that in the seniority list of zonal railway they shall be placed at the bottom of the batch which had joined the railway in the year of their enlistment and such placement may result in reversion in rank also. The applications seeking transfer voluntarily are claimed to have been submitted on various dates in 2007 and the transfer was allowed thereafter only. It is countered that the impugned notices dated 4.8.2008 and 14.9.2008 are in furtherance of such declaration and option submitted by the petitioners. It is also pleaded that in the order of transfer this fact could not be mentioned but later on the staff officer on behalf of Chief Security Commissioner, Railway Protection Force sent a letter dated 30.5.2008 appending therewith the order dated 23.5.2008 issued by the Deputy Director (Security), Railway Board stating as under:

10. The case of the petitioners is that inter zonal or inter railway transfer on request is not totally prohibited but under the statute it is permitted with a condition that the incumbent will be assigned bottom seniority in the same rank. The respondents cannot compel the petitioners to accept a condition which is contrary to the statute and to that extent even the principle of estoppel would not apply against the petitioners. This was probably realised by the authority concerned when the order of transfer was issued inasmuch as it clearly stated that the bottom seniority in the same rank shall be assigned in accordance with the other terms and conditions and the petitioners joined the place of transfer pursuant to such order of competent authority passed on 22/23.4.2008. Later on it was not open to Deputy Security Commissioner, Railway Protection Force to add a condition which is ex facie contrary to the statutory rules and, therefore, cannot be fastened upon the petitioners.

11. Sri Govind Saran, learned counsel for the respondents admitted that the case of petitioners being covered by Act, 1957 and Rules, 1987, the provisions pertaining to transfer contain in the rules will primarily govern these cases and wherever the rules are silent, the executive orders, if any, issued by the authorities concerned may be looked into. He placed reliance on Rule 99.2 and 101 which are reproduced as under:

99.2 Transfer on own request or on mutual exchange:

Seniority of an enrolled member of the Force transferred on his own request or on mutual exchange from one zonal railway to another or to the Railway Protection Special Force and vice versa shall be fixed below that of all existing confirmed and officiating enrolled member of the Force in the relevant rank of that railway or Railway Protection Special force irrespective of the date of confirmation or length of officiating service of the transferred member of the

Force.

101. Miscellaneous provision governing seniority:

All other cases of seniority, not specifically covered in the above provisions, shall be decided-

(a) in the case of superior officer by the Central Government;

(b) in the case of enrolled members of the Force by the appointing authority, in accordance with the Directives or on the advice of the Director-General.

12. In a case where Rules do not permit transfer even on request which may result in reduction in rank or reversion to a lower post or nullifying the promotion earned by an employee at the place of earlier posting, this Court has to consider whether such a condition can be superimposed by the respondents either by issuing an executive order or circular or whether the Railway Board can make such a condition in one or the other manner ignoring the statutory Rules.

13. A bare perusal of Rule 99.2 shows that a member of the force may be transferred on his own request from one zonal railway to another or to Railway Protection Special Force and vice versa but in that case his seniority shall be fixed below that of all existing confirmed and officiating enrolled member of the force in the relevant rank of that Railway or Railway Protection Special Force irrespective of the date of confirmation or length of officiating service of the transferred member of the force. Loss of seniority to an incumbent transferred on his own request as governed by Rule 99.2 is only qua the employees working in the relevant rank whether confirmed or officiating but it does not talk of giving seniority and designation of a lower rank and that also below all the persons working in the lower rank whether officiating or confirmed. It also does not talk of the batch or year of recruitment etc.

14. Transfer when made on the own request of the employee concerned, the concept of bottom seniority is a well recognised consequence in service matters and provisions to this effect can be found in various services. Dispute pertaining to bottom seniority in such cases of transfer in the context of some other aspects have arisen time and again before the Courts also.

15. In Smt. Renu Mullick Vs. Union of India and another, , a transfer was made from one place to another on the condition that the transferred employee will get seniority below all the employees working in the same grade. When the question of promotion came, the transferred employee was denied benefit of service rendered at the earlier place for the purpose of eligibility on the ground that the service rendered after transfer would only be counted for eligibility. Construing provisions of the rules, the Apex Court held when the rules contemplate loss of only seniority, it was not incumbent upon the authorities to add something more on their own and thereby deny even the benefit of service which the incumbent has rendered before transfer though no such exclusion is contemplated in the rules. The Apex Court consequently permitted the employee concerned to count

service rendered by her in her earlier Collectorate for all other purposes except seniority. To the same effect is the view taken in some later cases, i.e., Scientific Advisor to Raksha Mantri and Another Vs. V.M. Joseph, ; Union of India (UOI) and Another Vs. V.N. Bhat, ; and State of Maharashtra and Others Vs. Uttam Vishnu Pawar, .

16. Smt. Renu Mullick (supra) was also followed by the Apex Court in Union of India (UOI) and Others Vs. Deo Narain and Others, . While construing the relevant rules therein, the Apex Court observed that if an employee is transferred from one department to another on compassionate ground he would be placed at the bottom of the seniority in the transferee department, the result would be that at the time of his transfer in the transferee department, all employees in the same cadre who were very much serving at that time would be shown above such transferred employee and in such combined seniority list the transferred employee would be shown as junior most. The only thing which the employee retained and can get benefit is that such employee who had already worked in a particular cadre and gained experience will not lose past service for experience for the purpose of considering eligibility when his case comes up for consideration for further promotion. In para 41 and 42 of the judgment the Apex Court agreed with the observation of the High Court that the persons, on voluntary transfer, would lose their seniority but the same by itself would not mean that their entire past service is wiped off. For the purpose of consideration of their case for promotion, their past service would be taken into consideration.

17. The above cases though relate to the question whether the voluntary transfer would result in counting service of the employees concerned, as a whole afresh, or it would cause only loss of seniority and nothing else, but they are relevant in the present case for the reason that here also the statutory rule contemplates only loss of seniority and that too qua the employees working in the same rank and not lower rank.

18. It is not disputed before the Court that in the Railway Protection Force the Constables and Head Constables constitute different cadre and rank. The Head Constable is admittedly a higher rank than the Constable. Rules do not contemplate that on transfer being made on request, the authorities can impose a condition of simultaneous reversion on the employee concerned. It is well settled that there is no estoppel against the statute. Neither the employer nor employee can act or represent or be bound by a conduct which would be contrary to the statute. When the rules require certain conditions and certain consequences they have to be observed and followed in words and spirit. The efficacy of the Rules cannot be either extended or whittled down by executive orders or action though not contemplated or supported by statute.

19. Sri Govind Saran, learned counsel for the respondents vehemently argued that in the application form submitted by petitioners seeking transfer voluntarily they also agreed to be sent on a lower post and, therefore, it is not open to them to challenge it but he could not dispute that in the order of transfer the

competent authority did not transfer the petitioners on the lower post but the orders of transfer categorically and unequivocally mention that the petitioners on transfer shall join in the same rank. This necessarily explain correct understanding of the authorities concerned that anything which is done by the employees or compelled by the higher authorities to be done by the employees though otherwise not consistent with the statutory rules cannot be accepted or acted upon and, therefore, they took precaution not to transfer the petitioners on a lower post but the orders of transfer very clearly and categorically says that the petitioners are being transferred in the same rank. That being so, subsequently and later on it was not open to any authority by issuing a kind of clarification or otherwise an executive order having the effect of modification of the transfer order of petitioners and saying that the transfer of the petitioners should be accepted and be treated on lower posts or else they should be send back.

20. It is not a kind of mercy or relaxation on the part of the respondents which has been shown to the petitioners by accepting their request of voluntary transfer for the reason that such a right with certain conditions has been conferred upon the members of force by statutory rules. It was incumbent upon the respondents to faithfully obey and follow those provisions and not to meddle with the same at their whims and caprice.

21. At this stage I may also discuss one more aspect which to some extent could have helped the respondents provided the conditions as available in that case would have existed in the cases in hand also.

22. In Union of India (UOI) and Others Vs. Muralidhara Menon and Another, , a situation somewhat similar to the present case arose but the real distinction comes on account of lack of statutory rules in that case though availability of statutory rules otherwise in the present case.

23. In Muralidhara Menon (supra) the employees sought voluntary transfer. They were in the cadre of Upper Divisional Assistant working in different states in various offices of Income Tax Department. Applications were filed for transfer to the State of Karela charge from Gujarat Charge. The service of the employees was charge-wise but an executive order/circular of the Central Government of Direct Taxes issued on 14.5.1990 gave power of relaxation to the Board while regulating inter-charge transfers. It was provided therein that where a voluntary transfer is sought, the head of department will examine the request and pass necessary orders for absorption of the transfer and such request will be considered and conceded only against a clear vacancy. The applications of the employees were processed but it was found that there was no vacancy in the cadre of Upper Divisional Clerk in Karela charge whereagainst they could have been allowed transfer. The employees were given an indication that in case they are willing to seek transfer voluntarily on lower post, they may exercise option whereagainst the voluntary transfer can be made. The employees thereafter in these facts situation exercised such option. Accordingly they were transferred on

the post of Lower Divisional Clerk. Having availed such transfer on lower post, the employees made representation claiming transfer on the same post, i.e., Upper Divisional Clerk and approach the Tribunal after rejection of their representation. The original applications filed by the employees were dismissed by the Tribunal. Thereafter the employees approached High Court by filing writ petition which was allowed observing that transfer on lower post causes hostile discrimination and this aspect was not considered by the Tribunal particularly when the circular guideline dated 14.5.1990 do not talk of any reversion as a pre condition for transfer. The Government of India took up the matter to the Apex Court. It was held that the employees having applied for voluntary transfer on the lower post of Lower Divisional Clerk after having been conveyed that no vacancy existed on the post of Upper Divisional Clerk whereupon they had sought transfer on the lower post wherein vacancy was available, and in these circumstances, having accepted the condition of transfer on lower post, they cannot approbate and reprobate by challenging transfer on lower post, made on their own request. The Apex Court in paras 14, 15 and 16 of the judgement observed as under:

14. Article 14 of the Constitution of India providing for the equality clause is a positive concept in terms whereof, the equals, subject to certain exceptions, are to be treated equally and unequals cannot be treated equally. If a relaxation has been granted in case of one employee on the basis of the materials available before the Board, the same by itself may not be treated to be a binding precedent so as to enable the Tribunal or High Court to issue a writ of or in the nature of mandamus. Our attention has not been drawn to any provision under the aforementioned circular or otherwise that the Chief Commissioner of Income Tax had any power of relaxation. If there are no vacancies, orders of transfer could not be made. Even if no vacancy existed in respect of the direct recruit quota, the respondents could not have been transferred. In absence of any power of relaxation, the respondents could not have been accommodated on the post of UDCs and they could be transferred only on the post of LDCs which were vacant at the relevant time. In our opinion, relying on or on the basis of the case of Sri Nair only, the impugned judgment could not have been passed.

15. The fact situation obtaining in case of Sri Nair has not been brought on record. A writ of mandamus can be issued, provided there exists a legal right in the applicant and a corresponding legal duty in the respondent. Even otherwise a Superior Court having a limited jurisdiction in this behalf would not interfere with the discretionary jurisdiction exercised by the statutory authorities unless a clear case for interference is made out subject of course to just exceptions.

16. Respondents furthermore having given an undertaking and having opted to be transferred on the post of LDC could not have resiled therefrom. They could not approbate and reprobate at the same time. If an order was passed on their representations, they were bound thereby particularly when the circular letter itself suggested that an order of transfer had been passed would be final and no

order for retransfer could be passed. The principle of "estoppel" would, therefore, clearly be applicable.

24. It would also be worthy to mention that in para 17 the Apex Court clearly observed that it is not a case where the service conditions of the first respondent is governed by any statute or statutory rules. This makes the clear distinction. In our case the matter is squarely covered by Rule 99.2 which contemplates seniority below all the confirmed and officiating employees of the members of force in the same rank. The members of force working on higher post, therefore, could have been given a bottom seniority but that could not have gone below the rank in which they were working and sought transfer.

25. Sri Govind Saran, learned counsel for the respondents further sought to argue though meekly that the words "relevant rank" in Rule 99.2 means the same rank or the lower rank in which the transfer is sought to be made. Even if for a moment this submission is accepted it would not make any difference. The petitioners were transferred in the same rank in which they were working. The transfer order did not contemplate or mention that the transfer is being made on a lower post or lower rank. That being so, it was not open to the respondents to make a subsequent amendment in the conditions of transfer and ask the petitioners either to work on the lower post and that too further at the bottom seniority or to go back. Once the transfer is allowed in the same rank and the power is exercised under the rules in accordance with the provision as it is, no subsequent alteration or modification is permissible that too to the detriment of the petitioners. However, this observation may not be construed as if this Court has accepted the suggestion of the construction of the words "relevant rank" in Rule 99.2 as suggested by Sri Govind Saran. In my view, the "relevant rank" would mean the rank in which the employee was working and from which he sought voluntary transfer otherwise it would create lot of complications and confusion. For example if it would mean that it includes the lower post, it would be extremely harsh and arbitrary that a person who is working in the higher post is transferred not only to lower post but also by placing him below all the confirmed as well as officiating employees on the lower post ignoring the fact that they might have joined the service even much later than the entry in service of the person who has sought transfer. Such a strange view is neither borne out from the simple reading of the statute, nor, in my view, there is any ambiguity in the provision which may compel this Court to take such extreme and harsh view which may go to the extent of arbitrariness and hostile discrimination. In the result all these writ petitions are allowed. The impugned orders to the extent it intend to accommodate the petitioners and redetermine their seniority on lower post, are hereby quashed. The petitioners shall be entitled to costs which is quantified to Rs. 500/- for each set of writ petition.