

* **IN THE HIGH COURT OF DELHI AT NEW DELHI**

+ **W.P. (C.) No.7579/2008**

% **Date of Decision: 24.11.2009**

K.K.Kaushik Petitioner

Through Mr.L.R.Khatana, Advocate

Versus

Union of India & Ors Respondents

Through Mr.H.K.Gangwani, Advocate for the
respondent No.1.

Mr.Rajiv Nanda, Advocate for the
respondent Nos.2 & 3.

CORAM:

HON'BLE MR. JUSTICE ANIL KUMAR

HON'BLE MR. JUSTICE VIPIN SANGHI

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| 1. | Whether reporters of Local papers may be allowed to see the judgment? | YES |
| 2. | To be referred to the reporter or not? | NO |
| 3. | Whether the judgment should be reported in the Digest? | NO |

ANIL KUMAR, J.

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The petitioner has impugned the order dated 22.1.2008 of Central Administrative Tribunal in OA No.2499/2006, K.K. Kaushik vs. Union of India & Ors., declining to set aside the orders dated 13.7.2006 and 17.11.2006 passed by the respondents. By these orders the respondents rejected the representations made by the petitioner against his being declined HRA for the period he was allowed mutual exchange of government accommodation with his son in law pursuant, to his undertaking that he will not vacate before the expiry of two years.

To comprehend the disputes some of the relevant facts are that the petitioner is an ACP-Special Cell. His son-in-law is also a police officer, however, junior in rank. The petitioner belongs to Delhi, Andaman and Nicobar Island Police Service, whereas his son-in-law is in Delhi Police. The petitioner and his son-in-law both had residential accommodation and the petitioner applied for exchange of his residential accommodation with the residential accommodation of his son-in-law. The mutual exchange was permitted to the petitioner whereby his accommodation was given to his son-in-law and the accommodation of the petitioner's son-in-law was occupied by the petitioner on the condition that in case either of them will surrender their government accommodation within two years from the date of mutual exchange, they would be liable for the consequences as per (SO) No.3/2006 and an undertaking to that effect was also executed by the petitioner along with his son-in-law.

The respondents under the provisions of Delhi Police Act, 1978, had issued a standing order (SO) No.3/2006. Under the terms and conditions which were agreed by the petitioner, one of the term was that in case of vacation of the exchanged residential accommodation by him prior to said period of two years, he will have to forego his HRA for the remaining period of two years and he would be debarred from allotment of another quarter.

Since the petitioner vacated his exchanged accommodation before the expiry of two years despite an undertaking given by him, as such his house rent allowance was withheld till 24.2.2008, as mutual exchange of government accommodation was permitted to the petitioner on 24.2.2006. By order dated 12.6.2006, the petitioner was further debarred for allotment of government quarter for that year and the government quarter vacated by him was allotted to HC Vinod Kumar.

The petitioner made a representation against the order dated 12.2.2006 contending, inter alia, that his son had suffered losses in his business which compelled him to move with his son and consequently he had to vacate the government accommodation. In the circumstances, petitioner contended that the order withholding house rent allowance till 24.2.2008 be set aside. The petitioner contended that order of withholding of payment of HRA after vacation of government quarter is in contravention of financial rules which give him the Constitutional right to get the HRA and thus under the standing order issued by the respondents his constitutional right to get the HRA cannot be denied. It was asserted that the order of withholding the HRA has put him in financial hardship and no loss is caused to the respondents as the government quarter vacated by him prior to expiry of two years period was immediately allotted to another occupant from 12.6.2006.

The representations of the petitioner were rejected and the order of withholding the HRA upto 24.2.2008, till the expiry of two years period, was upheld by the respondents. Aggrieved by the orders of rejection of representations of the petitioner, he filed a petition being OA No.2499/2006, K.K. Kaushik vs. Union of India & Ors before the Central Administrative Tribunal, Principal Bench, New Delhi, which was also dismissed by the Tribunal by order dated 22.1.2008 which is impugned by the petitioner before this Court.

The principal ground raised before us by Mr. Khatana, learned counsel for the petitioner, is that the petitioner has a right to get his HRA under the service rules applicable to him and the standing order framed under the provisions of Delhi Police Act, 1978, will not disentitle him to get his HRA as the terms and conditions of that Standing order will not be applicable to him. Reliance has been placed on Section 5 of Delhi Police Act, 1978 which categorically stipulates that condition of service of the members of Delhi Police will not be applicable to the members of Delhi, Andaman and Nicobar Island Police service (DANIPS). He submits that, admittedly, the petitioner is a member of the DANIPS.

The petitioner had also challenged the Constitutional validity of standing order No.3 of 2006 framed by respondent No.2 under the provisions of Delhi Police Act, 1978, contending the same cannot

override, supersede or in any manner derogate the provisions of Section 5 of Delhi Police Act, 1978. The petitioner, however, had filed a affidavit dated 2.3.2003 deposing categorically that in view of his plea that standing order 3/2006 issued by Commissioner of Police, Delhi, is not applicable to the petitioner, therefore, the petitioner has given up his contention concerning the Constitutional validity of the standing order 3 of 2006 issued under Delhi Police Act, 1978.

The petition is contested by the respondent contending, inter alia, that the condition of withholding the HRA to the petitioner was applied on his undertaking and acceptance of the term of mutual exchange. It is asserted that once the petitioner, pursuant to his undertaking, gave his accommodation to his son-in-law and occupied accommodation of his son-in-law who was a junior officer, on violation of his undertaking, he is liable for the consequence thereof and he cannot allege that the ramification of the violation of terms and conditions of mutual exchange will not be applicable to him on the ground that SO 3 of 2006 was issued under the provisions of Delhi Police Act, 1978.

The respondents also contended that the representations made by the petitioners were considered in detail and had been rejected. The Tribunal has also not granted any relief to the petitioner in the facts and circumstances of the case especially in view that the petitioner by his own volition accepted the consequences of vacating the government

quarter before the expiry of two years which was the relevant term of permitting mutual exchange to the petitioner and after availing the mutual exchange on the terms and conditions which were known to the petitioner and which could not be denied by the petitioner, he cannot absolve himself of the consequences and the liability. The Tribunal had declined to exercise any jurisdiction in favour of the petitioner in the facts and circumstances. In the circumstances, it is contended that the petitioner is not entitled for any relief and the writ petition be dismissed.

We have heard the counsel for the parties in detail. The learned counsel for the petitioner has relied on (2005) 5 SCC 451, Additional District Magistrate (Rev.) Delhi Admn. Vs Shri Ram to contend that the SO No.3 of 1996 which came into force on 3rd February, 2006, could not be applied to the petitioner as the petitioner is not governed by the condition of service of Delhi Police as the petitioner belongs to Delhi, Andaman and Nicobar Island Police and the rules of Delhi Police are not applicable to the service of the petitioner which is categorically contemplated under Section 5 of Delhi Police Act, 1978. In Addl. District Magistrate (supra), relied on by the petitioner, the amendment to Rule 49 and Rule 63 had affected the rights of tenure holder adversely which was contrary to the provisions of Delhi Land Revenue Act and Delhi Land Reforms Act. In the circumstances it was held that

conferment of rule making power by an Act does not enable the rule making authority to make a rule which travels beyond the scope of enabling act, which is inconsistent therewith or repugnant thereto.

In case of petitioner, the plea of the petitioner is that the provisions of Delhi Police Act, 1978 are not applicable to him. The case of the petitioner is not that the SO 3 of 2006 framed under the provision of Delhi Police Act, 1978 is repugnant to the provisions of Delhi Police Act, 1978. Apparently the petitioner is contending that the SO 3 of 2006 is not applicable to him and he has not challenged the validity of the same. The plea of the petitioner is therefore, different than the ratio of the case relied on by the petitioner. The Supreme Court in Rafiq Vs State, 1980 SCC (Crl.) 946 had held that the ratio of one case cannot be mechanically applied to another case without having regard to the fact situation and circumstances obtaining in two cases. In Bhavnagar University v. Palitana Sugar Mills Pvt Ltd (2003) 2 SC 111 (vide para 59), the Supreme had observed:-\

" It is well settled that a little difference in facts or additional facts may make a lot of difference in the precedential value of a decision."

The tribunal while dismissing the petition of the petitioner had noted that the petitioner exchanged the house allotted to him with his son-in-law knowing the consequences of the same. When the petitioner

exchanged his house and opted for a house which was for the personnel of Delhi police, he had not reserved his right to be governed by the rules applicable to accommodation of General Pool for which the petitioner was entitled being a member of Delhi, Andaman and Nicobar Island Police. The petitioner sought exchange of his accommodation with that allotted to his son in law by resort to clause (xxvi) of the same (SO) No.3/2006. If the said (SO) No.3/2006 was not applicable to him, he could not even have sought the exchange as sought by him. After having taken advantage of the provision for exchange in the said SO, the petitioners attempt to wriggle out of the conditions on which the exchange was permitted cannot be permitted. He cannot approbate and reprobate. Rather his undertaking amounts to abide by the rules framed under Delhi Police Act, 1978 for the said accommodation whose exchange was sought by the petitioner. On the specific undertaking of the petitioner, he was allowed to exchange his accommodation with the accommodation of his son in law.

As a term of exchange of accommodation, it was within the knowledge of the petitioner and it was also brought to his notice that if any of the officers who had exchanged the accommodation, would vacate the accommodation before the period of two years from the date of mutual exchange, he shall not be granted HRA for the remaining period from the date of surrender/vacation of the accommodation till the completion of two years from the date of mutual exchange. The

petitioner had given an undertaking at the time of submitting the request for mutual exchange. He did so by design so that his son in law could jump the queue and get an accommodation in preference to other police officials higher in seniority to occupy a house which was occupied by the petitioner. Though the petitioner in his representation had contended that he had to shift with his son who had suffered losses in his business, however, whatever may be reason, the petitioner accepted the applicability of the condition and consequence of it on his own volition. The undertaking given by the petitioner and his son in law is as under:

" Undertaking

We hereby declare and undertake that we Rajesh Sharma Rank & No.SI, D-158 and Shr. K.K.Kaushik Rank and No. ACP/Hq/Sp.Cell are doing mutual exchange of our Government quarters solely at our own will and we have not been pressurized by anybody at all to do so. We will also not surrender/vacate the Government quarters for a period of two years from the date of mutual exchange. In case something adverse come to notice later on mutual exchange may be cancelled

Applicants

Name, Rank & NO.

Rajesh Sharma
SI. D-158

Name, Rank & NO.

K.K.Kaushik
ACP

Place of Posting

Spl.CP (Ints & Ops)

Place of Posting

ACP/HQ/Sp.Cell"

In the circumstances, the petitioner cannot be allowed to contend that he is not bound by the consequences of vacating the accommodation prior to period of two years on the ground that he is

member of service of Delhi, Andamans and Nicobar Island Service and consequence of SO 3 of 2006 cannot be applied to him. This is not the case of the petitioner that he was not aware of said SO 3/2006, as he had exchanged the accommodation on 1st March, 2006 whereas the SO 3 of 2006 came into being on 3rd February, 2006. If the petitioner had given up his right for HRA for two years as consequence of condition for mutual exchange which benefited his son in law, the petitioner cannot be allowed to evade the consequences on the ground of non applicability of one of the term of the SO 3 of 2006.

The petitioner filed an affidavit dated 2nd March, 2009 and had given up his plea of the Constitutional Validity of the standing order no.3 of 2006 issued by the Commissioner of Police. The petitioner is not entitled for the relief against withholding of his HRA also on the ground that the accommodation vacated by him was allotted to another occupant in the facts and circumstances.

The High Court in exercise of its jurisdiction under Article 226 of the Constitution of India can take cognizance of the entire facts and circumstances of the case and pass appropriate orders to give the parties complete and substantial justice. The jurisdiction of the High Court, being extra ordinary, is normally exercisable keeping in mind the principle of equity. One of the ends of the equity is to promote honesty and fair play. If there be any unfair advantage gained by a

party, before invoking the jurisdiction of the High Court, the court can take into account the unfair advantage gained and can require the party to shed the unfair gain before granting relief. The Supreme Court had held so in *Shangrila Food Products Ltd. Vs Life Insurance Corporation of India* (1996) 5 SCC 54. The petitioner had taken advantage of mutual exchange of accommodation subject to terms and conditions which had been categorically agreed by him. The petitioner had given an undertaking on the basis of which his accommodation was given to his son in law who was much junior in service to him. After taking advantage of mutual exchange, the petitioner cannot be allowed to contend that the SO 3 of 2006 is not applicable to him as he is a member of another service. After agreeing specifically to the consequence of vacating the exchanged accommodation prior to a period of two years, the petitioner cannot be allowed to take benefit of his lapse and in the circumstances the petitioner is not entitled for exercise of any equitable jurisdiction in his favour.

Even if we accept the petitioners submission that (SO) No.3/2006 per se does not apply to him, it cannot be said that the terms and conditions of that SO did not get incorporated in the conditional order passed by the petitioners permitting the exchange. Therefore, contractually the petitioner was bound by the said terms and conditions, even if it is accepted that statutorily he was not so bound.

For the foregoing reasons, the order of the Tribunal impugned by the petitioner does not suffer from any illegality nor the action of the respondents suffer from any such irregularity or illegality which would entail interference by this Court in exercise of its jurisdiction under Article 226 of the Constitution of India. The writ petition in the facts and circumstances is without any merit and it is therefore, dismissed. Parties are however, left to bear their own costs.

ANIL KUMAR, J.

NOVEMBER 24, 2009

Jk/dp

VIPIN SANGHI, J.