

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

+ **Writ Petition (Civil) No. 6085/2011**

% **Date of Decision:** August 23, 2011

Aniruddha Panda & Ors. Petitioner
Through Dr. M.P. Raju, Advocate with
Mr. K.K. Mishra, Advocate.

VERSUS

Union of India & Ors. Respondents
Through Mr. Romil Pathak, Dr. Ashwin
Bhardwaj with Mr. Varun Kumar,
Advocates.

CORAM:
HON'BLE THE CHIEF JUSTICE
HON'BLE MR. JUSTICE SANJIV KHANNA

ORDER

The petitioners were appointed as Inspectors in Central Excise and Customs in 1990 and onwards; and were posted at Indore, Bhopal and other Commissionerates. As per the recruitment rules of Group 'B', 'C' and 'D' employees appointed zone-wise and commissionerate-wise have their separate cadre and seniority. The Inspectors do not have all India seniority. In normal circumstances and, without their consent, they cannot be transferred outside their commissionerate. They are posted and

transferred within the jurisdiction of the allotted cadre controlling collectorate.

2. By order dated 5th November, 2003, the petitioners were transferred to Delhi zone on Inter Commissionerate Transfer. They were assigned seniority in the Delhi zone on the basis of their appointment on transfer to Delhi and their past service was ignored and was not counted for the purpose of seniority.

3. Aggrieved, the petitioners filed OA 1803/2009, before the Central Administrative Tribunal, Principal Bench, New Delhi (Tribunal, for short), which has been dismissed by the impugned decision dated 24th February, 2011.

4. Learned counsel for the petitioners has submitted that the petitioners were compelled and forced to give an undertaking that on transfer they shall not claim seniority on the basis of services rendered in the earlier Commissionerate and their seniority would be counted from the date of joining the new Commissionerate. It is submitted that the undertakings given were bad in law on account of undue influence, force and coercion. Further, the Tribunal has erred in holding that the application was barred by limitation.

5. We do not find any merit in the contentions raised by the petitioners. The petitioners were allocated respective commissionerates and were assigned seniority within the said commissionerates. Without their consent/willingness, they could not be transferred out of the commissionerates. On 17th October, 2003, in view of the shortage of Inspectors in some of the commissionerates, a policy decision was taken to call for options from the Inspectors for inter-commissionerate transfers. The Inspectors seeking transfer had to give their willingness for the inter-commissionerate transfers. It was specified that their previous seniority would not be counted and the date of joining the Delhi zone would be the relevant date for the purpose of seniority. The petitioners, it appears did have reservation on the aforesaid term, but they accepted the said term and gave undertakings in writing in 2003. They gave up their claim of seniority on the basis of past service in different commissionerate and joined the Delhi commissionerate. We do not think that they should be permitted to resile from the said undertakings. They cannot take advantage of the policy and transfer, but ignore the terms and conditions on the basis of which they were transferred.

Sanctity and inviolability must be attached to the terms on which the transfer was made and to the solemn undertakings executed by the petitioners. These cannot be brushed aside or ignored. In case there was no loss of seniority, many others including those who were senior to petitioners may have applied and expressed their willingness to the transfer. Moreover, the undertakings were furnished in the year 2003. The OA was filed in the year 2009. It is apparent that the petitioners did not object to the undertakings and had accepted the term that their past service in the old commissionerate would not to be counted for seniority in the new commissionerate. The Tribunal has also recorded that no application for condonation of delay was filed. Even otherwise, we do not find that there is any justification to condone the delay. The decisions of the Supreme Court in ***Ramesh Chand Sharma vs. Udham Singh Kamal & Ors***, (1999) 8 SCC 304, and ***Union of India vs. M.K. Sarkar***, 2010(2) SCC 59 are applicable.

6. Learned counsel for the petitioners had relied upon the following cases:-

- (i) ***K. Madhavan and Anr. Vs. UOI & Ors.***, AIR 1987 SC 2291
- (ii) ***V.P. Shrivastava and Ors. vs. State of M.P. and Ors.***,

(1996) 7 SCC 759

- (iii) ***Balco Captive Power Plant Mazdoor Sangh and Anr. Vs. National Thermal Power Corporation and Ors.***, (2007) 14 SCC 234.
- (iv) ***Writ Petition (Civil) No. 1624/2010*** titled ***Union of India & Ors. vs. Ram Kishore & Ors.***, dated 10.09.2010, of Delhi High Court.
- (v) ***Union of India vs. Deo Narain and Ors.***, (2008) 10 SCC 84,

7. In ***K. Madhavan's case*** (supra), the petitioners were permanently absorbed in CBI as per the prescribed rules. In these circumstances, the Supreme Court has held that on transfer and absorption in the CBI, the past service is not wiped out. In the said case it was noticed that persons from different sources with eligible experience were drafted to serve the service and also there was no expressed condition or provision regarding the unaccountability of the past service. In the present case, as noted above, the factual position is different. There is no absorption on transfer as per the recruitment rules but the transfer was made on the specific and express condition that for the purposes of seniority, the past service would not be counted. The recruitment rules do not stipulate to the contrary.

8. In ***V.P. Shrivastava's case*** (supra), the provisional seniority list was finalized in 1988 and in 1989, the parties had approached the Tribunal and, therefore, the plea of delay and laches was rejected. In the present case, the term and condition that on transfer, the past service would not be taken into consideration for the purposes of seniority, was stipulated in the scheme/policy for transfer itself. The petitioners had given their written undertakings in 2003 accepting that their past service would not be counted for the seniority purposes. In 2004, the provisional seniority list was issued without accounting for the past service of the petitioner. The challenge to the seniority list could be only raised in case the undertakings and the terms and conditions of transfer were set aside. Thus the original application filed in 2009 was barred by limitation.

9. The decision in the case of ***Balco Captive Power Plant Mazdoor Sangh's case*** (supra), is again not applicable. In the said case employees of public sector undertakings were transferred to a company which was originally a public sector undertaking but under the scheme of disinvestment was privatized. Clause 14 of the appointment letters was challenged

and it was held that the said clause was contrary to the provisions of Section 23 of the Contract Act. It was held that undue influence has been exercised on the selected candidates to execute undertakings to secure appointments. In the present case, we are not inclined to accept the plea that the undertakings in 2003 were taken under undue influence or violate Section 23 of the Contract Act. Petitioners were appointed and granted seniority in the respective commissionerate. With the open eyes they exercised their option and willingness to be transferred and appointed in the Delhi Commissionerate but lose their seniority/benefit of the past service. There was no compulsion and they were not forced to join the Delhi Commissionerate. The question of undue influence does not arise.

10. The decision of Delhi High Court dated 10th September, 2010, in WPC No. 1624/2010, **UOI & Ors. vs. Ram Kishore & Ors.**, is distinguishable. In the said case, respondents were appointed as Inspectors in the year 2005, with the stipulation that they would give their willingness to serve anywhere within the jurisdiction of Shillong Zone and in no circumstances their request for transfer outside the said zone would be entertained. In

earlier years candidates had the option/privilege to chose their zone. Subsequently, again the Government had interpreted the relevant service condition as entitling the employees to seek and ask for transfer to anywhere in India. Plea of discrimination was raised as a right of an employee to seek all India transfer was accepted and available to employees inducted upto 2003 and then for employees inducted in 2006 and onwards. The right to ask for all India transfer was denied to employees inducted into service between 2004 to 2005. The tribunal remanded the matter to the authorities to re-consider the question of all India transfer for the inspectors appointed between 2004 and 2005 as they were singled out and were treated as a separate class without any reason and justification. A speaking order was required to be passed within three months. It was held that there should not be any discrimination and violation of Article 14 of the Constitution of India. The decision of Supreme Court in ***M. Rao vs. State of Andhra Pradesh***, (1990) 2 SCC 707 was distinguished. The High Court has held that the plea of discrimination and violation of Article 14 was required to be dealt with and answered. The plea of equality and similar treatment must be examined and considered

by the respondent authorities. Bar to request/prayer for transfer outside the commissionerate is one aspect and seniority upon transfer is another aspect. What was addressed and answered in **Ram Kishore's** case (supra) was the absolute and complete prohibition to the request for transfer from the commissionerate even if the employees/officers of 2005 batch were willing and wanted a transfer. There was no such prohibition or bar for officers appointed in other batches, when they wanted a transfer. We are not concerned with the said factual matrix or dispute. The challenge is not to the bar/prohibition to ask for transfer but seniority after the petitioners accepted the term of transfer that they shall lose benefit of their past service for seniority.

11. In **Deo Narain's** case (supra), the Supreme Court examined the question of loss of seniority as a result of transfer. It was held that eligibility and counting of past service for the purpose of eligibility is different from seniority where past service need not be counted. Reference was made to **Union of India vs. C.N. Ponnappan**, (1996) 1 SCC 524, it was held that an employee can be placed at the bottom of the seniority list at the transferred place but his previous experience rendered in the first

department cannot be ignored and must be considered as experience for promotion if the matter relates to eligibility.

12. Earlier, in ***Renu Mullick v. Union of India***, (1994) 1 SCC 373, it has been held:

“5. The appellant gave the necessary undertaking in the following words:

“I hereby agree to and undertake to comply with the conditions detailed below:

(1) My seniority will be fixed below the last temporary UDC in the Allahabad Collectorate, i.e. I will be treated as a fresh entrant in the cadre of UDC in the new charge.

(2) No transfer, travelling allowance and joining time etc., will be admissible to me as a result of this transfer.

(3) I will not be considered for further confirmation and promotion in the Directorate of S & I, Central Excise and Customs, New Delhi.

I will be adjusted against a direct recruit and unreserved vacancy in the grade of UDC.”

9. On November 11, 1989, the appellant and 79 other candidates were promoted to the post of Inspector. The promotion order stated that the same was provisional and subject to further revision or modifications, if any. The appellant joined as Inspector at Allahabad and continued to serve in that capacity till the impugned order of reversion was passed. On February 20, 1992, the Additional Collector (P & V), Central Excise and Customs,

Allahabad, passed an order reverting the appellant from the post of Inspector. No reason was assigned in the order of reversion. No opportunity, whatsoever, was afforded to the appellant before passing the said order. The appellant challenged the order of reversion before the Central Administrative Tribunal, Allahabad. Before the Tribunal, the respondents took the stand that on transfer from Delhi to Allahabad, the service rendered by the appellant at Delhi was wiped off for all purposes including for determining her eligibility under the Rules for promotion to the post of Inspector. The Tribunal dismissed the application of the appellant.

10. We are of the view that the Tribunal fell into patent error in dismissing the application of the appellant. A bare reading of para 2(ii) of the executive instructions dated May 20, 1980 shows that the transferee is not entitled to count the service rendered by him/her in the former collectorate for the purpose of seniority in the new charge. The later part of that para cannot be read differently. The transferee is to be treated as a new entrant in the collectorate to which he is transferred for the purpose of seniority. It means that the appellant would come up for consideration for promotion as per her turn in the seniority list in the transferee unit and only if she has put in 2 years' service in the category of UDC. But when she is so considered, her past service in the previous collectorate cannot be ignored for the purposes of determining her eligibility as per Rule 4 aforesaid. Her seniority in the previous collectorate is taken away for the purpose of counting her seniority in the new charge but that has no relevance for judging her eligibility for promotion under Rule 4 which is a statutory rule. The eligibility for promotion has to be determined with reference to Rule 4 alone, which prescribes the criteria for eligibility. There is no

other way of reading the instructions aforementioned. If the instructions are read the way the Tribunal has done, it may be open to challenge on the ground of arbitrariness.”

13. Reference can also be made to ***K.P. Sudhakaran v. State of Kerala, (2006) 5 SCC 386***, wherein it has been elucidated and explained :

“11. In service jurisprudence, the general rule is that if a government servant holding a particular post is transferred to the same post in the same cadre, the transfer will not wipe out his length of service in the post till the date of transfer and the period of service in the post before his transfer has to be taken into consideration in computing the seniority in the transferred post. But where a government servant is so transferred on his own request, the transferred employee will have to forego his seniority till the date of transfer, and will be placed at the bottom below the juniormost employee in the category in the new cadre or department. This is because a government servant getting transferred to another unit or department for his personal considerations, cannot be permitted to disturb the seniority of the employees in the department to which he is transferred, by claiming that his service in the department from which he has been transferred, should be taken into account. This is also because a person appointed to a particular post in a cadre, should know the strength of the cadre and prospects of promotion on the basis of the seniority list prepared for the cadre and any addition from outside would disturb such prospects. The matter is, however, governed by the relevant service rules.”

14. In ***State of Maharashtra v. Uttam Vishnu Pawar***, (2008) 2 SCC 646, it has been observed :

“**10.** In this connection our attention was invited to *Dwijen Chandra Sarkar v. Union of India*, (1999) 2 SCC 119. In that case the incumbent was transferred from the Rehabilitation Department to the P&T Department in public interest at zero-level seniority in the P&T Department but his past services were counted for giving him the benefit of the Scheme on completion of 16 years of service. In the said case the Court relied on an earlier decision of this Court in *Renu Mullick v. Union of India* (1994) 1 SCC 373, wherein in identical situation the transferee was not permitted to count her service rendered in former Collectorate for the purpose of seniority in the new charge but she was permitted to count the service rendered by her in earlier Collectorate for other purposes except seniority.

11. Similarly, in *Scientific Advisor to Raksha Mantri v. V.M. Joseph* (1998) 5 SCC 305, it was held by this Court that the service rendered in another department which helps for determination of eligibility for promotion will be counted but not for seniority. Again, in *A.P. SEB v. R. Parthasarathi* (1998) 9 SCC 425 the government servant was transferred and absorbed in the Electricity Board. It was held that the services rendered in the previous department could be counted towards requisite experience of 10 years for eligibility for promotion.

12. Our attention was also invited to *Union of India v. V.N. Bhat* (2003) 8 SCC 714. In that case also in identical situation the incumbent was transferred from one department to another. He lost his seniority in the new department but his service was counted for purposes of promotion.

13. Therefore, in view of the consistent approach of this Court, it is no more res integra that the incumbent on transfer to the new department may not get the seniority but his experience of the past service rendered will be counted for the purpose of other benefits like promotion or for the higher pay scale as per the Scheme of the Government.”

15. In the light of the aforesaid discussion, we do not find any merit in the present writ petition and the same is dismissed. No costs.

SANJIV KHANNA, J.

CHIEF JUSTICE

August 23, 2011

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