

CENTRAL ADMINISTRATIVE TRIBUNAL
MUMBAI BENCH, MUMBAI

ORIGINAL APPLICATION NO.234/2019
and
ORIGINAL APPLICATION NO.630/2018

This the 18th day of July, 2019

CORAM:- R. VIJAYKUMAR, MEMBER (A).
R.N. SINGH, MEMBER (J).

(Applicant in OA No. 234/2019)

1. SANDEEP KUMAR
son of JAIPAL SINGH
Preventive Officer (Inspector)
of Customs Department,
aged about 29 years,
residing at 403,
Gyan Vikas Road,
Sector-19, Kopar Khairane,
Navi Mumbai-400 709.

(By Advocate Sh. Vicky Nagrani)

and

(Applicant in OA No.630/2018)

1. Mr. Amit Malik,
Age 27 years,
Son of Devinder Singh Malik,
Working as Inspector in CGST & CS,
Madgaon, Goa,
Residing at Flat F-4, 1st Floor,
Atreya Apartment,
Durganand Nagar, Morailem,
Curchorem, Goa-403 706.

(By Advocate Sh. S. V. Marne)

VERSUS

(Respondents in OA No.234/2019)

1. **Union of India,**
Through its Secretary
Ministry of Finance,
Department of Revenue,
Central Board of Indirect
Taxes & Customs,
North Block, New Delhi-110 001.
2. **The Commissioner of Customs**
(General) Having its office at
New Customs House,
Ballard Estate,
Mumbai-400 001.

(By Advocate Sh. N. K. Rajpurohit)

and

(Respondents in OA No.630/2018)

1. **Union of India,**
Through its Secretary,
Ministry of Finance,
Department of Revenue,
Central Board of Indirect
Taxes & Customs,
North Block, New Delhi-110 001.
2. **The Director,**
Directorate General of Human
Resources Development,
2409/8, Deep Shikha,
Gajendra Palace,
New Delhi-110 008.
3. **Chief Commissioner of CGST &**
CS, 41 A, ICA House,
Opp. Wadia College,
Sasoon Road, Pune-411 001.
4. **The Commissioner,**
CGST & CS,

Goa Commissionerate,
ICA House, EDC Complex,
Patto, Panjim, Goa-403 001.

... Respondents.

(By Advocate Sh. R. R. Shetty)

O R D E R (O R A L)

Per: R. Vijaykumar, Member (A)

1. When the cases were called out, Sh. Vicky Nagrani, learned counsel appeared for the applicants in OA No.234/2019. Sh. S. V. Marne, learned counsel appeared for the applicants in OA No.630/2018. Sh. N. K. Rajpurohit, learned counsel appeared for the respondents in OA No.234/2019. Sh. R. R. Shetty, learned counsel appeared for the private respondents in OA No.630/2018.

2. Heard all the learned counsels for the parties.

3. The applicants have filed these OAs under Section 19 of the Administrative Tribunal's Act, 1985.

4. The applicant in OA No.630/2018 has filed this OA on 08.10.2018. He was selected in the examination conducted by Staff Selection Commission (SSC) in the year 2013 and joined as

Inspector of Central Excise in Shillong zone on 03.12.2015. He applied for inter-commissionerate transfer in terms of the provisions of the Recruitment Rules called the Central Excise and Land Customs Department Inspector (Group 'C' posts) Recruitment Rules, 2002. Based on his letter seeking transfer from Shillong Zone to Pune Zone, an Establishment Office Order no. CCC/02/2018 dated 09.01.2018 was issued granting him transfer subject to certain conditions laid down therein and was relieved from his duties w.e.f.02.02.2018 from Shillong. The respondents had meanwhile amended the Recruitment Rules by issuing a notification in terms of these new rules. The earlier provision under Rule-4 which contained clauses Rule 4(i) and Rule 4(ii) were amended to read as Rule (5) containing only erstwhile Rule 4(1) to the effect that each cadre controlling authority (CCA) shall have its own cadre unless otherwise directed by the CBEC. In terms of these Rules, instructions were issued in circular dated 20.09.2018 by which all inter-commissionerate transfers in the grade of

Inspector issued on or after 26.12.2016 (date of effect of RR-2016) were held to be non-est and they were directed to be treated as on deemed loan basis w.e.f. 26.12.2016 until relief on 31.03.2019 for report to their parent zones. The applicant has challenged these orders and has sought the following reliefs:

"a. This Hon'ble Tribunal may graciously be pleased to call for the records of the case from the Respondents and after examining the same and set aside the Impugned Circular dated 20.09.2018 with all consequential benefits.

b. This Hon'ble Tribunal may graciously be hold and declare that Inter-Commissionerate Transfer granted to the Applicant at Goa Commissionerate vide Establishment Order dated 09.01.2018 is legal and valid and the Respondents be restrained from disturbing the same without in any manner.

c. This Hon'ble Tribunal may graciously be pleased to hold and declare that the decision to discontinue the Inter-Commissionerate Transfers vide discontinue the Inter-Commissionerate Transfers vide Circular dated 20.09.2018 can only be implemented prospectively and the same does not have any effect on the Establishment Order dated 09.01.2018 passed in case of the Applicant.

d. Costs of the application be provided for.

e. Any other and further order as this Hon'ble Tribunal deems fit in the nature and circumstances of the case be passed."

5. The applicant has filed OA No.234/2019 on 05.04.2019. In this case he commenced service on 19.04.2016 from Vishakhapatnam Zone and sought transfer to Mumbai which was ordered in Establishment Office Order no.125/2018 dated 28.06.2018 issued by the Principal Commissioner of Customs (General), Mumbai and reported at Mumbai thereafter on 09.07.2018. In terms of the Board orders, he has been advised of his reversion on 31.03.2018 in Establishment Office Order no.219/2018 dated 16.10.2018 by the Principal Commissioner of Customs (General) Mumbai. He has sought the following nearly identical reliefs:

"a. This Hon'ble Tribunal may graciously be pleased to call for the records of the case from the Respondents and after examining the same quash and set aside the Impugned Circular dated 20.09.2018, and order dated 16.10.2018 qua the Applicant with all consequential benefits.

b. This Hon'ble Tribunal may graciously be hold and declare that Inter Commissionerate Transfer granted to the Applicant at Mumbai zone vide Establishment Order dated 28.06.2018 is legal and valid and the Respondents be restrained from disturbing the same in any manner.

c. This Hon'ble Tribunal may graciously be pleased to hold and declare that the decision to discontinue the Inter Commissionerate Transfers vide Circular dated 20.09.2018 can only be implemented prospectively and the same does not have nay effect on the Establishment Order dated 28.06.2018 passed in the case of the Applicant.

d. Costs of the Application be provided for.

e. Any other and further relief as this Hon'ble Tribunal deems fit in the nature and circumstances of the case be granted."

6. At the outset, it is clear that the applicants are not challenging the vires of the Recruitment Rules of 2002 which had enabled them this benefit of inter-commissionerate transfer or of the rules of 2016 which has dropped the said provisions from the Recruitment Rules and therefore, made it clear that the Inspector Cadres under each Commissionerate are independent

of other. An identical matter had been considered by the Bangalore Co-ordinate Bench of this Tribunal in OA No.101/2018 dated 15.11.2018 by which it was held that the rules appeared to be arbitrary and therefore, the Tribunal held that the rule should be quashed and accordingly quashed the orders. The matter was also heard by the Ernakulam Bench of this Tribunal in a batch of OAs lead by OA No.956/2017 decided on 08.08.2018. The Bench considered that after the Recruitment Rules had been formulated in the year 2002, the practice of ICT was stopped by CBEC by order dated 19.02.2004. But this was restored on 27.10.2011 and continued with problems of discrimination and non-uniform practices. Finally, that Tribunal directed the department to formulate a policy on ICT and this was done by issue of draft guidelines in order F. No.5/1/2016-Estt dated 05.02.2018. Therefore, that bench did not accept the inference that the exclusion of mention of ICT in Recruitment Rules of the year 2016 was relevant to the case of the applicants and accordingly allowed the OA. This

matter was taken to the Hon'ble High Court of Kerala at Ernakulam which considered the status of the Recruitment Rules vis-a-vis executive orders including by reference to OM No.A.22015/23/2011-Ad.III.A dated 27.10.2011 and the rulings of the Hon'ble Apex Court on the privacy of rules held as follows:

"22. In A.B.Krishna and others v. State of Karnataka and others [(1998) 3 SCC 495], the Karnataka Government had made the Mysore Fire Force (Cadre Recruitment) Rules, O.P.(CAT) Nos.173, 176 & 190 of 2018-1971, which contained a provision for promotion to the post of leading firemen from the post of Firemen/Firemen Drivers. An examination was conducted in accordance with the Rules and a select list prepared for promotion to the post of leading firemen. Pending the select list, the Government of Karnataka took a policy decision that promotions to various posts, including that of leading firemen, shall be made on the basis of seniority-cum-merit and not by selection. The Karnataka Civil Services (General Recruitment) Rules, 1977 was amended accordingly and the appellants promoted to the post of leading firemen based on seniority. Their promotions were challenged on the ground that the Karnataka Civil Services (General Recruitment) Rules, 1977 was not applicable and that promotion to the post of leading firemen shall continue to be governed by the Mysore Fire Force (Cadre Recruitment) O.P.(CAT) Nos.173, 176 & 190 of 2018. Rules, 1971 made by the State Government under Section 39 of the Fire Force Act, 1954. Answering the

issue involved, the Apex Court held as follows:

"It is no doubt true that the Rule-making authority under Article 309 of the Constitution and Section 39 of the Act is the same, namely, the Government (to be precise, Governor, under Article 309 and Govt. under Section 39), but the two jurisdictions are different. As has been seen above, power under Article 309 cannot be exercised by the Governor, if the legislature has already made a law and the field is occupied. In that situation, Rules can be made under the Law so made by the legislature and not under Article 309. It has also to be noticed that Rules made in exercise of the rule-making power given under an Act constitute Delegated or Subordinate legislation, but the Rules under Article 309 cannot be treated to fall in that category and, therefore, on the principle of "occupied field", the Rules under Article 309 cannot supersede the Rules made by the legislature."

23. The contention urged, based on the principle laid down in the aforementioned decision is that, insofar as the Recruitment Rules of 2016 do not contain any provision O.P. (CAT) Nos.173, 176 & 190 of 2018 regarding transfer, it is not an occupied field and therefore, Annexure A3, which is an Executive Order governing the issue of ICT is a valid order. The said contention regarding the absence of provision prohibiting ICT in the Recruitment Rules of 2016 and the validity of Annexure A3 order cannot be countenanced for the following reasons; it is not in dispute that Annexure R3 Recruitment Rules of 2002 contained a provision enabling ICT. It is an admitted fact that no such provision is included in the Recruitment Rules of 2016 and on the other hand, Rule 5 of Annexure R4 specifically stipulate that each Cadre Controlling Authority (CCA)

shall have its own separate cadre, unless otherwise directed by the Central Board of Excise and Customs. Any inter-commissionerate transfer would violate the unique identity of each cadre envisaged under Rule 5 of Annexure R4, the Recruitment O.P. (CAT) Nos. 173, 176 & 190 of 2018 Rules of 2016. In that view of the matter, ICT orders issued on the strength of Annexure A3 would definitely be a transgression into the field occupied by Annexure R4 Rules issued in exercise of the power under the proviso to Article 309 of the Constitution of India.

24. For the reasons mentioned above, we find considerable force in the contention urged by the learned Additional Solicitor General that Annexure A1 having been issued without authority and in violation of the Recruitment Rules of 2016, was invalid and hence the cancellation of Annexure A1 by issuing Annexure A2 was perfectly in order. The decisions in Prem Parveen v. Union of India and others [1973 SCC OnLine Delhi 194] and Bhagawati Prasad Gordhandas Bhatt v. The State of Gujarat and others [1976 SCC OnLine Gujarat 51], lend credence to the contention. O.P. (CAT) Nos. 173, 176 & 190 of 2018. Moreover, the question as to whether Annexure A3 or Annexure R4 would govern the ICT of the respondents is no longer doubtful in view of Ext.R1 (o) Circular dated 20.9.2018 wherein, the Government of India has made it absolutely clear that the Recruitment Rules, 2016 do not have any provision for recruitment by absorption and accordingly, no ICT application can be considered after coming into force of the Recruitment Rules, 2016. In the light of Ext.R1(o), no reliance can be placed on Exts.R1(p) and R1(q) which are only office notes and related correspondences.

25. Having held that transfer is a condition of service, we also hold that it is well within the power of the employer to take a policy decision either to grant or not to grant ICT to its employees. There cannot be a judicial review and interference on such policy decisions. In the absence of a provision for ICT O.P. (CAT) Nos.173, 176 & 190 of 2018 in Annexure R4 Recruitment Rules of 2016, the Tribunal could not have found fault with the authorities in having issued Annexure A2 order cancelling Annexure A1 by which ICT was granted to the respondents and others.

In such circumstances, we find it impossible to sustain the findings in the impugned orders of the Tribunal. Consequently, the original petitions are allowed, setting aside the impugned orders of the Central Administrative Tribunal in O.A.Nos.956/2017, 148/2018 and 164/2018."

7. In the cases decided at Ernakulam Bench the transfer of the applicants in all the three OAs were made after the enactment of the Recruitment Rules of 2016 although some of them had applied for transfer prior to its enactment.

8. A similar set of applications were considered by the Principal Bench of this Tribunal in a batch of OAs led by OA No.93/2018 decided on 01.05.2019 wherein the applicants had made request for inter commissionerate transfer

prior to the issue of 2016 Recruitment Rules but had been transferred in the subsequent period in orders issued subsequent to the enactment of Recruitment Rules 2016. The question raised by these applicants was whether they would need to be considered under the Recruitment Rules of 2002 or under the Recruitment Rules of 2016. The Principal Bench in its order adopted the ratio and judgment of the Hon'ble High Court of Kerala at Ernakulam Bench which has been reproduced in previous paras and held that this batch of OAs was squarely covered by the said decision. It was particularly held by the Principal Bench that the argument that applicants had applied earlier and therefore, they should be considered under the 2002 Rules was not relevant because the cause of action for the applicants arose when their applications were rejected which happened after the issuance of the Recruitment Rules of 2016. The Principal Bench accordingly dismissed the OAs.

9. The present batch of OAs contain applicants who are identically placed with those

who were considered by the Principal Bench and the Ernakulam Bench. Therefore, their cases are squarely covered by the judgment of the Hon'ble High Court of Ernakulam Bench which is binding on this Tribunal for the purpose.

10. In the aforesaid circumstances, these OAs are dismissed as devoid of merits without any order as to costs.

(R. N. Singh)
Member (J)

(R. Vijaykumar)
Member (A)

v.

JD
26/8/19