(1973) 12 MP CK 0002

Madhya Pradesh High Court

Case No: M.P. No. 623 of 1972

Mathura Prasad Yadava		APPELLANT
	Vs	
Inspector General, Rly. Protection Force, Railway Board, New Delhi and others		RESPONDENT

Date of Decision: Dec. 4, 1973

Acts Referred:

- Constitution of India, 1950 - Article 226
- Essential Commodities Act, 1955 - Section 3(6)
- Mines and Minerals (Development and Regulation) Act, 1957 - Section 28(2)
- Railway Protection Force Act, 1957 - Section 15, 21, 21(2)(a), 21(3), 8

Citation: (1974) JLJ 225 : (1974) MPLJ 373

Hon'ble Judges: M.L. Malik, J; G.P. Singh, J

Bench: Division Bench

Advocate: P.C. Pathak, for the Appellant; B.C. Verma, for the Respondent

Final Decision: Dismissed

Judgement

@JUDGMENTTAG-ORDER

G.P. Singh, J.

The petitioner who is a Circle Inspector in the Railway Protection Force by this petition under Article 226 of the Constitution challenges an order of transfer passed by the Inspector General on 3rd June 1971 by which the petitioner was transferred from Central Railway to Western Railway.

The impugned order of transfer is expressed to be made under Regulation 14 of the Railway Protection Force Regulations, 1966 which reads as follows:

14. General.--Although the Railway Protection Force has been organised on all India basis, the members of the Force shall be ordinarily employed throughout service on the Railway or Railway Establishment to which they are posted on first appointment and shall have no claims, as of right, for transfer to another Railway or Railway Establishment. In the interest of administration, it shall, however, be open to the Inspector-General to transfer the members of the Force from one railway to another.

The Regulations were framed and issued by the Inspector General with the approval of the Central Government in exercise of the power conferred on that behalf by Rule 32 of the Railway Protection Force Rules, 1959. Rule 32 is as under.

Powers of Inspector-General to frame regulations,--The Inspector-General may, from time to time, for the proper administration of the Force frame and issue regulations with the approval of the Central Government and superior officers and members of the Force shall, as a condition of their service, be governed by such regulations in the discharge of their duties. Such regulations as are in force on the date of commencement of the Act shall continue to remain in force unless repealed or modified

The Rules were made by the Central Government u/s 21 of the Railway Protection Force Act, 1957. The relevant clauses of this section read as under:

21. Power to make Rules:--(1) The Central Government may, by notification in the Official Gazette, make Rules, for carrying out the purposes of this Act.

(2) In particular and without prejudice to the generality of the foregoing powers, such Rules may provide for:

(a) regulating the classes and grades and the pay and remuneration of superior officers and members of the Force and their conditions of service in the Force;

xxx xxx xxx xxx

(3) All Rules made under this section shall be laid for not less than thirty days before both Houses of Parliament as soon as possible after they are made and shall be subject to such modifications as Parliament may make during the session in which they are so laid or the session immediately following.

The learned counsel for the petitioner has raised before us the following contentions: (1) Rule 32 is invalid as the Central, Government instead of itself making rules regulating the conditions of service as required by section 21(2)(a) has sub-delegated that power to the Inspector-General by authorising him to make regulations; (2) assuming that Rule 32 is valid, Regulation 14 is still invalid as it was not laid before Parliament as required by

section 21(3); (3) the Regulation is invalid also on the ground that it is in excess of the power conferred on the Inspector-General by Rule 32 ; and (4) that the transfer of the petitioner from the Central Railway, where he has been serving upto this time, to the Western Railway will prejudicially affect his seniority and chances of promotion.

Although there is no direct English authority on the point, the English writers have consistently expressed the view that an authority, to whom power to make delegated legislation is conferred, cannot sub-delegate that power unless it is authorised to do so by the enabling Act. [see Allen, Law and Orders, 3rd edition, p. 181; Smith, Judicial Review of Administrative Action, 2nd edition, pp. 282, 283; Halsbury"s Laws of England, 4th edition, Vol. 1, p. 34.]. The rule against sub-delegation of legislative power has been judicially recognised in Commonwealth countries; [Geraghty v. Porter (1917) NZLR 554; A.G. of Canada v. Brent (Canada) LR 1956 SC 318; Fox and Bavies, Sub-Delegated Legislation, 28 Australian Law Journal p. 486]. In India the rule can be taken to be firmly established by the decision of the Supreme Court in Ganpati Singhji v. State of Ajmer AIR 1955 SC 188. In that case the question related to delegation of rule making power conferred on the Chief Commissioner by section 46 ALR 1877 . That section empowers the Chief Commissioner among other things to make rules for "the maintenance of watch and ward, and the establishment of proper system of conservancy and sanitation at fairs and other large public assemblies." The rule made by the Chief Commissioner prohibited the holding of fairs except under a permit issued by the District Magistrate who was "to satisfy himself before issuing any permit, that the applicant was in a position to establish a proper system of conservancy, sanitation and watch and ward at the fair." The Supreme Court held that the rule did not itself bring a system of conservancy and sanitation into existence and merely empowered the District Magistrate to evolve his own system and to see that it was observed and as the Chief Commissioner was not authorised to delegate his authority of establishing a system, the rule made by him was ultra vires. The enabling Act, may, however, empower the authority on whom power to make delegated legislation is conferred to further delegate that power to some other authority; Harishankar Bagla and Another Vs. The State of Madhya Pradesh, . But there is a strong presumption against construing a grant of legislative power as impliedly authorising sub-delegation, therefore, sub delegation can be held to be permissible only when power to that effect is expressly conferred or when it can be inferred by necessary implication.

Section 21 of the Act empowers the Central Government to make rules. The Act contains no provision authorising the Central Government to sub-delegate its power of making rules. There is also nothing in the Act which may lead one to conclude that the authority to sub-delegate has been conferred by necessary implication. The learned counsel for the petitioner is, therefore, right in contending that the Central Government has no authority to sub-delegate its power of making rules u/s 21 of the Act.

The next question is whether the Central Government by making Rule 32 has sub-delegated its power to the Inspector- General. By section 21(2)(a) the Central Government is empowered to make rules regulating the classes and grades and the pay

and remuneration of superior officers and members of the Force, and their conditions of service in the Force. Rules 28 to 31 made in exercise of this power lay down the classes and grades, and the pay and allowances including gratuity, pension, provident fund benefits etc. of superior officers and members of the Force. These rules also lay down the duration of appointments and the age of superannuation. Thus, the important conditions of service are all provided in these rules which are directly made by the Central Government. Then comes Rule 32 which unthorises the Inspector-General to frame and issue regulations with the approval of the Central Government for the proper administration of the Force. The Rule further lays down that the superior officers and the members of the Force shall, as a condition of their service, be governed by the regulations so made. In this connection it is relevant to refer to section 8 of the Act which vests the superintendence of the Force in the Central Government and subject thereto the administration of the Force in the Inspector-General. The section further provides that the administration of the Force shall be carried out by the Inspector-General in accordance with the provisions of the Act and of any rules made thereunder. When section 8 vests the administration of the Force in the Inspector-General, it is implicit in that provision that he can issue general or special orders for the proper administration of the Force, Further, as the administration of the Force by the Inspector-General is to be carried out in accordance with the provisions of the Act and the rules made thereunder and under the superintendence of the Central Government, it is also implicit that the orders issued by the Inspector-General in the exercise of his power of administration of the Force u/s 8 must be consistent with the Act and the Rules and in conformity with the control exercised by the Central Government in the exercise of its power of superintendence. In this background, when Rule 32 authorises the Inspector-General to frame and issue regulations with the approval of the Central Government for the proper administration of the Force, it confers no new power on the Inspector-General but it merely makes express what is implicit in section 8 of the Act. The Rule correctly understood, does not sub-delegate any power of the Central Government of making rules as to the conditions of service; it merely recognises that power of administration of the Force subject to control of the Central Government is vested by section 8 of the Act in the Inspector-General. The condition of service is laid by the rule itself that superior officers and members of the Force shall, as a condition of their service, be governed by the regulations in discharge of their duties. Putting it differently, the rule serves a dual purpose: First, by authorising the Inspector-General to frame and issue regulations with the approval of the Central Government for the proper administration of the Force it carries out the purpose of section 8 of the Act and makes express which is implicit in that provision; and secondly, it lays down a condition of service for the officers and members of the Force that they shall be governed by the regulations in the discharge of their duties. The rule does not in any way transfer to the Inspector- General the rule making power of the Central Government on the subject of conditions of service of the officers and members of the Force and there is no sub-delegation of any rule making power.

There is yet another reason for holding that there is no sub-delegation. The authority to make regulations conferred on the Inspector-General by Rule 32 is accompanied with an important condition that it can be exercised only with the approval of the Central Government. The power to approve preserved by the Central Government by the rule will include a power to disapprove or to reject any regulation proposed by the Inspector-General. It will even include a power to suggest modification or change in a proposed regulation. Thus, the control preserved by the Central Government is substantial and close enough to hold that the regulations made and issued by the Inspector-General are in effect regulations made and issued by the Central Government. The reason of the rule against sub-delegation is that when Parliament entrusts a function to A, confidence being reposed in A, he alone must discharge that function. This reason is wanting in a case where the delegate preserving substantial control takes merely the assistance of some other person for discharging the function entrusted to him ; the confidence reposed in the delegate by Parliament is then not betrayed and there is no real sub-delegation. In Union of India (UOI) and Another Vs. P.K. Roy and Others, the Supreme Court, in dealing with the power of integration of services vested in the Central Government under the States Reorganisation Act, 1956, held that so long as the Act of ultimate integration is done with the sanction and approval of the Central Government and so long as the Central Government exercises general control over the activities of the State Government whose assistance is taken in the task of integration, it cannot be said that there is any violation of the rule against sub-delegation. In holding so the Court made the following general observations:

If, however, the administrative authority named in the statute has and retains in its hands general control over the activities of the person to whom it has entrusted in part the exercise of its statutory power and the control exercised by the administrative authority is of a substantial degree, there is in the eye of law no "delegation" at all and the maxim "delegatus non potest and delegare" does not apply See Fourier John and Co. (Leeds) v. Duncan 1941 Ch. 460. In other words, if a statutory authority empowers a delegate to undertake preparatory work and to take an initial decision in matters entrusted to it but retains in its own hands the power to approve or disapprove the decision after it has been taken, the decision will be held to have been validly made if the degree of control maintained by the authority is closed enough for the decision to be regarded as the authority"s own.

These observations equally apply to the sub-delegation of legislative power, for the rule against sub-delegation of legislative power is only a corollary of the more general rule that a discretionary power conferred by a statute must be exercised only by the authority to which it has been committed unless the statute permits sub-delegation. We, therefore, reject the argument that Rule 32 suffers from the vice of sub-delegation and is invalid.

We now come to the question whether Regulation 14 framed by the Inspector-General is bad as it was not laid before Parliament. There is no judicial authority on the point whether subsidiary orders issued under a rule should also be laid before Parliament when

the enabling Act in terms only requires that the rules made under it should be laid. The Committee on Subordination Legislation of Lok Sabha appears to be of the view that subsidiary orders should also be laid before Parliament, but the recommendations of the Committee were dropped in some cases where the Government pointed out that subsidiary orders run into thousands and there would be considerable practical and administrative difficulties in laying them before the House; [See Delegated Legislation in India, Indian Law Institute, p. 239]. We will, however, assume for the purposes of this case that the requirement of laying prescribed by section 21(3) of the Act applies to regulations made under Rule 32. We also accept the allegation made in the petition that the regulation was not laid at all, for this fact is not controverted by the respondents.

What then is the consequence of failure to lay the regulation? Laying clauses enacted by the legislature are of various kinds, but essentially they are of three varieties: (1) laying which requires no further procedure; (2) laying allied with an affirmative procedure; and (3) laying allied with a negative procedure; See Hukam Chand etc. Vs. Union of India (UOI) and Others, . An example of the laying clause of the first variety requiring no further procedure is found in section 3(6) of the Essential Commodities Act, 1955, which provides that "every order made shall be laid before both Houses of Parliament as soon as may be after it is made." The second variety, i. e. laying allied with an affirmative procedure, can be illustrated by reference to section 28(2) of the Mines and Mineral (Regulation and Development) Act, 1957, which reads "no rules made shall come into force until they have been approved whether with or without modifications by each House of Parliament." The laying clause in section 21(3) of the Railway Protection Force Act with which we are concerned and which we have earlier quoted is of the third variety. Apart from these three broad categories, laying clauses are found in various forms depending upon the degree of control which Parliament desires to keep over the delegated legislation. The Select Committee on Delegated Legislation in 1953 summarised these forms under seven heads; [Delegated Legislation in India, pp. 166 to 169]. A correct construction of any particular laying clause depends upon its own terms. If a laying clause defers the coming into force of the rules until they are laid, the rules do not come into force before laying and the requirement of laying is obligatory to make the rules operative; R. v. Sheer Metalcraft (1954) 1 All ER 542, p. 545 and Metcalfe v. Cox (1895) AC 328 (HL). So the requirement of laying in a laying clause which requires an affirmative procedure will be held to be mandatory for making the rules operative, because, in such cases the rules do not come into force until they are approved, whether with or without modifications, by Parliament. But in case of a laying clause which requires a negative procedure, the coming into force of the rules is not deferred and the rules come into force immediately they are made; Hukam Chand v. Union of India. The effect of a laying clause of this variety is that the rules continue subject to any modification that Parliament may choose to make when they are laid ; but the rules remain operative until they are so modified. Laying clauses requiring a negative precedure are, therefore, construed as directory ; See Bailey v. Williamson (1873) L R 8 Q R 118 and Storey v. Graham (1899) 1 406, p. 412. The matter is put beyond controversy by the decision of the Supreme Court

in Jan Mohammad Noor Mohammad Begban Vs. State of Gujarat and Another, . In that case the question related to the construction of section 26 (5) of the Bombay Agricultural Produce Markets Act, 1938, which enacts a laying clause requiring a negative procedure. In holding that the said requirement of laying was not mandatory the Court observed as follows:

Section 26 (5) of Bombay Act 22 of 1939 does not prescribe that the rules acquired validity only from the date on which they were placed before the Houses of Legislature. The rules are valid from the date on which they are made u/s 26 (1). It is true that the Legislature has prescribed that the rules shall be placed before the House of Legislature, but failure to place the rules before the Houses of Legislature does not affect the validity of the rules, merely because they have not been placed before the Houses of the Legislature. Granting that the provisions of sub-section (5) of section 26 by reason of the failure to place the rules before the Houses of Legislature were violated, we are of the view that sub-section (5) of section 26 having regard to the purposes for which it is made, and in the context in which it occurs, cannot be regarded as mandatory.

It is true that in two earlier cases of the Supreme Court viz D.S. Garewal Vs. The State of Punjab and Another, and In Re: The Kerala Education Bill, 1957. Reference Under Article 143(1) of The Constitution of India, there are observations to the effect that even in the case of a laying clause requiring a negative procedure the rules come into operation only when they are laid ; but these observations are merely obiter and cannot prevail against the clear ruling given in Jan Mohd"s case. Our conclusion, therefore, is that the laying requirement enacted in section 21(3) of the Act is merely directory. It logically follows that failure to lay Regulation 14 has no effect on its validity and it continues to be effective and operative from the date it was made. The learned counsel for the petitioner referred to us an unreported judgment of the Delhi High Court Gurbaksh Singh v. General Manager, Northern Railway Civil Writ No 872 of 1971, decided on the 10th March 1972 in support of the view that Regulation 14 was invalid for want of laying before Parliament. With great respect, for the reasons already indicated, we are unable to accept the view taken in that case.

We will now take up the contention that Regulation 14 is ultra vires the powers conferred on the Inspector-General by Rule 32. The argument in support of this contention is that the rule authorises the Inspector-General to frame and issue regulations only "for the proper administration of the Force", and that the subject of transfer which is dealt with by Regulation 14 does not concern the "administration of the Force" and, therefore, the regulation is in excess of the power conferred by the Rule. To understand the real nature of Regulation 14, we have to read it in the context of section 15 of the Act. That section provides that "every superior officer or member of the Force shall, for the purpose of this Act, be considered to be always on duty and shall at any time be liable to be employed in any part of the Railways throughout India." The underlined words clearly meant that any superior officer or member of the Force can at any time be posted to any place on any Railway within India. The section, therefore, necessarily confers on the authority

concerned power to transfer any officer or member of the Force from one Railway to another. It was argued that the section only enables temporary posting on the occasion of some emergency of an officer or member from one Railway to another but not a permanent transfer. It is difficult to accept this argument, for there are no such words of limitation in the section. In our opinion, permanent and temporary transfers are both included within the ambit of the section. The section in effect lays down a condition of service of the officers and members of the Force that they can at any time be transferred from one place to another on any Railway throughout India and it also impliedly confers the necessary power of transfer on the authorities concerned. Read in the background of the section, Regulation 14 does not create any new power of transfer ; it only regulates transfers for the proper administration of the Force by providing that a member will be employed normally on the Railway to which he is first posted and he will have no claim, as of right, for transfer to another Railway, but in the interest of administration it shall be open to the Inspector-General to transfer a member from one Railway to another. It has already been noticed that the administration of the Force is vested by section 8 in the Inspector-General and, therefore, when a member of the Force is to be transferred for administrative reasons from one Railway to another the Inspector-General will be the only proper authority to pass the necessary order of transfer. Regulation 14 makes that position clear. We are, therefore, of opinion that the topic of transfers dealt with by Regulation 14 is for the proper administration of the Force and its scope is within the power conferred on the Inspector-General by Rule 32.

As regards the contention that the transfer of the petitioner from Central Railway to Western Railway will affect his seniority and chances of promotion, we were told by the counsel appearing for the respondents, that the petitioner will get seniority according to his length of service in Western Rail way and that his chances of promotion are not likely to be affected We are, however, of opinion that even if the transfer from one Railway to another affects petitioner''s seniority or chances of promotion that cannot invalidate the transfer which is made in exercise of the power conferred by the Act and the rules and regulations made thereunder.

The learned counsel for the petitioner lastly drew our attention to the fact that the petitioner also prays in his petition that the Court should "direct the respondents to treat the petitioner on duty w. e. f. 4th May 1972 when he reported on duty and for making payment w. e. f. 1st December 1971." The facts bearing upon this relief are not admitted and as the matter relates essentially to claim of salary for the period in question we do not think it proper to investigate the matter in this writ petition. The petitioner can take recourse to civil suit for claiming any salary to which he may be entitled.

The petition fails and is dismissed. There shall, however, be no order as to costs. The security deposit may be refunded to the petitioner.