

(2006) 09 CAL CK 0074
In the Calcutta High Court
Case No : W.P.C.T. No. 290 of 2005

Hari Narayan Kirtania

APPELLANT

Vs

Union of India and Others

RESPONDENT

Date of Decision : 15-09-2006

Acts Referred:

Constitution of India, 1950 — Article 261

Citation : 112 CWN 495

Hon'ble Judges : Manik Mohan Sarkar, J; Kalyan Jyoti Sengupta, J

Bench : Division Bench

Advocate : Udayan Dutta and Sanjit Kr. Ghosh, for the Appellant;

Final Decision : Allowed

Judgement

Kalyan Jyoti Sengupta, J.—I have had the advantage of going through the draft judgement of the Learned Brother. While agreeing with His Lordship's findings and ordering portion of the judgment I wish to supplement the same with my own words in the manner as follows : The fact of the case has been exhaustively recorded by His Lordship. The point involved in this matter is whether the applicant before us is entitled to get the benefit of being treated as on duty from 12th April, 1985 till 30th November, 1987 and for the period from 3rd December, 1987 to 7th August, 1989. On 12th April, 1985 the petitioner obtained interim order of injunction against the respondents from giving effect to the transfer order in his writ petition being CO. No. 6078 (W) of 1985. This interim order continued and no appeal was preferred till 30th November, 1987 when the said writ petition, on being transferred, was disposed of holding that the transfer order was valid. By order dated 30th November, 1987 learned Tribunal while upholding the order of transfer directed the respondents to make payment for the period spent by the applicant during the aforesaid period of interim order. The respondents appealed against the direction passed by the learned Tribunal for making payment. The Supreme Court allowed the S.L.P, holding that the direction given by the learned Tribunal is not lawful as it was not within its

jurisdiction to. pass such order. This S.L.P, was allowed on 12th July, 1989. The petitioner thereafter resumed his office at Hyderabad as P.R.O. on 7th August, 1989. The petitioner was also promoted to the post of the Assistant Passport Officer through U.P.S.C. and then he retired from service from Hyderabad office on 31st January 1992, but the period during which the interim order was subsisting was not treated as spent on duty by the Department. So he moved the Hon"ble Supreme Court for clarification and or modification of the order dated 12th July, 1989. The Hon"ble Supreme Court passed an order directing the respondents to consider the representation of the petitioner.

2. It seems to us because of the two orders of the aforesaid Supreme Court the learned Tribunal held that there is no scope for regularization of the aforesaid period treating the petitioner as having spent on duty.

3. In order to decide the aforesaid question I feel that two thorny issues are involved :

Whether on dismissal of the lis the effect of the interim order comes to an end with retrospective effect or not ? In this case order of injunction was passed and for violation of the order of injunction contempt application was initiated and in spite of that the respondent authority did not allow in breach of the order of injunction to resume duty.

4. What would be the position of law even if the lis is dismissed, with regard to effect of the interim order passed by the Court vis-a-vis the parties ? It has been explained on a good number of occasions by the Supreme Court in the case of Burn Standard Company Ltd. vs. Tarun Kumar Chakraborty, (2002) 10 SCC 585) .

5. In paragraph 8 of the said judgement it has been found that the authority concerned could not have any justification under the law not to allow the employee concerned to join service during which the interim order was subsisting and also to make payment and accord consequential benefit.

6. Then again in the case of Electronics Corporation of India Limited & Ors. vs. Sateesh S. Rao Sonawalkar reported in 2004(11) SCC 550 it was held in paragraph 9 that the employee concerned therein is entitled to be treated as spent on duty during, the period when interim order of injunction of the Court was subsisting.

7. Thus, it is settled position now that if the Court passes an order of injunction and consequently employee in spite of reporting for duty and being prevented from resuming office he cannot be treated to be off duty. Dismissal of the proceedings ultimately does not take away effect of interim order when it was valid, subsisRRting and binding. Naturally benefit of such an order which ought to have been given, must be given. The Constitution of India mandates under Article 261 what I have spoken of: "Article 261: Public acts, records and judicial proceedings : (1) Full faith and credit shall be given throughout the territory of India to public acts, records and judicial proceedings of the Union and of every

State....

8. In my view the above provision is one of the facts of expressed-provision of Rule of law, which is basic structure of the Constitution.

9. The Rule of law thus demands the order of the Court so long remaining subsisting and valid has to be accepted and carried out by everyone under the provision of our Constitution. In this case, the High Court passed an order of injunction initially, so the applicant could not resume duty at the place of transfer and naturally in compliance of the order of this Court in writ jurisdiction he rightly reported for duty at Calcutta Office. It is the fault of the respondents who neither took any step for getting the said interim order vacated, nor allowing the applicant to perform his duty at Calcutta Office. The respondent authority cannot take the law in their own hand with their administrative power. They ought to have allowed him to resume duty at Calcutta.

10. As such the respondent authority is bound to treat the petitioner as having spent on duty during this period.

11. Now I shall deliberate on the implication of the two orders passed by the Hon"ble Supreme Court. Texts of the two orders are set out hereunder.

12. Order dated 12th July, 1989 of the Hon"ble Supreme Court is as follows :

"The respondent's writ petition pending before the Calcutta High Court was subsequently transferred to the Central Administrative Tribunal, Calcutta Bench. The Tribunal by its order dated November 30, 1987 disposed of the writ petition. The Tribunal held that the order of transfer was not mala fide or unfair, there was no ground for interfering with the transfer order. After recording that finding the Tribunal directed the appellants to pay all arrears of salary with allowances to the respondent with a further direction that no release order should be issued to the respondent unless all his emoluments are paid to him.

After hearing learned counsel for the parties we find that the Tribunal acted in excess of its jurisdiction in issuing impugned direction. The Tribunal recorded positive findings that the transfer order was legal and valid and it was not vitiated by any unfairness, or mala fide, thereupon it should have dismissed the writ petition. It had no jurisdiction to issue further directions regarding the release order and the payment of emoluments. The Tribunal lost sight of the fact that the respondent had already been released from the Calcutta Office with effect from 15-03-1985, therefore, there was no question of issuing any fresh release order. We accordingly allow the appeal and set aside the impugned direction of the Tribunal. There will be no order as to costs."

Order dated 2nd November, 1992 of the Hon"ble Supreme Court is as follows :

"Counsel heard. In our opinion no further direction is called for as the appellants have already given the applicant the benefit of adjusting his Earned Leave against the period in question. We are shown an order dated 13-07-1990 which

is at Annexure-VI and in view of that order we direct that the applicant may make a representation to the authorities for similar relief and the said representation will be considered and disposed of according to law as early as possible.

I.A. No. 1-4 are disposed of."

13. On perusal of both the orders, according to me, the Supreme Court set aside the direction given by the learned Tribunal in relation to payment of salary during the aforesaid period holding that the Tribunal had no jurisdiction. By this order passed on the S. L. P. the Supreme Court did not decide the question whether the applicant is entitled to get the benefit of being treated as on duty during the aforesaid period. This question was in our view kept at large. It is not the question of *res judicata*, as principle of *res judicata* will be applicable in a case where a competent Court has decided a matter on a particular issue. Before the Hon'ble Supreme Court the issue was of jurisdiction, not of entitlement of the aforesaid benefit on merit.

14. The Supreme Court held impliedly that it was the domain of the administration how to deal with this period during which the interim order was subsisting and it would be plain when one reads subsequent order of clarification of the Supreme Court that the applicant would be entitled to make a representation which shall be decided in accordance with law.

15. The administrative authority was to take decision in accordance with law meaning thereby without being influenced and swayed by the earlier decision of the Supreme Court. The law has been explained as above, so the respondent authority should have followed as we have already discussed. It is significant to mention that on identical fact and situation other four employees were given the benefit as claimed by the applicant herein. But in case of the applicant the said legal position was not followed. Accordingly, the judgement and order of the learned Tribunal is not sustainable as it failed to address the real issue and further to decide the same.

Per Manik Mohan Sarkar, J.

16. The Judgment dated 23-03-2005 of the learned Central Administrative Tribunal passed in Original application No. 159 of 1995 is under challenge in this application. The fact lending to filing the above application is stated in short as follows :

Petitioner was appointed as Lower-Division-Clerk in the Passport Office at Calcutta under the Ministry of External Affairs on January 14, 1957 and subsequently was promoted on April 12, 1978, though the promotion was effected on and from May 30, 1977. Subsequently, he was transferred to Bhubaneswar as Superintendent on ad-hoc basis on April.18. 1980 and again was transferred to Calcutta in December, 1983 to discharge his duties as Superintendent. The petitioner was subsequently appointed on promotion as

Public Relations Officer at Calcutta Office on July 18, 1984. On March 15, 1985 the petitioner claimed to have been released from Calcutta Office with a direction to join at Jaipur as Public Relations Officer though no formal order of transfer was issued. The petitioner made representation against that transfer order on March 16, 1985 but his representation was rejected by a telegraphic message on March 30, 1985 and the petitioner was directed to join his Office at Jaipur or to face disciplinary action.

17. Then the petitioner filed a writ application being CO. No. 6078(W) of 1985 before this High Court challenging the said order of transfer and an interim order was issued on 12-04-1985 thereon restraining the respondents from giving effect to the transfer order. Petitioner claimed that the respondents neither allowed the petitioner to discharge his duties by allowing the petitioner to join at Calcutta Office nor paid his salaries. Petitioner then filed an application for contempt and Rule was issued. The said Rule was challenged in an appeal by the respondents on October, 18, 1985 before this Court but ultimately that application was dismissed on January 24, 1986. Even then the petitioner was not allowed to report for duty at Calcutta Office though the said post was available there. Subsequently, CO. No. 6078(W) of 1985 was transferred to Calcutta Bench of Central Administrative Tribunal on November 30, 1987 on its formation and subsequently, the learned Tribunal held the transfer as not unfair and the same was held valid and it was viewed that for non-availability of the post of Public Relations Officer at Jaipur, the petitioner should be transferred to a new place of posting and also directed the respondents to pay all the arrears by December 31, 1987 and thereafter he was directed to be transferred on and from January 1, 1998.

18. The petitioner alleged that even then he was not allowed to join. Petitioner also alleged that the counsel for the respondents submitted that all payments towards the salaries would be made to the petitioner on obtaining instruction and even then the respondents preferred a SLP before the Hon''ble Supreme Court being No. 1449 of 1988. By Order dated July 12, 1989 the Hon''ble Supreme Court held that the impugned order of tribunal as in excess of jurisdiction, even though the tribunal held the transfer order as valid and legal. The petitioner filed application before the Hon''ble Supreme Court in reference to an order of the respondents dated July 13, 1980 where four employees of the Ministry of External Affairs who challenged their respective orders of transfer before the Central Administrative Tribunal, Severe treated as on duty during the period of stay issued by the learned Tribunal and were allowed to draw annual increment and other pecuniary benefits and in reference to the same Hon''ble Supreme Court directed the petitioner on November 2, 1992, to file representation before the authority for similar relief and authority was directed to consider the representation and to dispose of the same in accordance with law as early as possible. The petitioner retired from the service on superannuation on January 31, 1992 and thereafter, the petitioner made repeated representations on different dates to the respondents for similar relief given to the earlier stated

four employees and those representations were replied by the respondents by an order dated December.19.1994 by stating that the petitioner could not be treated as analogous and could not be granted with similar relief.

19. Being aggrieved, petitioner filed the above Application being No. 159 of 1995 which was disposed of by the learned Tribunal on May 8, 1998 by holding the said application as not maintainable in view of the Hon''ble Supreme Court's order dated July 12, 1989. Petitioner moved this High Court by filing W.P.C.T. No. 93 of 1998 which was disposed of on January

20. 1999 by setting aside the said order of the learned Tribunal directing it to hear out and dispose of the said application after giving opportunities to the parties to be heard and to pass a reasoned order. The learned Tribunal again dismissed the said Original Application being No. 159 of 1995 by an order dated March 23, 2005 holding the order of transfer as valid and since the petitioner did not join the transferred post and discharge duties, his action was not treated as period spent on duty and the petitioner was ordered not to be entitled to any salary for work not discharged. None appeared on behalf of the respondents during hearing, nor any affidavit-in-opposition has been filed.

20. Mr. Udayan Dutta, learned advocate for the petitioner submitted that the petitioner was not initially permitted to join the Office at Calcutta even after being relieved, pending his representation against the order of transfer and subsequently even after the transfer direction was stayed by the Hon''ble High Court and continued till the disposal of the said writ before the Central Administrative Tribunal. The said period is claimed to be treated as "On Duty". Mr. Dutta further submitted that the order of the Central Administrative Tribunal, Calcutta in the S.L.P, filed by the respondents before the Hon''ble Apex Court which was ultimately disposed of on July 12, 1989. Further, it is submitted by Mr. Dutta that the said period in between December 3, 1987 on which day the request of petitioner was not acceded to by the respondents to permit him to join at Calcutta Office and July 12, 1989 on which day the Hon''ble Apex Court disposed of the S.L.P, to be treated as "On duty". It is the submission of Mr. Dutta that the period of absence of the petitioner from the date of his relieving from the Calcutta office on March 15, 1985 till the disposal of the S.L.P, by the Hon''ble Apex Court on July 12, 1989 was not intentionally done by the petitioner since he was not permitted to join in the office at Calcutta initially pending his representation and subsequently followed by an "interim stay order in that writ application. Mr. Dutta relied upon a decision reported in (2004) 11 S.C.C. 550 wherein in a similar type of case, the Hon''ble Apex Court held that the period from which an employee was relieved from his erstwhile Office on an order of transfer till the vacating of the order of stay to be treated as the period spent on duty and the subsequent period was directed to be adjusted against Earned Leave or any other such leave which according to the employer have been made admissible to the employee concerned and that the rest period has only to be regularized as against Extraordinary Leave without pay. Mr. Dutta further

submitted that the Hon''ble Apex Court in the said order held that by adjusting the period of absence of the employee concerned the continuity of the service of the employee is to be maintained and the arrears of salary to be calculated in the manner indicated in the order of the Hon''ble Apex Court.

21. Mr. Dutta submitted that without serving any formal order of transfer to the petitioner to join at Jaipur Office from Calcutta Office, he was released from Calcutta Office to join at Jaipur Office as Public Relations Officer and called that order as of administrative lapses since release precedes with the issue of transfer order. In the context of this submission of Mr. Dutta, we are of the view that the petitioner filed application before the learned Tribunal questioning that transfer order in Title Appeal No. 452/1987 and in the said application learned Tribunal held the transfer having no unfairness or malafide and in disposing of the application, the learned Tribunal made some other order in respect of issuing a fresh transfer order to any other outstation office since the vacancy at Jaipur Office was not available. In the said order learned Tribunal put a condition for the release of the petitioner that until all his arrear dues in respect of salaries are paid as per order of this High Court, order of transfer is not to be effected. The said order was challenged by the present respondents before the Hon''ble Supreme Court of India. The Apex Court did not interfere with the finding of the learned Tribunal in respect of the order of transfer but direction for payment of all the arrear dues was set aside. However, in view of the said decision of the Hon''ble Apex court, the order of transfer of the petitioner to Jaipur by way of release order has not been questioned as improper or beyond any rule. So, the petitioner''s plea of the said release order for his transfer. to the Jaipur Office cannot be questioned anew.

22. It is found that on filing of the writ application before this Court by the petitioner in C.O. No. 6078(W)/1985, the order of transfer to Jaipur Office was stayed and the said stay order remained operative till disposal of Transfer application No. 452/1987 by the learned Central Administrative Tribunal.

23. It is also found that the respondents in disregard to the said interim order of stay in C.O. No. 6078(W)/1985 did not allow the applicant to resume his duty at Calcutta office.

24. The refusal from the side of the respondents is well apparent from the letter dated April 15, 1985 (Annexure T-2'') wherein the joining report of the petitioner was left pending to be considered on receipt of the Ministry''s instructions and also from another letter dated December 14, 1987 of the respondents (Annexure ''P-31 on the same ground.

25. Mr. Dutta claimed that the absence of the petitioner for such a long period of four years and five months from March 15, 1985 till August 7, 1989 was not intentional from the side of the petitioner since he was not allowed to join the Office at Calcutta wherefrom he was relieved to join the Office at Jaipur on transfer and since it was under an order of stay and the request of the petitioner

to join the said office was refused repeatedly by the respondents in writing. So, Mr. Dutta submitted that the petitioner should be paid with full salaries for the said period by the respondents.

26. In consideration of the submissions made by Mr. Dutta, we are of the view that the period of absence of the petitioner is not negligible one since it covered a period more than four years and five months though the said period was intervened by an interim stay order from this Court followed by that of the Central Administrative Tribunal and then followed by refusal by the respondents to allow the petitioner to join the Office at Calcutta till the entire matter over on his transfer to the Hyderabad Office.

27. We have also considered the order passed by the learned Tribunal in upholding the order of transfer as legal and valid followed by some directions to release the salaries of the petitioner. We have also gone through the order passed by the Hon''ble Apex Court in SLP No. 1449 of 1988 wherein the Hon''ble Apex Court did not pass any order setting aside the finding of the learned Tribunal treating the transfer order as valid and legal. So, the petitioner was to move to his place of posting at Jaipur immediately after the order passed by the Tribunal.

28. Mr. Dutta submitted in reference to (Annexure "P-61 which is an order issued by the Ministry of External Affairs on July 13, 1990 releasing pay and allowances to four officers for the period during which their order of transfer was stayed by the learned Tribunal. Mr. Dutta submitted in the case of the petitioner similar order should have been there. As none is present on behalf of the respondents, this point of differentiation in between the petitioner and those four officers could not be explained since the claim made by the petitioner in reference to the said order (Annexure "P-6") was refused on the ground as not being analogous.

29. Though the respondents side ended up by refusing the petitioner's claim to release his pay and allowances during the period of stay in the way the matter was treated for four employees of the same office through the order dated July 13, 1990 (Annexure "P-67), it was simply refused only by stating that the case of the petitioner was not analogous with those four employees. The said order or any corresponding letter did not explain how the respondents' office treated the case of the petitioner as not analogous to the said case. Further, since the respondents' side did not appear during the hearing of this application, no clarification of the word "analogous" could be called for from the respondents' side. The matter was very lightly handled by the respondents' side since on repeated representations from the side of the petitioner by letters, respondents' side did not allow him to do his office work at Calcutta at least during the period of interim stay granted initially by this High Court and was continued before the learned Tribunal till the disposal of the petitioner's application. It may be that the Hon''ble Supreme Court of India might have set aside different directions given by this High Court and subsequently by the learned Tribunal giving several interim benefits to the petitioner from the side of the respondents, the interim

stay granted on 12-04-1985 was never vacated till before the learned Tribunal passed final order in the said writ application on 13-11-1977 in Title Appeal No. 452 of 1987 (CO. 6078(W)/1985). Since the order of transfer and the release of the petitioner from Calcutta Office were stayed in petitioner's writ application, it was a normal practice that the petitioner should have been permitted to work at the office from where he was transferred to. Jaipur, at least during the period of stay. From the finding of the learned Tribunal it is revealed that the respondents raised plea during the hearing of the writ application before the Tribunal, that the petitioner never joined the office or proceeded with the office work, the petitioner's plea for regularization of the said period as "on duty" should not be entertained on the principle of "No Work No Pay" basis. We cannot agree with the said finding of the learned Tribunal since the learned Tribunal has never discussed the petitioner's plea that the petitioner made several written representations to the respondents to allow or permit him to join at Calcutta office till the disposal of the said writ application. We cannot ignore the petitioner's plea that he made representations before the respondents to permit him to join at the Calcutta office, followed by refusal from the side of the respondents in writing to that effect.

30. It is not expected that the petitioner will proceed to Jaipur to join in the transferred post there since the said transfer followed by release of the petitioner from Calcutta Office was stayed for the interim period by the order of this Court together with the direction to allow the petitioner to continue in his pre-transfer posting. The absence of the petitioner from duty was not intentional on the part of the petitioner since he was prevented by the respondents, time and again, on the plea of instruction from the Ministry concerned. Respondents never informed the petitioner specifically about any such instruction of the Ministry.

31. It is our view that when the petitioner, time and again, made representations to the respondents to permit him to join at Calcutta Office after the stay order was passed by this Court in the writ application filed by him, and since his repeated representations were denied by the respondents by not allowing him to join his pre-transfer post at Calcutta, he should not be penalized without any payment of salary on the plea of "No Work No Pay" basis, during his absence from the office. It can never be stated that the petitioner was at fault during that period by not doing any office work.

32. Further, respondents never issued any letter to the petitioner calling explanation from him about his alleged unauthorized absence from the office during the alleged period and to initiate any disciplinary proceeding against him as he was so cautioned in reply to his representation to reconsider the order of transfer to Jaipur.

33. We are of the view that when some of the employees were permitted to draw pay and allowances for the period of stay granted by the learned Tribunal against their respective order of transfer, why similar benefit should not be extended to the petitioner standing almost on the same footing, rather he was in a better

position as he was not permitted by the respondents to join his pre-transfer posting during the interim stay on the transfer and release order, ignoring repeated representations from the side of the petitioner.

34. The learned Tribunal was wrong in observing that the Hon''ble Supreme Court upheld the order of transfer passed by the learned Tribunal and that no direction was given to the respondents to treat the period from 16-03-1985 till 06-08-1989 as "On Duty". On perusal of the copy of the order of the Hon''ble Apex Court in SLP Nov1449 of 1988, it is found that the Hon''ble Court did not interfere with the finding of the learned Tribunal upholding the order of transfer and the said order of transfer was touched only for reference in setting aside the directions given by the learned Tribunal to issue a fresh release order on payment of his arrear pay and allowances. The Hon''ble Supreme Court concluded the said order with the sentence-

"We accordingly allow the appeal and set aside the impugned directions of the Tribunal".

35. So, it cannot be stated that the absence of the petitioner from the office was dealt with by the Hon''ble Apex Court in the said appeal and thus, at least in respect of the order of transfer, the order of the learned Tribunal dated 30-11-1987 stands. On that day learned Tribunal vacated the interim order of stay. So, it is deemed that the interim order of stay continued upto 30-11-1987.

36. In our considered view and in reference to our above observations, we cannot agree with the findings of the learned Tribunal and accordingly, direct the respondents to adjust the period of absence of the petitioner from the office from 15-03-1985 to 30-11-1987 to be treated as "On Duty" with full pay and allowances and rest period from 01-12-87 to 07-08-1989 up to the date of his joining at Hyderabad Office be adjusted initially with the Earned Leave and the rest period to be treated as "Extraordinary Leave" without pay, within a period of two months since the petitioner has already retired from the service on 31-01-1992 and his retirement benefits has not yet been completely released. So, the petition is, thus, allowed accordingly.

We pass no order s to costs.

Manik Mohan Sarkar, J.