
(2018) 10 CAT CK 0121

In the Central Administrative Tribunal

Case No : Original Application No. 1805 Of 2017

Mukul Sanwal

APPELLANT

Vs

Union Of India

RESPONDENT

Date of Decision : 09-10-2018

Acts Referred:

Administrative Tribunals Act, 1985 — Section 19
All India Services (Leave) Rules, 1955 — Rule 7(2)
All India Services (Death-cum-Retirement Benefits) Rules, 1958 — Rule 5(1), 16(2A)
Constitution Of India, 1950 — Article 142, 311(2)

Citation : (2018) 10 CAT CK 0121

Hon'ble Judges : Nita Chowdhury, Member (A)

Bench : Single Bench

Advocate : Mahendra Vikram Singh

Final Decision : Dismissed

Judgement

1. MA 3228/2018

This MA has been filed by the respondent seeking waiving of the costs imposed by this Tribunal on the respondent for delay in filing the counter affidavit. For the reasons stated therein, the same is allowed. The cost earlier imposed by this Tribunal upon the respondents is waived off and the counter affidavit filed by the respondents is taken on record.

OA 1805/2017

By filing the instant OA under Section 19 of the Administrative Tribunals Act, 1985, the applicant sought the following reliefs:-

"(a) This tribunal may be pleased to set-aside the impugned communications/orders dated 24.11.2016, 26.12.2016 and 06.01.2017;

(b) This Hon?ble Tribunal may be pleased to direct the respondents to pay pension and other related entitlements due to the applicant alongwith arrears

and interest thereon; and

(c) pass such other/further orders as this Hon^{ble} Tribunal may deem fit and proper in the facts and circumstances."

2. Brief facts of the case, as stated by the applicant, are that the applicant was appointed to the Indian Administrative Service in 1971. In 1993, the applicant was deputed on foreign assignment as Policy Adviser in the United Nations, duly approved by the competent authority and cadre controlling authority. Thereafter prior to completion of 5 years on foreign assignment, the applicant was transferred within the United Nations by the Secretary General. Government of India considered the said transfer as a fresh deputation and the foreign assignment was not extended beyond 1995, even though he had not completed 5 years period for such assignment permissible under the Consolidated instructions relating to Foreign Assignment of Indian Exports.

2.1 On 12.9.1997, the Cadre Controlling Authority endorsed the stand of the applicant for extension of foreign assignment vide letter dated 12.9.1997 and applicant continued to represent against the aforesaid decision.

2.2 The applicant was subsequently only given the option that he should resign if he wanted to continue in the United Nations, vide communication dated 25.1.2001 to which applicant did not agree.

2.3 Thereafter the applicant made representation on 2.9.2016 seeking pension and other related benefits from the respondent, inter alia, on the ground that he had qualifying period of service for pension and other related benefits before proceeding on foreign assignment. However, the same was rejected vide impugned order dated 24.11.2016 and his earlier representation dated 10.11.2016 was also rejected vide communication dated 26.12.2016.

2.4 Thereafter again the applicant submitted another representation dated 30.12.2016 seeking grant of pension and other benefits due to him but the same was again rejected by the respondent vide impugned communication dated 6.1.2017 whereby decision communicated vide orders/communications dated 24.11.2016 and 26.12.2016 was reiterated.

2.5 Feeling aggrieved by the aforesaid orders/communications of the respondent, the applicant has left with no option except to approach this Tribunal for redressal of his grievances on the following grounds:-

(i) it is settled legal position that pensionary benefits extend to all those persons who render qualifying period of service under the pension rules and as such, purported deemed resignation under the leave rules cannot be penal in nature and entail forfeiture of past services to which applicant is otherwise eligible and once an officer has to his credit the minimum period of qualifying service for pension under the applicable rules, he earns a right to get pension and such right cannot be taken away only if his service is not satisfactory consequent to any disciplinary proceedings or where he is dismissed or removed from service;

(ii) the said leave rules do not contemplate automatic deprivation of retirement/terminal benefits and forfeiture of qualifying period of service for pension as the said deemed resignation - Rule 7 (2) AIS (Leave) Rules - is not a provision for imposition of penalty for a misconduct and is only a deeming provision. Without prejudice, as a case of overstay and not proceeding on foreign assignment without permission or abandonment of employment and with no disciplinary proceedings, applicant ought to have been given the option of voluntary retirement as he had rendered requisite period of qualifying service and earned pension and the sole option of resignation without clarifying the status of pensionary benefits and deemed resignation after completion of more than 20 years in service is arbitrary and unfair;

(iii) Pension is a right and an entitlement which does not depend upon the discretion of the Government but is governed by rules and a Government servant coming within those rules is entitled to claim pension and related benefits, which have been arbitrarily denied to him;

(iv) denial of pensionary benefits in the garb of Rule 7 (2) of AIS (Leave) Rules, 1955 with the approval of competent authority, despite the fact that he had completed more than 20 years of service and that Govt. of India at no stage, including overstay, had any objection to the continuation of the applicant in United Nations and there is no adverse record, misconduct or disciplinary proceedings instituted against the applicant, is an unreasonable ground;

(v) in view of Cabinet Secretary's letter dated 27.4.2016, reiterating DOP&T's OM dated 1.3.2011, 'Overstay while on Deputation?', it has been clarified that period of unauthorized overstay will not be counted for the purpose of pension. Thus, overstay leading to withholding of pension, which was due prior to the deputation as well as period of overstay, is arbitrary and unfair;

(vi) the applicant's foreign assignment commencing from December 1993 was not extended beyond July, 1995 even though he had not completed five years on foreign assignment to which he was eligible was arbitrary and unfair and impacted on subsequent decisions; and

(vii) the impugned orders are untenable in law in the facts and circumstances of the present case.

3. Pursuant to notice, respondent filed reply in which it is raised the preliminary objections that the OA is hopelessly barred by limitation. Applicant was deemed resigned his post, on approval of the Hon'ble Prime Minister vide Notification dated 18.5.2001 under Rule 7 (2) of AIS (Leave) Rules, 1955. The applicant has not challenged the aforesaid order till date. Since the applicant has resigned the post on deemed basis, his entire qualifying service has been forfeited. As such the present claim for grant of pensionary benefits and conversion of deemed resignation to voluntary retirement is not tenable and is barred by laches. Having acquiesced to the order dated 18.5.2001 and having accepted the deemed resignation, mere filing of representation after fifteen years shall not extend the

limitation, in view of judgment of the Hon^{ble} Supreme Court in Jaidev Gupta vs. State of H.P., 1997 (11) SCC 13.

3.1 Mere response to the respondent to the representation of the applicant made belatedly, without applicant showing any sufficient cause for not making application, since 2001 till date the OA is liable to be dismissed on limitation alone. No MA for condonation of delay has been filed. In fact, in the guise of reconsideration for grant of pensionary benefits, the applicant seeks a mandamus to modify the impugned order passed in 2001 which is hopelessly barred by limitation in the light of the judgment of the Hon^{ble} Supreme Court in Baliram Prasad vs. UOI, 1997(2) SCC 290.

3.2 The applicant was deemed to have resigned from service as per Rule 7 (2) of the Rules *ibid* and his qualifying service no more exists to entitle the applicant for any pensionary benefits. Even in Cabinet Secretariat letter dated 27.4.2016, the situation envisaged was when an Officer of service overstays the deputation, but continues thereafter in service, only then the aforesaid overstay shall not be counted for qualifying service. However, the said letter dated 27.4.2016 does not grant pensionary benefits to a deemed resigned officer and rather, a strict compliance of Rule 7 (2) of the Rules *ibid* has been directed.

3.3 The respondents have also stated the fact of the case that the applicant was appointed to IAS in the year 1971 and allotted to UP cadre. The applicant while working as Joint Secretary in the Ministry of Environment & Forest, Govt. of India, was granted permission to take up foreign assignment with the United Nations Environment Programme, Nairobi initially for a period of 11 months from 3.12.1993 to 2.11.1994, which was extended up to 30.6.1995. No further extension in foreign assignment was granted thereafter. Hence, after completion of foreign assignment on 30.6.1995, the applicant was required to report for duty in his parent cadre, but he did not report for duty. Thus, the applicant remained unauthorisedly absent from duty w.e.f 1.7.1995. Thereafter, the respondent vide letter dated 22.8.1997 had informed him that his request for continuance on foreign assignment is not agreed to and directed him to return to the cadre latest by 15.9.1997 otherwise disciplinary proceedings will be initiated as per relevant rules. Once again, the respondent vide letter dated 24.12.1997 intimated the applicant that his continuance on foreign assignment beyond 30.6.1995 was without sanction and unauthorized and informed him of the decision to initiate disciplinary action as per rules.

3.4 Since the applicant had been unauthorisedly absence from duty for five years other than on foreign service on 1.7.2000 and had not return to duty despite specific directions to report back, he was liable for deemed to have resigned from service under the provisions of Rule 7 (2) of the Rules *ibid* as existing at that time. Accordingly, proceedings under said Rule were initiated by the respondent and show cause notice dated 25.1.2011 (Annexure-III) was issued to the applicant for remaining absent from duty exceeding five years. Subsequently, applicant submitted his reply dated 25.1.2001 which was not satisfactory and he

had admitted that he was unauthorisedly absent since 1.7.1995. Accordingly, with the approval of Hon?ble Prime Minister, he was deemed to have resigned from service under Rule 7 (2) of the Rules ibid vide notification dated 18.5.2001.

3.5 Thereafter, his request dated 2.9.2016 regarding conversion of his deemed resignation was not acceded to and conveyed to him vide letter dated 24.11.2016 stating that the deemed resignation was effected after following the due procedure as per Rule 7 (2) of the Rules ibid and with the approval of the competent authority. With reference to his subsequent representations dated 10.11.2016 and 30.12.2016, the stand of the respondent taken vide letter dated 24.11.2016 was reiterated. Hence, consequent to deemed resignation, past service of the officers is forfeited and as such he is not eligible for retirement benefits as available to the pensioners.

3.6 They further stated that even in case of simple resignation, as per Rule 5(1) of AIS (DCRB) Rules, an officer is not entitled for retirement benefits. Rule 5(1) of AIS (DCRB) Rules, inter alia, provides that "No retirement benefits may be granted to a person who has been dismissed or removed from the service or who has resigned from the service."

3.7 It is further stated that pension benefits do not automatically accrue to member of service on completion of 20 years service. If an officer has to earn pension benefits after qualifying service of 20 years, he is mandatorily required to seek voluntarily retirement from service under Rule 16 (2A) of AIS (DCRB) Rules, 1968. For taking voluntary retirement under Rule 16 (2A) of the Rules ibid, three months notice is mandatory. The notice is required to be accepted by the Central Government. The notice for such retirement is required to be given by the member of the service while on duty (or on leave which is counted as duty for all practical purpose). Whereas he had never applied for VRS prior to his deemed to have resigned from service, vide notification dated 18.5.2001 (Annexure-IV) for unauthorized absence of more than five years.

3.8 They further stated that applicant had taken Government of India for granted first for not following specific directions given from time to time just for the personal gains as he was taking hefty pay & perks in foreign assignment with UN and continued therein even after his deemed resignation. As per information available on website of Aisa Global Institute, he has retired from UN in 2007 and eligible for pension from UN. Consequent to deemed resignation, past service of the applicant is forfeited and hence, he is not eligible for any retirement benefits as available in case of pensioners.

3.9 To the contention of the applicant that Government of India had no objection on his continuance during overstay, it is stated by the respondent that the respondent vide letter dated 22.8.1997 had not only rejected his request for continuance on foreign assignment but also specifically directed him to return to the cadre latest by 15.9.1997 with warning of consequences. Thereafter respondent also intimated vide letter dated 24.12.1997 to the applicant that his

continuance on foreign assignment beyond 30.6.1995 was without sanction and unauthorized and informed him of the decision to initiate disciplinary proceedings as per rules. Since the applicant had been unauthorisedly absence from duty for five years other than on foreign service on 1.7.2000 and had not returned to duty despite specific directions to report back, he was liable for deemed to have resigned from service under the provisions of Rule 7 (2) of the Rules ibid as existing at that time. He did not bother at all about directions of the Government and continued on foreign assignment unauthorisedly for personal gains as he was taking hefty pay and perks and impliedly challenged the authority of the Government. Thus despite having been given a number of opportunities to join back, when he did not join duty, with the approval the Hon^{ble} Prime Minister, he was deemed to have resigned from service under Rule 7(2) of the Rules ibid for unauthorized absence of more than five years, vide notification dated 18.5.2001.

3.10 Regarding reference to Cabinet Secretary's letter dated 27.4.2016 reiterating clarifications of DOP&T's OM dated 1.3.2011 made by the applicant, it is stated that the applicant had already been deemed resigned in the year 2001, these clarification are not applicable at all.

3.11 Respondent further stated the in a similar case of deemed resignation of Sh. M.P. Joseph, IAS, Hon^{ble} High Court of Kerala in W.P. No.27511/2009 has upheld that order of Hon^{ble} CAT wherein OA filed against deemed resignation was not allowed.

4. Heard the applicant who appeared in person and learned counsel for the respondents and carefully perused the material placed on record.

5. The question which is required to be adjudicated in this case is confined to the extent that whether the applicant, who was deemed to have resigned by the respondent by invoking the provisions of Rule 7(2) of AIS (Leave) Rules, 1955, despite the fact that, according to the applicant, he has rendered more than 20 years qualifying service which entitled him for pension and pensionary benefits, is entitled for grant of pension and pensionary benefits?

6. Applicant who appeared in person submitted that it is an admitted fact that deemed resignation was processed after applicant had satisfactorily served period of over 20 years ordinarily treated as qualifying for or enabling voluntary retirement, before proceeding on foreign assignment. No disciplinary proceedings were initiated at any stage during the tenure of the applicant from July 1971 till July 1995, and hence, pension became due under the Pension Rules on termination of lien and applicant had not resigned, surrendered his right or was informed of penal consequences.

6.1 Applicant further argued that it is settled law that there is right to retiral benefits, which is not a bounty payable on the will and pleasure of the Government, and does not depend upon an order being passed by the authorities to that effect except for the purposes of quantifying the amount having regard to the period of service and other allied matters. The right to receive pension flows

to an officer not because of the order but by virtue of the rules, and this right has been recognized as a fundamental right akin to property as held by the Hon?ble Apex Court in the case of Deokinandan Prasad vs. State of Bihar and others, 1971 SCR 634. He further stated that once an officer has to his credit the period of qualifying service there is an entitlement to pensionary benefits, and there is no automatic forfeiture of pension as held by Apex Court in the case of Union of India vs. Lt. Col. P.S. Bhargava, (1997) 2 SCC 28.

6.2 Applicant further submitted that the Pension Scheme is to be understood in a liberal sense so as to extend benefit to all those who rendered qualifying service and there cannot be any artificial distinction between a person who retires and a person who resigns. In support of the said contention, applicant placed reliance on the judgment in the case of Sudarshan Kumar vs. Delhi Transport Corporation and Anr., 1994 7 (SLR) 163.

6.3 Applicant also submitted that pension can be withheld only following finding in a departmental inquiry/judicial proceedings of a grave misconduct, the right to receive pension is property and the State has no power to withhold the same by an exclusive order. To buttress is argument, applicant placed reliance on Vijay L. Mehrotra vs. State of U.P. and others, (2001) 9 SCC 687.

6.4 Applicant further contended that it is no more in dispute that pension is not bounty; instead it is a right to property earned by the Govt. servant on his rendering satisfactory service to the State. In Deokinandan Prasad v. State of Bihar & Ors., [1971] Suppl. SCR 634, the Apex court held that pension is not bounty payable at the sweet will and pleasure of the Govt.; instead the right to pension is valuable right vested in a Govt. servant. Again in D.S. Nakara and Ors. v. Union of India, [1983] 2 SCR 165 the Apex Court held that payment of pension does not depend upon the discretion of the Govt. but it is governed by the rules and Govt. servant coming under those rules is entitled to claim pension. A Govt. employee earns his pension by rendering long and efficient service, the claim of pension is regulated by rules, which provide for reduction in the amount of pension if the Govt. servant has failed to render efficient service.

7. Counsel for the respondents submitted that in the facts and circumstances of the case as the applicant was deemed to have resigned from service as per Rule 7 (2) of the Rules ibid and his qualifying service no more exists to entitle the applicant for any pensionary benefits. Even in Cabinet Secretariat letter dated 27.4.2016, the situation envisaged was when an Officer of service overstays the deputation, but continues thereafter in service, only then the aforesaid overstay shall not be counted for qualifying service. However, the said letter dated 27.4.2016 does not grant pensionary benefits to a deemed resigned officer and rather, a strict compliance of Rule 7 (2) of the Rules ibid has been directed.

7.1 Counsel further contended that the said order of deemed resigned was passed way back on 18.5.2001 and the applicant is well aware of the same but he has not chosen to challenge the said order of 18.5.2001 as such the present

OA is barred by limitation as no misc. application for condonation of delay has been filed along with this OA.

7.2 Counsel also contended that the applicant was granted permission to take up foreign assignment with the United Nations Environment Programme, Nairobi initially for a period of 11 months from 3.12.1993 to 2.11.1994, which was extended up to 30.6.1995. No further extension in foreign assignment was granted thereafter. Hence, after completion of foreign assignment on 30.6.1995, the applicant was required to report for duty in his parent cadre, but he did not report for duty. Thus, the applicant remained unauthorisedly absent from duty w.e.f 1.7.1995. Thereafter, the respondent vide letter dated 22.8.1997 had informed him that his request for continuance on foreign assignment is not agreed to and directed him to return to the cadre latest by 15.9.1997 otherwise disciplinary proceedings will be initiated as per relevant rules. Once again, the respondent vide letter dated 24.12.1997 intimated the applicant that his continuance on foreign assignment beyond 30.6.1995 was without sanction and unauthorized and informed him of the decision to initiate disciplinary action as per rules. Since the applicant had been unauthorisedly absence from duty for five years other than on foreign service on 1.7.2000 and had not returned to duty despite specific directions to report back, he was liable for deemed to have resigned from service under the provisions of Rule 7 (2) of the Rules ibid as existing at that time. Accordingly, proceedings under said Rule were initiated by the respondent and show cause notice dated 25.1.2001 (Annexure-III) was issued to the applicant for remaining absent from duty exceeding five years. Subsequently, applicant submitted his reply dated 25.1.2001 which was not found satisfactory and he had admitted that he was unauthorisedly absent since 1.7.1995. Accordingly, with the approval of Hon?ble Prime Minister, he was deemed to have resigned from service under Rule 7 (2) of the Rules ibid vide notification dated 18.5.2001.

7.3 Counsel also contended that applicant?s request dated 2.9.2016 regarding conversion of his deemed resignation was not acceded to and conveyed to him vide letter dated 24.11.2016 stating that the deemed resignation was effected after following the due procedure as per Rule 7 (2) of the Rules ibid and with the approval of the competent authority. With reference to his subsequent representations dated 10.11.2016 and 30.12.2016, the stand of the respondent taken vide letter dated 24.11.2016 was reiterated. Hence, consequent to deemed resignation, past service of the officers is forfeited and as such he is not eligible for retirement benefits as available to the pensioners. The said communications of 2016 and 2017 have been challenged by the applicant in this OA.

7.4 Counsel further submitted that even in case of simple resignation, as per Rule 5(1) of AIS (DCRB) Rules, an officer is not entitled for retirement benefits. Rule 5(1) of AIS (DCRB) Rules, inter alia, provides that ?No retirement benefits may be granted to a person who has been dismissed or removed from the service or who has resigned from the service.

8. After having heard both the rival contentions of the parties, this Court is of the opinion that so far as preliminary objection of limitation as raised by the respondent is concerned, the same is not sustainable in law as the applicant is not challenging the said Order dated 18.5.2001 vide which he was declared as deemed resigned from the service by the respondent but was challenging the decision of denial of pensionary benefits which right has accrued to him by virtue of rendering more than 20 years of qualifying service for this purpose and this prayer of grant of pensionary benefits is a recurring cause of action, as held in the catena of judgments rendered by this Tribunal, High Courts and the Hon^{ble} Apex Court.

9. So far as the contention of the respondent that since the applicant was declared as deemed resigned in terms of the provisions of Rule 7(2) of AIS (Leave) Rules, 1955 with the approval of competent authority, despite the fact that according to the applicant, he had completed more than 20 years of service, his entire qualifying service has been forfeited is concerned, for proper appreciation of the issue involved in this case, reference is made to the said Rule 7 of the Rules which provides as under:-

"7. Maximum period of absence from duty-

(1) No member of the Service shall be granted leave of any kind for a continuous period exceeding five years.

(2) A member of the Service shall be deemed to have resigned from the service if he -

(a) is absent without authorisation for a period exceeding one year from the date of expiry of sanctioned leave or permission, or

(b) is absent from duty for a continuous period exceeding five years even if the period of unauthorized absence is for less than a year, or

(c) continues of foreign service beyond the period approved by the Central Government: Provided that a reasonable opportunity to explain the reason for such absence or continuation of foreign service shall be given to the member of the Service before the provisions of this sub-rule are invoked."

10. By invoking the provisions of Rule 7 (2) of the Rules, *ibid*, as the applicant did not report back from his foreign assignment beyond the period approved by the Central Govt. even after expiry of five years, proceedings were initiated and with the approval of the competent authority, vide Notification dated 18.5.2001, the applicant was deemed to have resigned from the IAS with effect from 1.7.1997 in terms of said Rule 7 (2) of the Rules *ibid*. However, in this OA, the applicant is not challenging the said decision of the respondent but his contention that in the garb of said Rule, the respondent has no right or authority to forfeit his entire service despite the fact that he has completed more than 20 years of qualifying service which is a precondition for being eligible for pension and pensionary benefits, which condition he was fulfilling even if it is presumed that

he was declared deemed resigned and the said right of pension accrues to him by virtue of rendering minimum qualifying service for pension. In support of his claim, applicant has placed reliance on the judgment of Apex Court in the case of State Of Jharkhand & Ors vs Jitendra Kumar Srivastava & Anr. in Civil Appeal No.6770/2013 decided on 14.8.2013.

11. This issue was earlier raised in the OA 239/2007 and the Ernakulam Bench of this Tribunal dismissed the same vide Order dated 17.6.2009 and the applicant in the said OA challenged the said decision of this Tribunal by filing Writ Petition (Civil) No.27511/2009 (S) before the Hon'ble Kerala High Court at Ernakulam which vide Order dated 19.3.2013 upheld the aforesaid decision of Ernakulam Bench of this Tribunal. The relevant paras of the said Order of the Hon'ble Kerala High Court read as under:-

"The facts in the present case are precisely similar to that stated supra.

19. Rule 7(2) reads as hereunder:

"(2) Unless the Central Government, in view of the special circumstances of the case, determines otherwise, a member of the service who remains absent from duty for a continuous period exceeding five years, other than on foreign service, whether with or without leave, shall be deemed to have resigned from the service.

NOTE: Provided that reasonable opportunity for explain the reasons for such absence shall be given to the member of the service before provisions of sub-rule (2) are invoked".

The rule has operation only when a member of the All India Service remains absent from duty for a continuous period exceeding five years, whether with or without leave, except on foreign service and the Central Government is conferred with the power to deem such person as having resigned from the service, with a further exception in so far as the Central Government, by virtue of some special circumstance, determine otherwise. Hence, if a person not being in foreign service or in the context of the Central Government having not determined any special circumstances; remains absent from duty for a period of five years, then he is deemed to have resigned from service by his voluntary conduct of absenting himself. The deeming provision, however, is subject to the note, which provides for a reasonable opportunity to explain the reasons for such absence.

20. Looking at the wide range of decisions laid before us; we cannot countenance the argument that Rule 7(2) is against the Constitutional mandate of Article 311(2), which provides that no person shall be dismissed or removed or reduced in rank except after an inquiry in which he has been informed of the charges against him and given a reasonable opportunity of being heard in respect of those charges. As has been noticed in the Supreme Court decisions, the mandate has application only in cases of dismissal, removal or reduction in rank pursuant to allegations levelled against the said officer. True, the Supreme Court has

declared that any termination from service which is not as per the rules of superannuation or rules of compulsory retirement would be removal from service. Whether the deemed resignation from service is on account of any charges of misconduct levelled against the officer and whether the same is imposed as a penalty would be the relevant question.

21. A resignation from service definitely would be a voluntary act on the part of the petitioner and none who has opted for the same voluntarily and with eyes open can turn around to challenge the necessary consequences on the ground of such acceptance of resignation amounting to termination from service. The above rule also postulates a situation where a member of the service absents himself from duty for a period exceeding five years. But for the absence being on foreign service or under special circumstances determined by the Central Government, the same has to be treated as a voluntary act with knowledge of the provision in the leave rules, of the service, in which such employee is borne. Any explicable circumstance which explains such absence could necessarily be taken into account by the appropriate authority and it is to that end an opportunity to explain the reasons for absence have been provided to any member of the service who remained absent from duty for a continuous period of five years.

22. In the first place, there is no misconduct alleged against the member of the service and the factum of absence from duty is self evident. In the instant case, we have to notice, it is admitted unequivocally. The operation of Rule 7(2) is a direct consequence of such voluntary absence from service. It cannot at all be said that this leads to arbitrariness in its operation. The Central Government has been conferred with the power to determine otherwise in the event of there being any special circumstances in the case. It is also obvious that the deeming provision could be operated only after affording a reasonable opportunity and considering the explanations offered for such absence. Rather than the rule resulting in automatic termination, as contended by the petitioner, we are of the opinion that it tantamounts to a natural consequence of the voluntary action of the officer in remaining absent; without sufficient cause.

23. Resignation in *Moti Ram v. Param Dev* [1993] 2 SCC 725] has been said to be meaning the spontaneous relinquishment of ones own right and in relation to an office it connotes giving up or relinquishing the office. In the general justice sense, to constitute resignation, the essential ingredients were held to be the intention to relinquish and the concomitant act of giving up. Both are apparent in the instant case.

24. We pause for a moment to notice that in the instant case there is also no explanation offered and the petitioner came out with a letter dated 27.1.2004 (Annexure A20), wherein it was contended that the Office Memorandum dated 29/30-12-2003 was received only a week before, since the petitioner had shifted his former residence. The only contention raised was that Rule 7(2) was omitted from the Leave Rules by notification dated 5.9.1978. The petitioner sought

confirmation as to whether the said rule still subsists. We are surprised that an officer borne in the IAS and claiming to have a lien on his post in the cadre has thought it fit not to communicate his residential address to his controlling authority, especially in the circumstance of a disciplinary enquiry pending against him. Again, but for the above contention of Rule 7(2) being no more available in the rules, the petitioner had no other contention in his reply; nor was any explanation offered, before the notification under Rule 7(2) was published by the Government.

25. *Punjab and Sind Bank v. Sakattar Singh* [(2001) 1 SCC 214] fortifies the view taken by us, which decision was also quoted with approval in *V.C., Banaras Hindu University (supra)*. We also garner support from the decision in *Aligarh Muslim University and Others v. Manzoor Ali Khan* [(2000 (7) SCC 529], placed before us by the Assistant Solicitor General of India, where two rules came up for consideration; one in the 'Terms and Conditions of Service Rules' and the other in 'Leave Rules', both deeming vacation of office on voluntary absenteeism and overstayal of leave. The Supreme Court held that while in the former, absence of more than 5 years was the controlling factor the Leave Rules contemplated absence without leave and overstayal of sanctioned leave. The latter rule also provided for due opportunity to the employee. Two employees, one proceeded under the 'Terms and Conditions of Service Rules' and the other under the 'Leave Rules' were before the Supreme Court. We are not concerned with the latter. In the case of the former, who was deemed to have vacated office under the 'Terms and Conditions of Service Rules', which provided for no opportunity, the employee was found to have been not covered by the said rule since the absence was less than five years. Hence the 'Terms and Conditions of Service Rules' were held to be inapplicable in the case of that employee and the absence of both the employees were held to be covered by 'Leave Rules', which specifically provided for an opportunity. Despite one of the employees being not proceeded against under Leave Rules, and no opportunity being granted, it was held that even if an opportunity was granted, on facts, no other conclusion was possible from the admitted and indisputable facts and it would have been an "useless formality". The lack of notice was held to have caused "no prejudice". A note of caution was also expressed that Courts should be very careful in justifying a denial of natural justice lest it be described as a pre-conceived view.

26. In the above cited decision, the rule which provided for notice though relevant, was not invoked and no notice was given before terminating the employee. Still the Supreme Court upheld the termination. The learned Senior Counsel would alertly point out the distinction between sitting in review of an administrative decision on grounds of violation of principles of natural justice and violation of Constitutional mandate. We are conscious of the same and the 'useless formality' theory or even the 'prejudice principle' may not strictly apply when a decision is challenged as violative of the principles enshrined in Article 311(2). But we cannot also shut our eyes to the fact that the principles of natural justice are embodied and epitomized in Article 311. The mandate is an

opportunity to explain, that too a reasonable one, the absence of which would definitely cut at the root of the exercise embarked upon. Rule 7(2) provides for an opportunity and that was granted in the instant case. Though belated, the reply of the petitioner does not contain any explanation for the absence. The petitioner's is not a case of overstaying, but a clear case of abandonment of employment without leave or sanction. The fact that he was granted an extension in the post in which he had originally been sent on 'foreign service' with proper sanction; is no justification. The communication dated 10.8.1998 (Annexure A7) granting sanction till 31.8.1998; categorically directed the petitioner to report back for duty. He joined for duty on 1.9.1998 and abandoned his post on 2.9.1998. The leave application was rejected, and as we noticed before, that rejection cannot now be assailed. By letter dated 11.6.1999 (Annexure A12), he was again directed to report for duty, failing which departmental enquiry was threatened and was followed by Annexure A14 (dated 3.8.1999). The show cause notice under Rule 7(2) also was not responded to with any explanation for the absence.

27. We are also of the opinion that there is nothing drastic, oppressive or unreasonable in Rule 7(2) and the action taken does not come within the mischief of *Wednesbury* unreasonableness. The Hon'ble Supreme Court in *All India Railway recruitment Board v. K. Shyam Kumar* [(2010) 6 SCC 614] has considered the proportionality test vis-a-vis unreasonableness:

"*Wednesbury* applies to a decision which is so reprehensible in its defiance of logic or of accepted moral or ethical standards that no sensible person who had applied his mind to the issue to be decided could have arrived at it. Proportionality as a legal test is capable of being more precise and fastidious than a reasonableness test as well as requiring a more intrusive review of a decision made by a public authority which requires the courts to "assess the balance or equation" struck by the decision-maker.

xx xx xx Proportionality requires the court to judge whether action taken was really needed as well as whether it was within the range of courses of action which could reasonably be followed. Proportionality is more concerned with the aims and intention of the decision-maker and whether the decision-maker has achieved more or less the correct balance or equilibrium. The court entrusted with the task of judicial review has to examine whether decision taken by the authority is proportionate i.e. well balanced and harmonious, to this extent the court may indulge in a merit review and if the court finds that the decision is proportionate, it seldom interferes with the decision taken and if it finds that the decision is disproportionate i.e. if the court feels that it is not well balanced or harmonious and does not stand to reason it may tend to interfere".

28. The rule does not impose a penalty for misconduct and the consequence of the deemed resignation is one which flows from the voluntary absence of a member of the service who has also been provided with an opportunity to put forward his explanations for such absence. There is no absolute discretion

leading to arbitrariness and the procedure prescribed for granting an opportunity to consider the explanations offered evidently satisfy the rules of fair play. On facts, in each case, according to us, on a judicial review of an order passed under Rule 7(2), what, Courts sitting in review would have to do is to test the said order; on the facts, to see whether any subterfuge was employed and whether the order in fact is one camouflaged under Rule 7(2); which, on moving aside the cloak of camouflage, is actually found to be one of imposition of penalty for misconduct. We cannot on facts discern any subterfuge in the order passed. We cannot also term it as a camouflaged one, visiting the petitioner with a penalty for a misconduct. Admittedly the petitioner rejoined duty and on the very next day, abandoned his post after preferring an application for Extra-ordinary Leave and remained absent for a continuous period of five years, callously indifferent to the rejection of leave and directions to rejoin.

29. Now we consider the contention of the learned Senior Counsel that the petitioner was entitled to the Extra-ordinary Leave. According to the petitioner, denial of leave was for reason of it being violative of the 'Consolidated Instructions relating to Foreign Assignment of Indian Experts' and that ground cannot be sustained for reason of such instructions being applicable only for assignments abroad. We have to first notice that the said issue is no longer open, since the CAT had considered the rejection of his Extra-ordinary Leave and have found the action of the State Government as also the Cadre Controlling Authority to be perfectly justified, in an earlier O.A. (O.A.No.917 of 1999). We cannot for a moment accept the contention of the learned Senior Counsel that Exhibit P1 set aside the findings in the order of the CAT in O.A.No.917/1999. On going through Exhibit P1 judgment, it is clear that the Original Petition was dismissed without expressing any opinion on the merits. The dismissal was on account of the fact that the petitioner had placed on record a fresh representation on 20.12.1999. It was only observed that the disposal of the O.A. by the CAT may not stand in the way of consideration of the representation; that is to only say that the Government, while considering the representation, could definitely come to a different conclusion. But, it is to be noticed that by Exhibit P2 the representation was rejected and no challenge was made against the said rejection dated 20.1.2000. We cannot permit the petitioner to rake up issues which are long settled.

30. However, to facilitate a proper adjudication, we also looked at the Consolidated Instructions referred to above. The emphasis laid on the word "abroad", according to us, is irrelevant. Paragraph 2(d) of the Consolidated Instructions refers to International assignments covering assignments to the UN and its agencies, the types of which have been further elaborated in sub-heading 7. Type 7(ii) refers to international assignments in project-related field jobs, operated in the developing countries under the auspices of the international organizations, where the final selection is usually made by the host country/ Government in consultation with the international agency. It is as per the said Consolidated Instructions preceded by the earlier Instructions of January, 1988

that the appointment as Project Co-ordinator to a project under the auspices of the ILO was made. The same happened to be in India, admittedly categorized by the United Nations as a developing country. It is under the said Instructions that the petitioner was selected and sent on deputation. His orders of deputation produced along with the O.A. specifically show that he is on a "deputation on foreign assignment". That his original deputation was sanctioned for one year and then further extended for four years as per the 'Consolidated Instructions' is not in dispute. Para 9 of the 'Consolidated Instructions' also provided that an officer may be permitted to remain on long term assignments adding upto the maximum of five years during the first twenty-five years of his service. The petitioner admittedly has not completed the said twenty-five year service period. We specifically notice Annexure A10 letter dated 17.11.1998 of the Establishment Officer and Additional Secretary of the Government of India, Department of Personnel and Training. It is stated that subsequent to the five year deputation as is permitted under the 'Consolidated Instruction' the further period of one year was granted in relaxation of the policy with the approval of the then Prime Minister. The deputation having been granted as per the Consolidated Instructions and further extension granted in relaxation of the said policy, the petitioner cannot now turn around and contend that his deputation is not regulated by the said Consolidated Instructions.

31. We are now faced with the contention of the petitioner's absence being exempted under Rule 7(2) for reason of it being "foreign service". We immediately notice the disparity between the contention earlier noticed and now raised. The learned Senior Counsel would distinguish it on the ground that here the contention is based on the definition of "foreign service" as per the AIS (Leave) Rules. We extract the definition hereunder:

"2(f) 'foreign service' means service where a member of the Service receives his pay with the sanction of the Government from any source other than the Consolidated Fund of India or the Consolidated Fund of any State".

The contention of the petitioner is that his initial appointment as Project Co-ordinator in the ILO was with sanction and he having continued so, and having received his pay from a source other than the Consolidated Fund of India or the State, he remains to be in foreign service. We are unable to sustain such a ground. The foreign service, in which a member of the Administrative Service receives his pay, should be with the sanction of the Government. The sanction was initially for a period of one year and the same was extended with clearance from the Cadre Controlling Authority for a further four years and as a special case, in relaxation of the policy, for another year. Subsequent to the extension up to 31.08.1998, there was no sanction/clearance from the Government of the Union or the State or the Cadre Controlling Authority. Before the period of deputation expired, the petitioner was called upon to return for duty on expiry of the period granted, i.e., till 31.08.1998. The petitioner also understood it as so; having joined back on 1.9.1998.

32. As we have noticed above, subsequently on the very next day he abandoned the post after making an application for Extra-ordinary Leave, which was subsequently rejected and the rejection has now become final. Repeated reminders and directions were issued for rejoining duty, which were stoutly ignored by the petitioner. Though the petitioner might have continued in the very same post, to which he was originally deputed, by the ILO, he joined there on 2.9.1998, without sanction from his Cadre Controlling Authority. We notice from the address in the Original Petition that the petitioner is now, at least at the time of filing of the Original Petition, in Cambodia, again on an assignment with the ILO. Even going by the application for Extra-ordinary Leave, we see that the petitioner seeks leave on the ground of public interest and for the benefit of the Government and the State of Kerala. We would think, it is for the Government to determine public interest and determine the benefits enuring to the State and it does not at all lie in the mouth of the petitioner.

33. The continuance of the petitioner with the ILO was not in accordance with the Consolidated Instructions or with the junction of the Union Government or the State. The extension of contract with the ILO was an unilateral act of the petitioner. We cannot but notice that the petitioner has been absent from his cadre for all these years. He abandoned his cadre to seek fresh employment and the continuance in ILO cannot be treated as continuance of his earlier assignment, which was with sanction and cadre clearance. Though no leave was granted, he continued in the ILO. The petitioner, hence, cannot claim any lien to the post in his cadre. The petitioner also seeks leave on the ground that it does not lead to any financial obligation to the Government of Kerala. Nearing the age of superannuation the petitioner turns around and seeks re-entry into service and setting aside of the order deeming his absence for a continuous five year period, as resignation, according to us, for obvious reasons. That at least would lead to financial obligation to the Government; in terms of pensionary benefits. Despite claims of public interest and benefits to the State Government, what stares at the face of the petitioner is the simple fact that it was personal aggrandizement, that comes with an assignment with the United Nations, both monetary and status-wise; that fuelled the actions of the petitioner.

34. The other contention raised by the petitioner is with respect to there being no rationale; nor specific provision for jettisoning the disciplinary proceedings initiated at its final stages and resorting to Rule 7(2). We have already held that Rule 7(2) is not a proceeding for imposition of penalty for a misconduct and is only a deeming provision visiting the member of a service with consequence of his voluntary action of absence from duty for a continuous period of five years. The learned Senior Counsel places before us the decisions reported in *Kanailal Bera v. Union of India* [(2007) 11 SCC 517] and *State of Assam v. J.N.Roy Biswas* [AIR 1975 SC 2277]. *Kanailal Bera* (supra) was a case in which disciplinary proceeding was initiated for refusal to subject to a sentence of confinement, which concluded in dismissal from service. Then another enquiry was ordered. The very procedure of holding another enquiry was found to be absent in the

rules. The ultimate relief granted therein need not detain us since it was under Article 142 of the Constitution of India. In *J.N.Roy Biswas (supra)*, the re-opening of an enquiry which concluded in exoneration and reinstatement of an officer was set aside on the premise only of absence of power to make such a re-visitation of concluded matters. We do not think that the above decisions advance the petitioner's case. The facts disclosed in the above cited decisions would show that they were related to an enquiry which was initiated after the original one concluded and penalty also was imposed. What was held was, without powers of review, such procedure cannot be adopted. The facts are clearly distinguishable in the present case. The enquiry, as is evident from the Articles of Charge (Annexure A15) is for unauthorizedly taking up a remunerative assignment with the ILO and failing to report for duty with the State Government, despite repeated directions from the State Government. We desist from looking at the facts or findings in the enquiry. But, we notice that the enquiry report was filed and the explanations were called for. It was at this juncture that the Central Government invoked Rule 7(2) for reason of the petitioner's absence from duty having continued for more than five years. The enquiry and the deemed resignation stem from distinct causes of action. On the deemed resignation of the petitioner, the enquiry proceedings would not survive and the natural conclusion, of such proceedings in the context of the deemed resignation of the petitioner, is an abrupt stop.

Having found the issues raised by the petitioner in the writ petition against the petitioner; we are unable to find any good reason to interfere with the findings of the CAT, which upheld the deemed resignation of the petitioner and the order by which his representation was rejected. We are of the definite opinion that the writ petition is devoid of merit and, hence, the same is dismissed."

12. In view of the above discussion, this Tribunal is of the considered opinion that the issues involved in this OA are squarely covered by the aforesaid decision of the Hon^{ble} Kerala High Court in *W.P.(C) No.27511/2009 (supra)*. In the said Order, the Hon^{ble} Kerala High Court had elaborately discussed the rule position as well as the authorities of the various Hon^{ble} Courts on the issues which are similar to that in this OA also. Hence, once the decision of deemed resignation is not called in question, the consequence therein, i.e., forfeiture of past service, automatically comes into effect as per the rules. Hence, once deemed resignation of the applicant of the OA has been affected, no further service remains for which pension can be counted or given.

13. In the result, and for the foregoing reasons, the instant OA is found to be devoid of merit and the same is liable to be dismissed. Accordingly, the OA is dismissed. There shall be no order as to costs.