

(2022) 09 DEL CK 0080

In the Delhi High Court

Case No : Civil Writ Petition No. 7531 Of 2019, Civil Miscellaneous Application
No. 31336 Of 2019

Union Of India And Anr.

APPELLANT

Vs

Vijay Kumar Trivedi

RESPONDENT

Date of Decision : 14-09-2022

Acts Referred:

Constitution Of India, 1950 — Article 14, 16, 309, 311
All India Service (Leave) Rules, 1955 — Rule 7(2), 7(2)(c)

Citation : (2022) 09 DEL CK 0080

Hon'ble Judges : Rajiv Shakdher, J; Jasmeet Singh, J

Bench : Division Bench

Advocate : Manish Mohan, Rakesh Tikku, Amol Sinha, Rahul Kochar, Kshitiz Garg

Judgement

Jasmeet Singh, J

1. The present writ petition has been filed by the Union of India through the Ministry of External Affairs (MEA) as well as Department of Personnel and Training (DoPT) seeking a challenge to the order dated 18.01.2019 passed by the Central Administrative Tribunal (CAT), Principal Bench, New Delhi in Original Application (O.A.) No. 1631 of 2017 titled 'Sh. Vijay Kumar Trivedi Vs. Union of India & Anr'.

2. Briefly stating the facts giving rise to filing of the present writ petition are :

3. The respondent is an Indian Foreign Service Officer (IFS) of 1994 Batch and was permitted to join as a "Policy Advisor in the office of Director General, WHO Framework Convention on Tobacco Control in Geneva" on foreign deputation basis on 02.03.2009 for an initial period of 6 months. On expiry of that said initial period, on his request, the respondent was granted periodic extensions and the deputation term kept getting extended from time to time till August, 2013.

4. Since both the daughters of the respondent were admitted at schools in Geneva and were in crucial stages of their education and any kind of disturbance

might have caused loss or adversely affect the academic careers of his daughters, the respondent vide an email dated 22.07.2013 further sought an extension of his deputation in Geneva till 31.08.2014. The request of the respondent was not acceded to by the petitioners vide their email dated 27.03.2014, and he was directed to return to his parent cadre forthwith.

5. The respondent, after almost 3 months vide email dated 30.06.2014 again made a representation to the petitioners reiterating his difficulties, particularly, about the educational concern of his daughters, and his requirement to complete the ongoing project, requested the petitioners to permit him to continue on deputation till the end of August, 2014.

6. On 05.07.2014, the petitioners informed the respondent vide an email, that for consideration to process his request for extension of tenure of deputation, the respondent would have to submit an undertaking that he would join the Ministry immediately on completion of his daughters' academic Session i.e for the year 2014-15, and will further communicate a probable date on which the respondent will thereby join the Ministry.

7. The respondent vide his reply letter dated 14.07.2014, gave an undertaking stating that the academic Session of his daughter would end in July, 2015, and he will join the Ministry in September, 2015. Albeit in another subsequent undertaking changed the date of his return from September, 2015 to 'no later than February, 2016'. However, the petitioner's after realizing that the respondent has no intention to join back his parent cadre/Ministry and was in fact procrastinating on the date of his return vide their email dated 11.08.2014 rejected the undertakings of the respondent and directed the respondent to return to his parent cadre immediately.

8. The respondent, as it appears refused to return and hence the petitioners vide another email dated 10.03.2015, directed the respondent to report to the Ministry immediately and stated that non-adherence to the same would be treated as a violation of clause 11 of DoPT O.M. dated 29.02.2008. The same is reproduced as under :

"Clause 11. The limit of 5 years in one stretch and 7 years in the entire career for foreign service to organizations covered under para 2.1 and 2.2 shall not be extended under any circumstances. The officer shall be deemed to have resigned from the service in case he/she fails to join the Government within one month of completion of his / her approved tenure with the concerned organization."

9. Further, in the same letter, the respondent was informed that in terms of the OM dated 29.02.2008, he shall be deemed to have resigned from service, in case, he fails to join the Government within one month of the completion of his approved tenure with the concerned organisation.

10. Yet again on 11.06.2015, another OM was sent to the respondent advising him to report to the Ministry immediately, while reiterating the consequences of

his disobedience

11. On 22.06.2015, the respondent wrote an email to the petitioners stating his hardship in returning to India as he was constrained by the educational needs of his daughters and was applying for getting appropriate permits so that his family could stay behind in Geneva and thus stated he will only be able to return to the Ministry around November, 2015.

12. On 30.06.2015, the petitioner's issued an O.M. bearing No. GEN/PMI/661/6/2015 to the respondent which reads as under:-

"PERMANENT MISSION OF INDIA

9-Rue Du Valais

1202 Geneva

Tel: 022 906 86 86

Fax: 022 906 86 86

Email: mission.india@ties.itu.int

No. GEN/PMI/661/6/2015

30 June, 2015

OFFICE MEMORANDUM

I am directed by Joint Secretary (AD), MEA, New Delhi, to convey the following message to you:

1. This is in response to Shri Vijay Kumar Trivedi's email dated 22 June 2015 requesting for extension till mid-November 2015 on educational grounds of his daughter.
2. The request of Shri Trivedi for extension till mid November 2015 was examined and his request was not acceded to. Shri Trivedi may be advised to report to Ministry within 15 days of receipt of this message. In case Shri Trivedi fails to join the Ministry, "The officer shall be deemed to have resigned from service within one month of completion of his/her approved tenure with the concerned organization".
3. Mission is also requested to confirm, within 05 days of receipt of this communication that the message has been conveyed and the same has been received by Shri Trivedi.

It is requested that receipt of this OM may kindly be acknowledged by signing on the spare copy attached with this OM.

(Anil Kumar Rai)

Counsellor (HOC)

Shri Vijay Kumar Trivedi (IFS:1994)

On deputation to FCTC Secretariat

World Health Organisation (WHO)

Geneva”

13. On 02.07.2015, the respondent wrote to the Petitioners that he may be able to report earlier than 02.07.2015, the same was rejected vide the petitioner’s email dated 20.07.2015. Thereby, the respondent was to report to his parent cadre within 15 days i.e 15.07.2015. The respondent once more wrote to the petitioners on 24.07.2015, stating that he could not leave his family behind without proper arrangements and humbly requested the petitioners to reconsider his extension of deputation till September, 2015 on compassionate grounds. In his email he further wrote that he understood the implications of the order dated 30.06.2015 directing him to return, including that of a deemed resignation. In turn the respondent informed the petitioner that he can report to the Ministry 01.09.2015.

14. Meanwhile on 24.08.2015, the Ministry of External Affairs, wrote to the DoPT asking to clarify as to whether the respondent who was already deemed resigned on 01.04.2014 i.e completion of one month after his approved deputation, due to being in violation of Clause 11 of the OM dated 29.02.2008, could be allowed to rejoin the cadre and if so, what would his absence period from 2014 be treated as.

15. While a reply was awaited from the DoPT, the respondent simultaneously reported for duty to his parent cadre under the Ministry on 01.09.2015.

16. On 04.02.2016, the Ministry of External Affairs issued the impugned notification against the Respondent bearing No. PA-I/09/2016 which reads as under:-

“Ministry of External Affairs

New Delhi

To be published in Part I Section II of the Gazette of India

No. PA-I/09/2016 New Delhi, February 4, 2016

Notification

Shri Vijay Kumar Trivedi, an officer of 1994 batch of Indian Foreign Service is deemed to have resigned from Government service in terms of Department of Personnel and Training Office Memorandum No. AB-14017/2/07-Estt (RR) dated February 29, 2008 with effect from April 1, 2014 (F/N).

(Paulomi Tripathi)

Under Secretary (FSP & Cadre)

The Manager,
Government of India Press
Faridabad"

17. It is this notification which had been challenged before the Central Administrative Tribunal by the respondent.

18. The Central Administrative Tribunal vide the impugned order allowed the Original Application and quashed notification dated 04.02.2016 issued by Ministry of External Affairs in terms of which the respondent (applicant in the O.A) was deemed to have resigned from service in terms of the DoPT OM dated 29.02.2008, and directed his reinstatement into service within 4 weeks with all consequential benefits.

19. The Central Administrative Tribunal adjudicated on the dispute in question and held that :-

" 12. Further, even the Rule 7(2) of the All India Service (Leave) Rules, 1955 provides for a prior notice before passing any order thereon. The action of the respondents in passing the impugned order, without even issuing any show cause notice to the applicant and without providing him any opportunity of any nature to show cause is in clear violation of the principles of natural justice and also violative of the Discipline and Appeal Rules. The direction dated 30.06.2015 to join the Ministry within 15 days, cannot be equated with issuance of a show cause notice in terms of the principles of natural justice.

13. In the circumstances and for the aforesaid reasons, the OA is allowed and the impugned Annexure A-1 Notification, dated 04.02.2016 is quashed with all consequential benefits. The respondents shall reinstate the applicant into service within 4 weeks from the date of receipt of a copy of this order."

20. It is this order of the Central Administrative Tribunal, which has been challenged before us by the Union of India (petitioners herein).

Submissions of the Petitioner

21. It has been argued by Mr Manish Mohan, learned CGSC appearing for the Union of India, that as per the O.M. of the DoPT dated 29.02.2008, the time-limit for officers of the Government of India on deputation to organisations shall not be extended under any circumstance, for a period beyond 5 years in one stretch and 7 years in the entire career of the officer on deputation.

22. He has taken us through the relevant rules and guidelines governing foreign service officers which are reproduced as below :-

23. The O.M. dated 29.02.2008 i.e. the Consolidated Guidelines on deputation / foreign service, in terms of which the respondent was sent on foreign deputation, reads as under:-

"GUIDELINES FOR DEPUTATION / FOREIGN SERVICE OF CENTRAL GOVERNMENT OFFICERS

1.1

2.1 International Organisations.

Posts that are to be covered:

i) UN Organisations

ii) International Financial Institutions like World Bank, IMF, ADB, etc.

iii) Multilateral organisations of which India a member, like IAEA, WTO, Commonwealth Organisation, International Court of Justice, SAARC etc.

iv) Bilateral Bodies set up under the Vienna Convention, i.e. Embassies and Bodies set up under them, like USAID, DFID, NORAD, etc.

v) International NGOs or Funding Organisations from which India receives technical / financial assistance like International Red Cross Society, Action Aid, Aga Khan Foundation etc, Ford Foundation etc.

xxx xxx xxx

Tenure to be applicable

Maximum of 5 years at a stretch

xxx xxx xxx

2.2 Autonomous body, trust, society, etc. not controlled by the Government or a private body.

Posts that are to be covered:

(i) Registered Societies or Trusts or Foundations or non-profit organisation or NGOs or cooperatives;

ii) Apex bodies of Industries and Commerce;

Provided that such autonomous or private bodies fulfil all four of the following criteria:-

a) they are Functionally autonomous of the Central and State Governments;

b) they are not substantially funded by the Central and State Governments;

c) the Central or State Governments do not have powers to give them directions; and

d) they are not companies registered under the Registration of Companies Act."

11. The limit of 5 years in one stretch and 7 years in the entire career for foreign service to organizations covered under para 2.1 and 2.2 shall not be extended

under any circumstances. The officer shall be deemed to have resigned from the service in case he/she fails to join the Government within one month of completion of his / her approved tenure with the concerned organization.”

24. The respondent herein, had continuously been on deputation to the World Health Organisation Framework Convention on Tobacco Control (FCTC) in Geneva since 02.03.2009, and as per the DoPT guidelines, the petitioner could remain on this assignment only upto 01.03.2014, being the maximum permissible time period of 5 years.

25. The petitioners had repeatedly asked and advised the respondent on various occasions to return to his parent cadre and the Ministry i.e :-

- 1) 27.03.2014,
- 2) 11.08.2014,
- 3) 10.03.2015,
- 4) 11.06.2015,
- 5) 30.06.2015.

26. The respondent showed scant regard to the emails and communications of the petitioners and kept postponing the date of his return and consequently joining the Ministry.

27. It is stated by Mr. Mohan, learned counsel that despite the said latitude on behalf of the petitioners, the respondent chose to show defiance and remained adamant in not joining the Ministry, even after exhausting his maximum permissible period of stay up till 01.04.2014 and continued to stay in Geneva till September, 2015 i.e 18 months later of his sanctioned deputation period.

28. The petitioners have also taken us through the official notings of the case file to show that the decision dated 04.02.2016 has not been taken in a haste, but after adequate consideration of the facts and due deliberation by all the senior officers of the department including the External Affairs Minister (EAM) and hence the orders and office memorandums passed by them were valid and should not have been interfered with by the learned Central Administrative Tribunal.

29. It is submitted that additionally, the Under Secretary, Ministry of External Affairs, sought a clarification by the DoPT as to whether the respondent may be allowed to rejoin the cadre, considering he had overstayed on his foreign posting even after the expiry of the maximum possible term of deputation. The letter dated 24.08.2015 reads as under:-

“Confidential

Ministry of External Affairs

[Administration Division]

Room No. 37, South Block,
New Delhi.

Subject : Deputation of Shri Vijay K. Trivedi (IFS:1994) to WHO, Geneva

Shri Vijay K. Trivedi (IFS:1994) has been on deputation as Policy Advisor in the office of Director General, Framework Convention on Tobacco Control (FCTC) in Geneva since March 2, 2009. He was granted extension till August 31, 2013. Thereafter, the matter was referred to DOPT for further extension till August 31, 2014. DOPT vide O.M. No. 12/40/2009-FA (UN) of October 31, 2013 clarified that the officer could remain on foreign deputation upto five years, i.e. March 1, 2014 (copy enclosed)

2. In pursuance to DOPT's instructions, the officer was asked to return to the Ministry. He was given several reminders on March 27, 2014, August 11, 2014, March 9, 2015, June 11, 2015 and June 30, 2015. Despite Ministry's instructions, the officer cited personal reasons like daughter's education for his continued absence from the cadre.

3. As per the consolidated guidelines on deputation/foreign service, issued by DOPT on February 29, 2008 vide O.M. No. AB-14017/2/07-Estt (RR) "The limit of 5 years in one stretch and 7 years in the entire career for foreign service to organizations covered under para 2.1 and 2.2 shall not be extended under any circumstances. The officer shall be deemed to have resigned from the service in case he/she fails to join the Government within one month of completion of his approved tenure of five years with concerned organisation."

4. In view of this rule position, External Affairs Minister has approved deemed resignation of Shri Trivedi from IFS with effect from April 1, 2014, i.e. completion of one month after five years of deputation. Shri Trivedi has again represented and has requested the Ministry to allow him to join in the cadre.

5. In view of this, DOPT may please clarify whether the officer may be allowed to join the cadre. If so, the manner in which his absence from the cadre beyond authorised deputation period which was till March 1, 2014 is to be treated may please be clarified.

Paulomi Tripathi

US (FSP & Cadre)

Tel: 23011650

D.S. (SM), Room No.20, North Block, New Delhi [Kind attn.: Ms. Nandini Paliwal]

MEA I.D. Note No. Q/PA-I/575/02/2009 dated 22nd August, 2015"

30. The DoPT replied vide OM dated 02.02.2016 stating that :-

"No.1141841/JS(E)/2015-Estt(Pay-II)

Government of India

Ministry of Personnel, Public Grievances & Pensions

Department of Personnel & Training

....

North Block, New Delhi

Dated 2nd February, 2016

OFFICE MEMORANDUM

Subject: Re-joining after deemed resignation – reg.

The undersigned is directed to refer to the M/o External Affairs ID Note No.Q/PA-I/575/02/2009 dated 30.12.2015 regarding subject mentioned above and to state as under:-

a) The officer overstayed his deputation and his case of deemed resignation was approved by Hon'ble Minister of External Affairs w.e.f. 1.4.2014. After that, if the officer has decided to request for re-entry, that may not be allowed. This is not a case where the officer did not understand the consequences of his overstayal.

b) Ministry of External Affairs has not indicatd what their stand is. They have simply referred the case with a technical question.

c) In other services, officers who are away for long periods unauthorisedly, are being dealt with in the same way. No exception may be needed in this case.

2. This has the approval of Secretary (P).

(A.K. Jain)

Deputy Secretary to the Government of India

Ph: 23094542"

31. Thereafter, the impugned notification dated 04.02.2016 came to be passed.

32. Mr. Mohan, learned counsel has tried to persuade us that what must be taken into consideration is that in the communications dated 10.03.2015 and 11.06.2015, the respondent was specifically put to notice of:

(a) the applicability of DOPT guidelines and

(b) that his non-compliance would amount to his deemed resignation.

33. Despite the same, the respondent chose to continue staying in Geneva and kept on making requests for extension :-

(a) notwithstanding the completion of respondent's five year tenure and the continuous denial of extension;

(b) disregarding the repeated directions to return to India and report to his parent cadre immediately and

(c) despite being aware of the mandate under DOPT guidelines prohibiting extension of five year limit of Foreign Service.

34. It is also brought to our attention by the learned counsel that even though in the original prayer, the respondent had sought to declare Clause 11 of the terms and conditions of Foreign Service of DoPT OM dated 29.02.2008 as ultra vires, the same was not allowed by the impugned judgment dated 18.01.2019 and the respondent has accepted the same by not filing any appeal.

35. It has been further submitted that the Foreign Service of all the Officers are governed by DoPT's guidelines contained in OM AB-14017/2/07-Estt (RR) dated 29.02.2008. These guidelines were issued under the powers delegated to the Central Government by Fundamental Rule 110 in Part V, Chapter XII of the Fundamental Rules which deals with "Foreign Service".

36. The Fundamental Rule 110 was substituted by G.I., M.F. Notification No. 18(13)-E, IV(B)/70 dated 29.01.1971 which reads as under:

"(b) Transfer to foreign service outside India and in India may be sanctioned by the Central Government subject to any restrictions, which it may deem fit to impose by general or special order."

37. It is submitted that Fundamental Rule 110 applies generally to persons working under the Central Government who are transferred to a Foreign Service outside India. As per Fundamental Rule 110, the Central Government has power to impose instructions and restrictions, which it may deem fit, on transfer to a foreign service which can be done by issue of a general or special order. The DOPT Guidelines are applicable to all appointments for the "deputation/foreign service" of members of "the organized Group 'A' and 'B' Services of the Central Government" from 29 February 2008 and accordingly, these guidelines are binding upon the respondent.

38. Clause 11 of the guidelines (supra), clearly states that under no circumstance can the time limit of 5 years of foreign deputation of an officer, be extended. It is submitted that this was not something for the respondent to negotiate with the petitioners. The day the respondent chose to ignore the directions of the petitioners, he was in direct violation of Clause 11 and thus cannot claim ignorance for the same.

39. Mr. Mohan, finally, has vehemently argued that the respondent has totally disregarded the requests and reminders of the petitioners, and has more than amply demonstrated his defiance to the rules. The petitioners are bound by their statutory regulations and no exception can be carved out and thus the petitioner

cannot be reinstated into service. He states that if the same is allowed, it shall set a bad precedent thereby enabling all officers on foreign deputation to join and return back to their parent cadre as per their own whims and convenience.

Submissions of the Respondent

40. Per contra, Mr Rakesh Tiku, learned senior counsel appearing for the respondent argued that the letter dated 04.02.2016 effectively tantamounts to the effective termination of the services of the petitioner, and is in violation of principles of natural justice.

41. Mr Tiku, learned senior counsel for the respondent, while supporting the decision of the Central Administrative Tribunal, submitted that the Ministry of External Affairs (MEA) on 05.07.2014 directed the respondent to furnish an undertaking regarding his joining after the completion of his daughter's academic session 2014-2015, which the respondent duly complied with. Thus, after the respondent submitted the undertaking on 14.07.2014 stating that he shall join office latest by September, 2015 and subsequently when he joined his cadre on 01.09.2015, it cannot be taken to be a outright defiance of the rules by the respondent entailing him a consequence such as deemed resignation.

42. Furthermore, it is stated by Mr. Tiku, learned counsel that the OM dated 30.06.2015, was never received by the respondent within time as he was away from his duty station, which was well within the knowledge of the petitioners. It is also submitted that the respondent joined his duties on 01.09.2015 and impugned notification dated 04.02.2016 was issued 5 months after the respondent reported to India for duty.

43. It has further been argued that the concept of "deemed resignation" cannot mean that an Officer who never wanted to resign, always expressed his intent to join his duties and return to his cadre, made a personal visit to convey his constraints and plead his case before the competent authorities and in fact joined the cadre on the stipulated date that he had previously given an undertaking for, be brought under the concept of "deemed resignation".

44. Mr. Tiku, learned Senior counsel has further contended that there has been no enquiry; no show cause notice; no reply sought, and the respondent was not even afforded the opportunity for a personal hearing before passing the impugned order dated 04.02.2016, and the same is in direct violation of the Respondent's right to natural justice.

45. It has further been argued that the letter dated 04.02.2016 is retrospective, and by virtue of the letter, the respondent has been deemed to have resigned from the Government Service with effect from 01.04.2014 at a point where the Respondent had served and represented the Government of India diligently for nearly 20 years. It is submitted that the respondent had been working till 04.02.2016 and cannot be ousted from service with an order of deemed resignation, that too one which is retrospective in nature.

46. It has been contended by Mr. Tiku, learned counsel that by virtue of the letter dated 04.02.2016, the entire work of the respondent from 01.04.2014 to 04.02.2016 has been wiped out and rendered as non-est. The same is not permissible under any Rule, Regulation or Bye-law and the notification dated 04.02.2016 thus cannot be upheld to be valid.

47. He submits that there is relaxation power that the respondent has under the Indian foreign Service Leave Rules. The relevant portion of the Indian Foreign Service (Pay, Leave, Compensatory Allowances and other Conditions of Service) Rules, 1961 read as under:-

"PART-I

CHAPTER XIV

MISCELLANEOUS

41. Relaxation of Rules - Where the Government is satisfied that the application of any of these rules causes or is likely to cause undue hardship to a member of the Service, it may, after recording its reasons for doing so and notwithstanding anything contained in any of these rules, deal with the case of such member in such manner as may appear to it to be just and equitable:

Provided that the case shall not be dealt with in any manner less favourable to such member than that prescribed in these rules.

xxx xxx xxx

43. Certain orders and rules not to have effect and provisions for residuary matters - (1) Where provision has been made in these rules in respect of any matter, any other orders or rules made by the Government making provision for the same or similar matters shall be deemed not to have any effect.

(2) Where any matter arises in respect of which no provision has been made in these rules, it shall be dealt with as follows:-

(i) in accordance with the relevant provisions of any other rules specifically promulgated by the government in respect of the Service;

(ii) in the absence of (i) above, in accordance with any general or special or executive orders of the Government in regard to such matters; and

(iii) if no provision referred to in clauses (i) and (ii) exists, in accordance with the provision of Service code such as the Fundamental and Supplementary Rules, the Civil Service Regulations or any other set of regulations applicable to officers of similar status serving in India.

48. (3) The Government may, at any time, by general or special order, make provision for any matter that has not been dealt within these rules."

49. We have heard learned counsels for the parties and have gone through the

pleadings and documents on record.

Analysis:-

50. The parties are Ad Idem to the factual matrix in the present case, as all the requests for extensions made by the respondent and all the orders rejecting the said requests are duly documented and admitted by the respective parties.

51. The DoPT guidelines have been issued under the powers delegated to the Central Government by Fundamental Rule 110 in Part V, Chapter XII of the Fundamental Rules. Fundamental Rule 110 substituted by G.I., M.F. Notification No. 18(13)-E, W(B)/70 dated 29.01.1971, reads as under:

"F.R 110. (a) - No government servant may be transferred to foreign service against his will:

Provided that this sub-rule shall not apply to the transfer of Government servant to the service of a body, incorporated or not, which is wholly or substantially owned or controlled by the Government.

(b) Transfer to foreign service outside India and in India may be sanctioned by the Central Government subject to any restrictions, which it may deem fit to impose by general or special order. (emphasis supplied)"

52. The plain language of Fundamental Rule 110 makes it clear that the Central Government has power to impose instructions and restrictions, which it may deem fit, on the transfer of a government servant to a foreign service and this can only be done by way of a general or special order.

53. The respondent had further challenged Clause 11 of the DoPT OM dated 29.02.2008, on the ground that the said clause amounts to discriminatory treatment of Officers of Indian Foreign Service vis-a-vis Officers of All India Service as Rule 7(2)(c) of the All India Service (Leave) Rules which stipulates a prior reasonable opportunity to the show cause to explain the reasons for overstay of deputation as a mandatory exercise before treating an officer as "deemed resigned" from service. It was contended by the respondent that Clause 11 of the OM dated 29.02.2008 not only violates Articles 14 and 16 of the Constitution but is also violative of Article 311 of the Constitution, since it is punitive and amounts to removal from service, without giving a reasonable opportunity to the officer and a prior show cause.

54. As there are no service conditions applicable to deputation of Foreign Service for Members of Central Government Organized Group 'A' and 'B', DoPT issued its own rules, restrictions and conditions by way of DoPT guidelines as contained in the OM dated 29.02.2008. The applicability of DOPT guidelines dated 29.02.2008 is not a subject matter under challenge in the present writ present or was even challenged by the respondent in the O.A before the Central Administrative Tribunal. The only limited challenge in the O.A was with regard to Clause 11 of the DoPT guidelines being ultra vires Article 311 of the Constitution being against

the principle of "audi alteram partem".

55. The Central Administrative Tribunal, declined to adjudicate upon the Respondent's challenge to Clause 11 of the DOPT guidelines dated 29.02.2008, as being ultra vires and the respondent having accepted the same, needs no adjudication by this court. Hence, we are of the view that DoPT guidelines including Clause 11 govern the conditions of service for foreign service officers on deputation abroad.

56. The next question that arises for our consideration is whether the petitioners have been guilty of violation of principles of natural justice and whether the petitioners were under a mandate to show cause, seek a reply and only thereafter take any action against the respondent.

57. The concept of principle of natural justice to our mind requires:

(a) the delinquent to be in knowledge of the allegations which are made against him;

(b) the foundation of those allegations;

(c) the proposed action and the consequences contemplated to be taken against the delinquent; and

(d) consideration of his defence before passing any orders or taking a decision.

In the present case, the aforesaid requirements to ensure that the principle of natural justice is achieved, has been substantially complied with by the petitioners.

58. A bare perusal of the communications between the petitioners and the respondent clearly reveals that throughout, the petitioners had been informing the respondent about rejection of his request for extension of his deputation period.

59. The petitioners had continuously and time and again called upon the respondent to resume his duties with the parent department immediately. The petitioner had duly informed the respondent that in the eventuality of him failing to join the duties, he would be deemed to have resigned. Hence the respondent, was well aware of the proposed consequences of his action, and still continued to seek extensions rather than returning to his parent cadre, for the reasons mentioned i.e. the pendency of the academic session of his daughters, his need for more time for relocation and even his renewal of contract with WHO.

60. Hence, it can be seen that the action of "deemed resignation" is not an action which has been sprung out of the blue by the petitioners upon the respondent. It is not a consequence which has been thrust upon the respondent suddenly and as a shocker. The respondent was permitted on foreign deputation based on rules, which also necessitates the resumption of his duties with the parent cadre after the maximum permissible time of deputation i.e 5 years.

61. The respondent had been throughout, from the very first date i.e. 27.03.2014 aware of the proposed action in case of abdication of his duties and the consequences of his actions, but declined to join despite the same.

62. In *Viveka Nand Sethi v. Chairman, J&K Bank Ltd. & Ors*, (2005) 5 SCC 337 the Hon'ble Supreme Court held as under:

"20. It may be true that in a case of this nature, the principles of natural justice were required to be complied with but the same would not mean that a full-fledged departmental proceeding was required to be initiated. A limited enquiry as to whether the employee concerned had sufficient explanation for not reporting to duties after the period of leave had expired or failure on his part on being asked so to do, in our considered view, amounts to sufficient compliance with the requirements of the principles of natural justice."

63. Thus, we cannot but take the view that in the facts of the present case there was a substantial compliance of principles of natural justice as the respondent was fully aware of :- (a) his alleged conduct (b) the basis of allegations which are made against him; (c) the foundation for those allegations; (d) the proposed action and the entailed consequences which could be taken against the delinquent; (e) calling for his defence before taking any action and (f) he was given sufficient opportunities to resume his role at the Ministry, which he did not do so at his own peril.

64. We are of the view that the respondent was rightly 'deemed resigned' by the petitioner.

65. The last question which requires our attention is whether the petitioners on 04.02.2016 could have passed an order of "deemed resignation" retrospectively from an earlier date i.e. 01.04.2014.

66. It has been held by a coordinate bench of this court in *Delhi Development Authority v. S.C Gautam* (2012) 189 DLT 322 (DB) that:

"11. In *R. Jeevaratnam v. State of Madras*, AIR 1966 SC 951, the Government passed an order on 17.10.1950, directing that the appellant be dismissed from service w.e.f. 20.05.1949. The appellant filed a suit seeking declaration that the order dismissing from service was illegal and void. The suit was dismissed and the order of the trial court was upheld by the High Court in appeal. It was contended before Supreme Court that the order having been given retrospective effect was illegal and inoperative. Rejecting the contention, Supreme Court, *inter alia*, held as under:—

"An order of dismissal with retrospective effect is, in substance, an order of dismissal as from the date of the order with the superadded direction that the order should operate retrospectively as from an anterior date. The two parts of the order are clearly severable. Assuming that the second part of the order is invalid, there is no reason why the first part of the order should not be given the fullest effect. The Court cannot pass a new order of dismissal, but surely it can

give effect to the valid and severable part of the order.”

Thus, the proposition of law which one gathers from this judgment is that an order of dismissal giving retrospective effect to the penalty of dismissal would not be per se illegal though it would operate prospectively. In *Laisram Tombi Singh, Imphal v. Laisram Gopal Singh, Imphal*, AIR 1963 Manipur 28, the petitioner was dismissed from service w.e.f. the date he was suspended. The dismissal was challenged by the petitioner. Dealing with the contention, Supreme Court, inter alia, held as under:—

“The ordinary rule is that any order including an order of dismissal can take effect only from the date of the order. If it is to have retrospective effect there must be some provision in the statute or in the rules on which the order was based, permitting retrospective effect to be given to the order. The Central Civil Services Rules, 1957 which are framed under Article 309 of the Constitution to regulate the conditions of service of Government servants provide for various penalties including dismissal. There is nothing in the said rules, which would permit the disciplinary authority to dismiss a person from Government service with retrospective effect.

An order of dismissal with retrospective effect from the date of suspension amounts even to a decision by the disciplinary authority that the Government servant is not entitled even to the subsistence allowance to which he has a right under F.R. 53. The disciplinary authority is bound by the provisions of F.R. 53 and he cannot make any order which will be against the said provision.”

In *Sudhir Ranjan Halder v. State of West Bengal*, AIR 1961 Calcutta 626, a Division Bench of Calcutta High Court took the view that suspension, dismissal or removal from service with retrospective effect is illegal and invalid.....

13.This view also find support from the decision of Supreme Court in *R. Jeevaratnam* (supra) where the Court took the view that an order of dismissal with retrospective effect has to take effect prospectively that is from the date it is passed.

We therefore hold that the order of dismissal of the respondent from service passed by the Vice Chairman of DDA on 16.2.2009 would not operate retrospectively and would operate only from the date on which it was passed. To this extent, the order passed by the Tribunal needs to be set aside.”

67. The respondent on reporting for duty on 01.09.2015 could not be ipso facto deemed to have resigned retrospectively from the year 2014. This Court cannot ignore the crucial fact of the case herein, where the petitioners, while having constantly sent reminders and requests to the respondent to return to his parent cadre and resume his duties, but they took no steps for his non compliance.

68. The fact that the Respondent remained on deputation in Geneva till August, 2015 without any repercussions or action taken by the petitioners and it is only on 04.02.2016, that an order of retrospective “deemed resignation” was illegal.

69. It is an admitted fact that the respondent reported for duty on 01.09.2015 and his order of deemed termination was only passed on till 04.02.2016.

70. The implication of deemed resignation is in conflict to the claim of the respondent that he continued to be in service and discharge his duty till 04.02.2016, as there was no order of termination, suspension or deemed resignation against the respondent. Further, what is pertinent before this court is that, even the first note of considering the respondent's case for resignation was on 17.07.2015 i.e more than a year later than the retrospective date of resignation.

71. If the respondent was deemed resigned from the retrospective date i.e 01.04.2014 and yet he was not removed and there was no action from the petitioners, it would seem as though the respondent never resigned for that period.

72. Thus, to hold his deemed resignation with effect from 01.04.2014 (the original date he was expected to return to his parent cadre) cannot be upheld specially under the circumstance that the department and ministry kept communicating with the respondent without taking any action. It is also not a case wherein the petitioners were unaware about the whereabouts of the respondent. The Respondent had made it clear his inability to report immediately to his parent cadre and kept postponing his return. If the same did not find favour with the petitioners, they should have issued an order on 01.04.2014 and not waited till 04.02.2016.

73. The fact of the matter is that the respondent overstayed his deputation term knowingly, deliberately and neglected to join the ministry despite the expiry of his maximum deputation period and hence the petitioners are justified in deeming the respondent to have resigned, albeit the same cannot be made effective retrospectively.

74. The Central Administrative Tribunal in the impugned order has also inter -alia held that:

"10. In the instant case/the respondents have not shown any statutory rule governing the service conditions of the applicant which enables them to declare that the applicant is deemed to have resigned from service, in the eventuality of a particular circumstance. They passed the impugned order by invoking Para 11 read with paras 2.1 and 2.2 of the Annexure A-3 Office Memorandum, dated 29.02.2008, i.e., the Consolidated Guidelines on deputation/foreign service. The service of a public servant can be terminated as per the service conditions applicable to him or as per the service rules under which he was governed. The OM dated 29.02.2008, cannot be equated with a service rule issued under Article 309 of the Constitution of India or with any other statutory rule.

11. In respect of All India Service Officers, the All India Service (Leave) Rules, 1955, more particularly. Rule 7(2), provides for declaration that a member of All

India Service shall be deemed to have resigned from the service if he violated the said rule. But no such analogous rule either under the Discipline and Appeal Rules or Leave Rules applicable to the applicant are shown by the respondents, which empowers them to pass the impugned order. It is true that even if a public servant violates any executive instructions, the same would attract action under the Discipline and Appeal Rules. Appropriate orders could be passed for any such misconduct, after due procedure as provided under the Discipline and Appeal Rules is followed. But the respondents have not chosen any such action.”

75. We must state that this finding is faulty. As far as Indian Foreign Service is considered, it is a Central Civil Service and to state that they must be treated on parity with All India Service rules under clause 7(2) of the All India Service (Leave) Rules cannot be held to be valid. Anyways, we have already stated above that there has been substantial compliance of the principles of natural justice, clause 7(2) will have no application herein.

76. In the absence of specific restrictions or service conditions applicable to the deputation of foreign service for members of Central Government’s Organized Group ‘A’ and ‘B’, the DoPT guidelines must be taken in the nature of ‘service rules’. As there were no specific rules governing deputation to foreign service, the DoPT issued its own guidelines vide OM dated 29.02.2008, pursuant to its powers delegated by the Central Government under Fundamental Rule 110. Annexure A of the said DoPT guidelines contain “The Terms and Conditions for foreign service”. The language and the provisions of the DoPT guidelines make it clear that they are binding on the term of service of an officer and are not merely suggestive.

77. Further, even if we were to assume the argument of the Respondent that it is indeed discriminatory for the Ministry to treat Indian Foreign Service differently, we cannot close our eyes to the fact that the petitioners did indeed have several communications with the respondent for over 18 months, wherein the respondent neglected to resume his duties with the parent cadre despite being asked to return time and again. Each time the respondent was also duly informed of the consequences of disobedience and unauthorized extension of stay and of the fact that the maximum permissible limit of his deputation had long expired. Alas, he failed to refute the same before the petitioners. The respondent cannot come before the court and now claim parity to justify his own wrongs, when it was he himself who chose to neglect and ignore the directions of the petitioners time and again and rejoin the Ministry.

78. Nonetheless, the DoPT guidelines dated 29.02.2008 (supra) for officers to be appointed to Foreign Service, are valid and binding and as even otherwise the Respondent’s deputation was granted under those very said guidelines. On having accepted a deputation based on the same guidelines, the respondent can now not turn around and assail the same to be non-applicable and ultra vires.

79. The applicability and legality of Clause 11 of the OM dated 29.02.2008

having been challenged by the respondent before the learned Central Administrative Tribunal, and the same having not been set aside by the tribunal and having not been challenged by the respondent, has attained finality.

Conclusion

80. Thus, in view of the aforesaid discussion and judgments noted above, we deem it necessary to set aside the impugned order dated 18.01.2019 passed by the learned Central Administrative Tribunal and uphold the notification dated 04.02.2016 deeming the respondent to have resigned from service.

81. However, we hold that the "deemed resignation" of the respondent herein would be effective from 04.02.2016 i.e the date of passing of the order and not retrospectively from 01.04.2014.

82. The respondent's deemed resignation from service shall be effective from 04.02.2016 and the impugned order of the Central Administrative Tribunal is set aside in these terms.