
(2013) 04 DEL CK 0078

In the Delhi High Court

Case No : Writ Petition (C) 6735 of 2011 and 6736 of 2011

Union of India

APPELLANT

Vs

Umesh Nanda and Another

RESPONDENT

Date of Decision : 01-04-2013

Acts Referred:

Citation : (2013) 4 LLN 201 : (2014) 3 SCT 571

Hon'ble Judges : Pratibha Rani, J;Pradeep Nandrajog, J

Bench : Division Bench

Advocate : R.V. Sinha, Mr. A.S. Singh and Mr. Yashpal Rangi Advocates, for the Appellant; Rohit Sharma and Mr. Amarjeet Singh, Advocates for R-1 and Mr. Yashpal Rangi, Manjit Singh, R.V. Sinha and Mr. A.S. Singh, Advocates for R-2, for the Respondent

Judgement

Pradeep Nandrajog, J.—Since the impugned order dated April 05, 2011 passed by the Central Administrative Tribunal has disposed of two Original Applications No. 1328/2009 and 2339/2010, we would be proceeding to note the relevant facts, which to some extent are intermingled within the two Original Applications; and this is the reason why the Central Administrative Tribunal has disposed of two Original Applications by a singular order which is conceptually dual in nature. Vide order dated April 21, 2004 passed by the competent authority, penalty of reducing pay of respondent No. 1, Umesh Nanda, by three stages for a period of two years with cumulative effect containing a direction that respondent No. 1 would not earn increments during the period of reduction was imposed. The order also directs recovery of a sum of Rs. 1,89,476/- together with interest @ 10% per annum from the date said sum was paid from out of the funds of Haryana Institute of Public Administration to the Union of India till realization. Appeal filed against order was rejected by the appellate authority i.e. the Central Government vide order dated January 07, 2005. Memorial filed by respondent No. 1 on March 06, 2006 being decided by the President of India on June 21, 2010 pertaining to the penalty, vide O.A. No. 2339/2010, the respondent No. 1 laid a challenge to the order imposing penalty, order rejecting the appeal as also

the order rejecting the memorial. But before the memorial could be decided by the President, since respondent No. 1 was compulsorily retired from service vide order dated April 12, 2007, exercising power under Rule 16(3) of All India Services (DCRG) Rules, 1958 (akin to FR 56(j)) and against which order memorial filed was rejected on May 05, 2008, she laid a challenge to said orders vide O.A. No. 1328/2009. It was during hearing of said Original Application that the Tribunal realize that penalty imposed would impact the compulsory retirement and hence passed an order requiring the Presidential Memorial to be decided and only thereafter order dated June 21, 2010 was passed. And this explains the order compulsorily retiring respondent No. 1 being challenged before she laid a challenge to the penalty order.

2. Since the Union of India and State of Haryana are the writ petitioners before us, it is apparent that respondent No. 1 has succeeded before the Tribunal.

3. The respondent No. 1, Smt. Umesh Nanda, was a member of the All India Administrative Services (IAS) and was allocated to the Haryana Cadre. Her spouse was also a member of the Indian Administrative Service. On deputation to the Central Government and posted as a Secretary in the Ministry of Health, he was allotted Flat No. D-1/93 Satya Marg, Chankyapuri in the year 1989 from the Central Pool Accommodation which he was entitled to occupy till his deputation posting came to an end. On November 01, 1990 respondent No. 1 was sent on deputation to the Central Government and was posted as Director, Ministry of Welfare. She made a request that the allotment of the flat made to her husband be changed in her name, which request was approved on May 01, 1991 with retrospective effect from November 01, 1990.

4. Completing her deputation with the Central Government, on repatriation to the State Government, respondent No. 1 was posted as Secretary Technical Education in December, 1996. As per Rules she was entitled to retain possession of flat at Chankyapuri for a period of 8 months. She was required to vacate the same on or before August 12, 1997. On April 01, 1997, respondent No. 1 was appointed as Director of Haryana Institute of Public Administration (HIPA) having its office at Gurgaon. The said Institute did not have a residential accommodation for its Director and in the past had been taking on lease a private house for the residence of the Director. Thus, HIPA was incurring huge expenses to pay rent for the house taken on lease, and as regards the Director, the usual license fee, being 5% of the basic pay, was being deducted. The respondent No. 1 made a representation to the State Government seeking permission to continue to occupy the flat in question while working as Director, HIPA. She requested the State Government to surrender one Pool Flat at Delhi to the Central Pool and in return take within the State Pool the flat in question and allot it to her. Needless to state if said request was accepted, no payment inter-se had to be made between the State and the Central Government; and as regards respondent No. 1, from her salary, 5% of the basic pay had to be deducted towards license fee. The terms and conditions of respondent No. 1's foreign posting, since HIPA is an

Autonomous body under the State Government, were finalized on November 20, 1997, as per order of even date issued; and pertaining to the accommodation to be provided by HIPA, Clause 10 of the order reads as under:-

10. Residential Accommodation/House Rent Allowance:

(i) If the officer occupies government owned residence, she will be required to pay rent thereof in terms of para 4 of Finance Departments' letter No. 1011-2FICW-91 dated 30.04.91 and the difference between this amount and rent charged by the Government for that house shall be paid by the foreign employer...

5. Thus, as per terms of foreign posting, respondent No. 1 was to be provided with a residential accommodation commensurate to her entitlement and she was to pay 5% of her basic pay as license fee.

6. At the 34th Meeting of the Executive Council of HIPA, since the Director's Residence within the HIPA Complex was under construction and was not expected to be completed within next six months, a proposal was put up before the Council that the State Government be requested to permit respondent No. 1 to reside at the flat at Chankyapuri which flat would be treated as the residence of the Director. Matter lingered on resulting in the Director of Estates, Ministry of Urban Development, Union of India demanding penal rent in sum of Rs. 64,400/- for the period of August 13, 1997 till October 31, 1998.

7. But for October 31, 1998, the Director's residence under construction within the precincts of HIPA complex in Gurgaon still not completed, at the 35th Meeting of the Executive Council of HIPA held on March 10, 1998, it was resolved that respondent No. 1 could continue to occupy the flat in question and that the penal rent would be paid by HIPA and as regards respondent No. 1 she would pay license fee to HIPA @ 5% of her basic pay.

8. In furtherance of the resolution passed on March 10, 1998, on October 29, 1998, a sum of Rs. 1,89,476/- was paid from the account of HIPA to the Central Government being penal rent for the flat in question from August 13, 1997 till October 31, 1998.

9. Vide Memorandum No. 20/76/98-2S (I), dated May 25, 1999, issued by the competent authority, respondent No. 1 was charged with two counts of misdemeanor. The Articles of Charge read as under:-

Article-I

That Smt. Umesh Nanda, IAS appointed three clerks apparently with some ulterior motive as they did not fulfill the requisite eligibility condition of knowledge of typewriting. She, thus, failed to maintain absolute integrity. Smt. Umesh Nanda, IAS, also did not even care to submit her explanation for this misconduct on her part and thereby violated the provisions of Rule 3 of All India Services (Conduct) Rules, 1968.

Article II

That Smt. Umesh Nanda, IAS unauthorisedly withdrew a sum of Rs. 1,89,476.00 on 29.10.1998 from the funds of HIPA for making payment on her personal liability of payment of house rent to Delhi Administration which tantamount to embezzlement of Government money. Further, Smt. Umesh Nanda, IAS did not deduct any rent of house @ 5% of her basic pay from her salary for the period 13.08.1997 to 31.10.1998.

The lapses detailed above on the part of Smt. Umesh Nanda, IAS constitute grave misconduct and severe dereliction of duty rendering her liable to strict disciplinary action.

10. Inquiry report submitted after the inquiry held charge No. 1 not proved but treated as partially proved by the Tribunal, in that, the Tribunal has treated as if there was an indictment of lack of supervision when three clerks were appointed. As regards charge No. 2, the report opined that respondent No. 1 continued to illegally occupy the flat at Chankypuri and the act of HIPA to pay penal rent in sum of Rs. 1,89,476/- amounted to a personal benefit taken by respondent No. 1; which tantamounts to embezzlement of Government money. Accepting the report of the Inquiry Officer vide order dated April 21, 2004, penalty as under was levied upon the respondent No. 1:-

...a penalty of reduction of pay by three stages in the time scale for a period of two years with cumulative effect with further directions that she will not earn increments during the period of reduction of pay is ordered to be imposed upon her. The amount of Rs. 1,89,476/- alongwith interest @10% per annum from the date of drawl till the date of repayment is also ordered to be recovered from her in equated monthly installments so that the said amount is fully recovered before her retirement on superannuation....

11. While the inquiry proceeding against the respondent No. 1 aforementioned was pending, a second charge-sheet was served upon her listing the charge of insubordination on account of being allegedly unauthorisedly absent when her foreign posting at HIPA came to an end and she was required to report to the State Government. However, after considering the reply filed by respondent No. 1, the charges were dropped vide order dated October 12, 2000. The period interregnum was treated as on leave sought by respondent No. 1.

12. Against the order levying penalty, respondent No. 1 preferred an appeal on May 24, 2004. Being a member of the Indian Administrative Service, the appellate authority was the Central Government. It sought opinion of the Union Public Service Commission. The opinion was that the penalty was justified. Taking into account the opinion of UPSC, the appeal was rejected vide order dated January 07, 2005, against which order the respondent No. 1 submitted a memorial to the President of India on March 06, 2006.

13. During the pendency of the memorial, exercising power under Rule 16(3) of

All India Services (DCRG) Rules, 1958, the respondent No. 1 was compulsorily retired vide order dated April 12, 2007, against which memorial filed by the respondent No. 1 was rejected on May 05, 2008, in which it was conveyed to respondent No. 1 that three adverse factors justified her being compulsorily retired; being:

(i) adverse entries in the integrity column of the ACR for the period April 01, 1998 - October 30, 1998;

(ii) adverse entries in the integrity column of the ACR for the period April 01, 1999 - March 31, 2000. (Which we note is a result of the inquiry conducted against respondent No. 1 and the penalty imposed vide order dated April 21, 2004 pertaining to Rs. 1,89,476/- paid by HIPA to the Central Government on October 29, 1998; treating said payment as amounting to lack of integrity on the part of respondent No. 1 being the beneficiary of said amount being paid).

(iii) adverse entries in the ACR for the period April 01, 1999 - March 31, 2000 that respondent No. 1 showed streaks of insubordination for being unauthorisedly absent after foreign posting period at HIPA came to an end and she was to report to the State Government.

14. Respondent No. 1 filed O.A. No. 1328/2009 challenging order compulsorily retiring her passed on April 12, 2007 and the order dated May 05, 2008, rejecting memorial submitted by her against the said order.

15. The Tribunal realized that the order levying penalty and its reflection in the ACR for the period April 01, 1998 - October 30, 1998 as also its reflection in the ACR for the next year had a bearing on respondent No. 1 being compulsorily retired. Noting that respondent No. 1 was justified in not challenging the penalty imposed till memorial submitted by her to the President of India pertaining to the penalty was decided, on March 26, 2010, an order was passed in O.A. No. 1328/2009 requesting that the memorial submitted to the President of India be decided.

16. On June 21, 2010 the memorial was rejected resulting in O.A. No. 2339/2010 being filed challenging the penalty order dated April 21, 2004, the order rejecting the appeal dated May 24, 2004 and the order dated June 21, 2010 rejecting the memorial.

17. Both Original Applications, as noted in para 1 above have been decided by the Tribunal in favour of respondent No. 1 vide order dated April 05, 2011.

18. To the reader of our opinion it would be apparent by now, that the focus would be on the penalty imposed for the reason if the same would stand, its impact on respondent No. 1 being compulsorily retired would be a sequitur.

19. With reference to the record of inquiry, the Tribunal found that there was evidence to the effect that on foreign posting with HIPA, respondent No. 1 was entitled to a residence and that within the precincts of the campus Director's

residence was yet under construction. The Tribunal noted the evidence that at the 34th and the 35th Meeting of the Executive Council of HIPA it was noted by the Council that the Director's residence was incomplete. Though reference has been made by the Tribunal to the fact that term of foreign posting as per order dated November 20, 1997 entitled respondent No. 1 to a residential accommodation as a Director of HIPA, the Tribunal has not expressly noted that taking on rent a private accommodation would have entailed a heavy expenditure on HIPA. But a read and feel of the order passed by the Tribunal would make it evident that in the subconscious mind of the Tribunal was the fact that the decision by the Council was motivated by the desire to save money. The Tribunal has specifically noted that it was not the personal decision of respondent No. 1 that penal rent be paid to the Central Government. The decision was of the Members of the Executive Council. The Tribunal has noted that none of them was charge-sheeted. Holding that the charge against respondent No. 1 of unauthorisedly withdrawing Rs. 1,89,476/- from the funds of HIPA by making payment for a personal liability could not be said to be established, in view of the hitherto fore noted express and not express reasoning of the Tribunal, the Tribunal further opined that the question of any embezzlement did not arise and hence the second limb of the charge pertaining to embezzlement could not be sustained. Treating Article I of the charge as being partly proved by the Inquiry Officer, the Tribunal noted that the Charge was of receiving illegal gratification with ulterior motive for making appointments of three clerks. The Tribunal noted that even as per the Inquiry Report it was not proved that illegal gratification was given. The Tribunal noted that as per the Inquiry Report it was at best a case of lack of proper supervision, which was not the charge against respondent No. 1.

20. So holding, the Tribunal quashed the penalty imposed.

21. Here ends the first conceptual part of the order passed by the Tribunal.

22. The second conceptual part picks up its threads from the destination reached at the first conceptual journey.

23. As noted hereinabove in paragraph 14, that pertaining to the ACR for the period April 01, 1998 till October 31, 1998, the sum of Rs. 1,89,476/- paid as penal rent by HIPA to the Central Government reflected itself in respondent No. 1's integrity being shown as doubtful, the Tribunal held that since the penalty was quashed by it, the reflection in the ACR that respondent No. 1's integrity was doubtful had to be removed and the impact of said removal on respondent No. 1 being compulsorily retired had to be evaluated. Pertaining to the adverse entries in the ACR for the period April 01, 1999 - March 31, 2000, to the effect that there were streaks of insubordination in the behaviour of respondent No. 1, an opinion premised on the fact that on foreign posting with HIPA coming to an end and being required to report to the State Government the respondent No. 1 sought leave and did not report back, the Tribunal noted that for the alleged act of indiscretion, the explanation of respondent No. 1 to the charge-sheet issued on January 18, 2000 being found satisfactory and the charge being dropped

obviously necessitated said adverse remark to be expunged and thereafter impact thereof on respondent No. 1 being compulsorily retired to be considered. Pertaining to the third adverse material i.e. integrity and reputation of respondent No. 1 as per the assessment year 1988-89, the Tribunal noted that the same have been expunged vide order dated February 14, 1992. The Tribunal opined that the Appraisal Committee could not have considered the expunged remarks while appraising the service record of respondent No. 1 when her dossiers were considered for further retention in service or to compulsorily retire her.

24. The Tribunal held, as per its reasoning, that removing the adverse entry for the assessment year 1988-89, which had been expunged, as also removing the adverse remarks pertaining to her integrity in the ACR for the year 1998-99 and removing the adverse remark in the ACR for the year 1999-2000, nothing remained to justify respondent No. 1 being compulsorily retired.

25. The penalty order as also the order compulsorily retiring respondent No. 1 have been set aside.

26. Learned counsel for the petitioners conceded that as regards the adverse remarks that respondent No. 1 did not enjoy good reputation about integrity entered in the ACR for the year 1988-89, the same was expunged vide order dated February 14, 1992, and thus as regards said entry, concededly the Appraisal Committee which considered the service record of respondent No. 1 committed an error by taking into account an expunged adverse remark. Further, pertaining to the ACR for the year 1999-2000 containing the adverse remark that respondent No. 1 showed a streak of insubordination, being unauthorisedly absent when foreign posting at HIPA came to an end and respondent No. 1 was to report to the State Government, learned counsel for the petitioners conceded that for the act in question i.e. unauthorized absence, explanation of respondent No. 1 to the charge-sheet dated January 18, 2000 being found justified and the charge being dropped resulting in her leave applications being accepted and the period in question adjusted against leave, the reflection in the ACR had to be expunged and ignored. Learned counsel conceded that the Appraisal Committee overlooked that for the same act of stated insubordination the justification given by respondent No. 1 was found to be legally sound and valid.

27. Pertaining to Article I of the charge-sheet, we do not find that the Inquiry Officer has found respondent No. 1 guilty, though the reasoning suggests that the conclusion arrived at by the Inquiry Officer is that it was at best a case of lack of supervision. We need not discuss much on the issue for the reason the Tribunal has correctly concluded that the charge of making appointments by receiving illegal gratification for ulterior motive would be distinct from a charge of lack of supervision and since the latter was not a charge, there could be no indictment without a charge.

28. This takes us to the integrated factor i.e. the charge-sheet dated May 25,

1999 pertaining to Rs. 1,89,476/- being transferred from the account of HIPA to the Central Government to clear the penal rent for flat No. D-1/93, Satya Marg, Chankyapuri, New Delhi. As noted above, the charge has been held to be proved and penalty levied. Its reflection in the ACR is to record that integrity of respondent No. 1 is doubtful.

29. From the facts noted by us hereinabove, the issue has to be looked at from two distinct angles. Firstly the factual angle. Secondly the conceptual angle.

30. Pertaining to the conceptual angle, assuming respondent No. 1 acted unlawfully in remitting Rs. 1,89,476/- from the funds of HIPA to the Union of India, but since it related to a penal rent charges for her occupying a Government flat beyond term of its allotment, prima facie it would not be a case of embezzlement strictly so called warranting it's having a reflection on her integrity being doubtful. Pertaining to money entrusted with a person, integrity doubtful would mean doing of an act which has a moral wrong element i.e. a turpitude. Every wrong may not be a moral wrong. Facts noted above would reveal that on account of Director's residence not constructed within the precincts of HIPA, respondent No. 1 made a representation to the Executive Council of HIPA to sanction for her the right to continue to occupy the flat with simultaneous request to the State Government to write to the Central Government to take within the fold of the State Pool Accommodation the flat in question in exchange for a State Pool Accommodation flat. We need to speak a word on this. In Delhi, certain flats have been made available by the Central Government to various State Governments which constitute the State Pool Accommodation in Delhi. These flats are allotted by the State Government to its employees stationed at Delhi in their capacity as State Government Employees and discharging duties for the State, for example Resident Commissioners. It is permissible for a State Government to surrender any one or more State Pool Accommodation in exchange for a Central Pool Accommodation. Thus, if the respondent No. 1 requested the Executive Council to avail said benefit, assuming it was a wrong, it would not be a wrong of a kind where one could say that respondent No. 1 has embezzled public funds for her personal benefit requiring it to be inferred that her integrity was doubtful. Thus, the not expressly stated reasoning of the Tribunal on the conceptual part of the indictment, but emerging as a read and feel reasoning, is correct.

31. With respect to the factual aspect of the indictment, the facts noted by us hereinabove would indicate that sent on a foreign posting to HIPA as Director thereof, respondent No. 1 was entitled to a residence in terms of the foreign posting terms and conditions order dated November 20, 1997. Since Director's residence was under construction, HIPA was obliged to take on hire a residence commensurate to the status of respondent No. 1 and pay the rent thereof. As regards respondent No. 1, she was liable to pay only 5% of her basic salary as license fee for the accommodation in question. The Executive Council passed two resolutions that a request would be made to the State Government to write to

the Central Government for an exchange of the flat in question at Chankyapuri which was in the Central Pool to be put in the State Pool with one similar flat in the State Pool to be surrendered in the Central Pool. The Executive Council took the decision to pay Rs. 1,89,476/- from out of the funds of HIPA to the Central Government pending the State Government writing to the Central Government for exchange of the flat in question and thereafter formally allotting the same to respondent No. 1. Evidence establishes that respondent No. 1 had by herself taken no decisions. Indeed she could not. It was the Executive Council alone which could decide, and which decided. Respondent No. 1 only made requests to the Executive Council.

32. If a request made by a person is wrongly accepted by the superior authority, the wrong if any, is by the superior authority and not the one who makes the request, unless of course there is an allegation which is found to be true, of acting in concert.

33. In the instant case there is no such allegation. As noted by the Tribunal, no action whatsoever was taken against the members of the Executive Council.

34. We concur with the view taken by the Tribunal that the penalty imposed is the result of a totally misdirected evaluation of the evidence by ignoring the salient features of the evidence.

35. If the penalty pertaining to the charge-sheet dated May 25, 1999 has to be set aside, the inevitable consequence thereof would be to expunge adverse remark in the ACR proforma for the year in question, which reflection we have even otherwise found to be, on a conceptual concept, a faulty entry.

36. Thus, it has to be concluded that there is a taint in the decision making process pertaining to respondent No. 1 being compulsorily retired.

37. It is trite that a Government servant is not assured of being permitted to serve till the age of superannuation. The only assurance is to be permitted to serve till pensionable service is rendered. Thereafter, the Government servant has to earn a right to serve till the age of superannuation by proving the worth i.e. being an above average worker. An average worker would be dead-wood. It subserves public interests that public posts are manned by those who are above average, requiring the average or the below average to be moved out and in their place new entrants inducted. Needless to state, if the dead branches of a tree are not pruned, the new shoots do not grow; new branches are not formed; and the tree bears no fruit. This compels us to have a look on the general profile of respondent No. 1, after ignoring the material illegally considered against her when decision was taken to compulsorily retire respondent No. 1.

38. Before we pen profile the same, we take note of the legal position that a decision pertaining to compulsory retirement of a Government servant authorizes the Government to take into account the entire service record but with greater weightage i.e. prominence, to the last five years service record. The reason

being that a Government servant may take time to find a niche, meaning thereby, initial career growth may be slow with ACR grading "Average", but with passage of time the Government servant may earn ACR grading "Good", "Very Good" and "Outstanding". Further, law requires such penalties, if any imposed, to be ignored which precede the date when a Government servant earns a promotion to a higher grade. The reason for this is that a promotion obliterates the impact of such penalties. Penalties levied after promotion have to be taken into account. It is for this jurisprudence that a compulsory retirement is not treated as a penalty.

39. We now pen profile the service record of respondent No. 1. As we have noted above, the service journey as a member of the Indian Administrative Service was commenced by respondent No. 1 in the year 1974. Put in a tabulated form, the service profile is as under:-

40. Suffice would it be to state that notwithstanding order compulsorily retiring respondent No. 1 being passed on April 12, 2007, as made available to us, service record as aforementioned was considered by the Appraisal Committee. It appears that the ACR for the year 2005-06 was not written. Thus, of the five preceding years, record would reveal that in the immediate preceding year the respondent was graded "Outstanding", the three preceding years to the immediate preceding year had respondent No. 1 being graded "Very Good" and the next preceding year i.e. fifth going backward had the ACR grading "Good". Of the 31 years service, for one year i.e. 1996-97 there was a no report certificate. Respondent No. 1 had "Average" grading, full or part years, only thrice; "Good" grading seven; "Good" and part "Average" twice; "Very Good" eleven; "Outstanding" four; and "Below Average" once.

41. We think there is no scope for a debate: Whether respondent No. 1 is a dead-wood. The writ petitions are accordingly dismissed but without any order as to costs.