

(2010) 11 DEL CK 0115

In the Delhi High Court

Case No : Writ Petition (C) 6512 of 2008

Union of India (UOI) and Others

APPELLANT

Vs

Rahul Rai Sur

RESPONDENT

Date of Decision : 08-11-2010

Acts Referred:

All India Services (Leave) Rules, 1955 — Rule 7, 7(2)

Citation : (2010) 11 DEL CK 0115

Hon'ble Judges : Siddharth Mridul, J;Pradeep Nandrajog, J

Bench : Division Bench

Advocate : A.K. Bhardwaj, for the Appellant; Ajit Warriar and Sanjeev Sharma and Party-in-Person, for the Respondent

Judgement

Pradeep Nandrajog, J.—Rahul Rai Sur an officer of Indian Police Service 1981 Batch, after having rendered exemplary service as a police officer was sent on deputation to the United Nations w.e.f. 15.7.1997 and from time to time was granted benefit of remaining on deputation. As per the last extension granted the deputation was extended till 31.5.2004.

2. Much before 31.5.2004, i.e. on 30.4.2004, Rahul Rai Sur informed that the work assigned to him at United Nations was yet to be over and thus requested that deputation be extended. On 13.5.2004, i.e. 18 days prior to 31.5.2004, the Permanent Mission of India to the United Nations forwarded a request from the United Nations to extend the deputation of Rahul Rai Sur, as per which, United Nations wrote that Shri Rahul Rai Sur was working in a key section and his services were required.

3. On 4.9.2004 the petitioner rejected the request of Rahul Rai Sur to continue to remain on deputation and advised him that he should seek voluntary retirement if he desires to continue to be posted at the United Nations. Reason for not extending the deputation was that he had concluded 7 years' deputation service. The letter dated 4.9.2004 reads as under:

A.K. JAIN

Joint Secretary

23094927

MINISTRY OF HOME AFFAIRS

NORTH BLOCK

NEW DELHI-110001

D.O. No. I-21015/83/97-IPS.III

4 September 2004

Dear

I would like to refer to PMI to UN, New York fax message No. 88 dated 13.5.2004 regarding extension of deputation tenure of Shri R.R. Sur, IPS (MH:81) working with the Office of Internal Oversight Services of the United Nations Secretariat for a period upto 6th May, 2006.

2. The matter regarding continuation of IPS officers in UN assignments beyond approved period has since been looked into by this Ministry. It has been decided that further cadre clearance for extension of deputation tenure of Shri R.R. Sur beyond 31.5.2004 cannot be given. Shri R.R. Sur has already completed 7 years in the United Nations posting and should be repatriated immediately under intimation to this Ministry. However, in case he desires to continue in UN and makes an unconditional prayer seeking voluntary retirement, the proposal will be considered by this Ministry. Such a prayer should be received by the Ministry latest by 31st October 2004. Otherwise the officer must report back to his cadre by that date.

Yours sincerely,

(AKHIL KUMAR JAIN)

Shri B.S. Prakash,

Joint Secretary,

Ministry of External Affairs,

South Block,

New Delhi.

4. Shri Rahul Rai Sur claims that he never received the said letter. Vide impugned decision, the Tribunal has returned a finding of fact that Shri Rahul Rai Sur did not receive the letter in question. It be noted that the language of the letter shows that it has not been addressed to Rahul Rai Sur, but to a third person and concerns the deputation of Rahul Rai Sur.

5. The effect thereof would be dealt with by us a little later. But proceeding with the narratives of the facts, on 30.10.2004, the applicable Service Rule being Rule 7 of the All India Services (Leave) Rules was amended. The Rule as originally framed reads 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) 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 a reasonable opportunity to explain the reason for such absence shall be given to the member of the service before the provisions of sub-rule (2) are invoked.

6. As per the amendment, Sub-rule (2) came to be amended as under:

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

(a) is absent without authorization for a period of one year; or

(b) remains absent from duty for a continuous period of five years, with or without leave; or

(c) continues on foreign service beyond the period approved by the Central Government;

Provided that a reasonable opportunity to explain the reason for such absence or continuation on foreign service shall be given to the member of the Service before the provisions of this sub-rule are invoked.

7. Ignoring the facts of certain correspondence being exchanged, but relevant to note that in the correspondence Rahul Rai Sur made no mention of letter dated 4.9.2004 being received by him, evidencing the fact that in all probability he did not receive so, it may be noted that on 2.3.2005 a show cause notice was issued to Rahul Rai Sur in which, making a reference to the letter dated 4.9.2004. Shri Rahul Rai Sur was asked to explain as to why it not be treated that he has resigned from service. The show cause notice dated 2.3.2005 reads as under:

The undersigned is directed to say that Shri Rahul Rai Sur, IPS (MH:81) had joined the United Nations to work as Investigator in the Office of Internal Oversight Services, New York on 15.07.1997. His deputation to the said post was extended from time to time and the last extension was allowed upto 31.05.2004. His request for further extension of his deputation with UN was not acceded to and he was advised on 4.9.2004 to report back to his parent cadre i.e. Indian Police Service I the Maharashtra Cadre forthwith Shri Rahul Rai Sur is however

still continuing with the UN posting.

2. The matter has been examined further, Government of India in such cases, have since laid down in Rule 7(2)(c) of the All India Services (Leave) Rules, 1955 (as amended on 19.10.2004) that a member of the Service (including the IPS officers) shall be deemed to have resigned from service if he continues on foreign service beyond the period approved by the Central Government. An opportunity has however been provided to such officers to explain the reasons for their overstaying before invocation of these provisions in their cases.

3. Shri Rahul Rai Sur, IPS (MH:81) is accordingly asked to explain as to why the above said provisions of the AIS (Leave) Rules, 1955 be not invoked in his case and he be treated as having resigned from service for remaining away from his duties beyond the date of approved tenure of his deputation to the above said post. He is advised to furnish his reply within fifteen days of receipt of this Memorandum failing which the Central Government would initiate further necessary action in the matter.

8. In response, Shri Rahul Rai Sur responded on 8.4.2005 as under:

I would like to thank you for your letter dated 2 March 2005 (No. 24012/86/99-IPS.II) which I received on 23 March 2005. The letter requests me to furnish a reply on my continuing to serve with the United Nations.

In this regard, I would like to kindly submit that I have not received the communication dated 4.9.2004, which is referred to in your letter dated 2 March 2005. As I was not in receipt of your communication dated 4 September 2004 advising me to report back to my parent cadre, I understood that the Government of India had no objection to my continuing to serve with the United Nations.

In view of this, I kindly request that I may be permitted to serve with the United Nations till the end of my current contract on 6 May 2006.

I thank you for your kind consideration of the matter.

9. Suffice would it be to state that the foundation of the show cause notice was the letter dated 4.9.2004, which Rahul Rai Sur claimed not to have received and thus he responded to the show cause notice informing the said fact and additionally praying that he may be permitted to serve with the United Nations till 6.5.2006.

10. On 26.9.2005 an order was passed that since Shri Rahul Rai Sur was continuing to remain unauthorizedly absent he was deemed to have resigned from the Indian Police Service.

11. Shri Rahul Rai Sur challenged the order dated 26.9.2005 for the reason after he received the said order he made two representations stating that he may be permitted to voluntarily retire, which request was turned down on the ground that his service had already been dispensed with on account of his deemed

resignation.

12. This led Rahul Rai Sur to file OA No. 1505/2007 which has been allowed vide impugned order dated 1.4.2008.

13. Two principal reasons are forthcoming on record.

14. Firstly, the Tribunal has held that there is no proof that letter dated 4.9.2004 was delivered to Rahul Rai Sur. The second reason by the Tribunal is that Rule 7(2) of the All India Services (Leave) rules was amended on 30.10.2004 and that it could not have retrospective operation. The reasoning of the Tribunal is as under:

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It could not be disputed during the course of arguments that retrospective effect of the substituted Sub-rule (2) of Rule 7 would prejudicially affect the interests of the applicant. The impugned notification dated 26.9.2005 (Annexure P-1) is expressly rested on the basis that the applicant "is continuing on deputation with United Nations unauthorizedly beyond 31.5.2004". The impugned notification is thus based upon the assumption of power and authority over a person who stood specifically excluded from applicability of Rule 7(2). The notification, concededly, is not retrospective either expressly or by necessary intendment. That apart, by virtue of provisions contained in Section 3(1-A) of the Act of 1951, the same could not possibly be made retrospectively, as surely, as mentioned above, it is bound to prejudicially affect the interest of the applicant. The prospective operation of substituted Rule 7(2) and non-permissibility with the rule making power so as not to make it retrospective apart, we are of the clear view that rule such as Rule 7(2) of the Rules of 1955, which would take away a vested right of an employee, could not possibly be made retrospectively....

15. With respect to the letter dated 4.9.2004 not being served upon Rahul Rai Sur, learned Counsel for the petitioner is unable to show any document wherefrom it can be established that the same was served upon Rahul Rai Sur. Thus, the finding of fact returned by the Tribunal is correct.

16. What would be its effect, would be dealt with by us a little later, but before that we deal with the reasoning of the Tribunal with reference to the amendment to Sub-rule (2) of Rule 7.

17. It is no doubt true that having not been granted any extension to remain on deputation, post 31.5.2004, Rahul Rai Sur could technically be treated as unauthorizedly absent. Thus, on 1.6.2004, action could be taken against him for unauthorized absence (technically speaking) but as per the existing Sub-rule (2) of Rule 7. But post 30.10.2004, it could not be said that the pre-amended Sub-rule (2) of Rule governs the field.

18. It is settled law that with respect to disciplinary action no civil servant has a vested right to claim that the Government cannot amend the discipliner rules. Of

course, a misdemeanour or a penal provision cannot have retrospective effect. But certainly, prospective effect can be given to an amendment.

19. Rahul Rai Sur did not re-join service on or after 30.10.2004 and thus treating the period post 30.10.2004, as one of unauthorized absence, the petitioner could certainly take action against him under Sub-rule (2) of Rule 7.

20. Thus, the second reasoning of the Tribunal is incorrect.

21. But, we need to deal with the effect of the order dated 4.9.2004 not being served upon Rahul Rai Sur.

22. With reference to the language of the order dated 4.9.2004, suffice would it be to state that had Rahul Rai Sur received the same, in terms of the order dated 4.9.2004, he could have made an unconditional prayer seeking voluntary retirement. On being informed that his deputation was not being extended and being advised to tender unconditional voluntary retirement, Rahul Rai Sur could have taken the benefit of the advice. Thus, non-service of the letter dated 4.9.2004 has resulted to the prejudice of Rahul Rai Sur.

23. Learned Counsel for the respondent on instructions from the respondent states that the statement of the respondent be taken on record that he is prepared to accept his being voluntarily retired w.e.f. 31.10.2004. Counsel states that the respondent would have done so had he received the letter dated 4.9.2004, i.e. would have given the 1 month notice seeking voluntary retirement.

24. We note that before the respondent approached the Tribunal, he made representations requesting petitioner to accept his voluntary retirement application, which was refused on the ground that the petitioner had already passed an order treating Rahul Rai Sur as having deemed to have resigned.

25. We note that the Tribunal has quashed the order treating Rahul Rai Sur as having deemed to have resigned and in respect of the alleged misdemeanour of unauthorized absence has permitted the petitioner to take disciplinary action against him.

26. In our opinion, for the reason letter dated 4.9.2004 was not served upon Rahul Rai Sur, and noting the contents thereof, ends of justice would be met, if in harmony with the statement made by learned Counsel for the respondent, the writ petition is disposed of maintaining the setting aside of the order dated 26.9.2005 but modifying the impugned order with the direction that Rahul Rai Sur be treated as having voluntarily retired w.e.f. 31.10.2004.

27. Necessary pensionary dues payable to Rahul Rai Sur in terms of the present decision would be paid to him within a period of 3 months from today, failing which the amount payable would carry interest @ 6% per annum reckoned 3 months after today, till date of payment.

28. No costs.