

(2019) 01 CAT CK 0085

In the Central Administrative Tribunal

Case No : Original Application No. 1631 Of 2017

Vijay Kumar Trivedi

APPELLANT

Vs

Union Of India And Ors

RESPONDENT

Date of Decision : 18-01-2019

Acts Referred:

All India Service (Leave) Rules, 1955 — Rule 7(2)
Constitution Of India, 1950 — Article 14, 21, 309

Citation : (2019) 01 CAT CK 0085

Hon'ble Judges : V. Ajay Kumar, J;A.K. Bishnoi, Member (A)

Bench : Division Bench

Advocate : Nidesh Gupra, Nilansh Gaur, Pallavi Singh, Rajeev Kumar

Final Decision : Allowed

Judgement

V. Ajay Kumar, J

1. The applicant, a 1994 batch of Indian Foreign Service (IFS) Officer, i.e., a Group 'A' officer of the Organized Central Civil Services, of the respondent-Union of India, filed the OA aggrieved with the Annexure A-1 Notification dated 04.02.2016 whereunder it was stated that he is deemed to have resigned from the Government service in terms of Department of Personnel & Training Office Memorandum No.AB-14017/2/07-Estt (RR) dated 29.02.2008 with effect from 01.04.2014 (F/N).

2. The Government of India, vide Annexure A-3 Office Memorandum dated 29.02.2008, issued the Consolidated Guidelines on deputation/foreign service for members of the Organized Group 'A' and Group 'B' services of the Central Government.

3. The brief facts, leading to the case, as submitted by the applicant are as under:-

3.1. Though the applicant has not applied for any foreign deputation, in terms of

Annexure A-3 Office Memorandum dated 29.02.2008 but he was directly offered an employment contract by the World Health Organisation (WHO), initially for a period of 6 months. In view of the same, the Government of India, Ministry of Home Affairs, vide Annexure A-4 (Colly) Office Order dated 24.02.2009, conveyed the sanction of the President to the deputation of the applicant for appointment as Policy Adviser in the office of the Director General, WHO Framework Convention on Tobacco Control in Geneva for a period of six months from the date of joining on the terms and conditions mentioned therein. Accordingly, in terms of the same, the applicant joined in WHO at Geneva on 02.03.2009. On expiration of the initial deputation period of six months, the respondents vide order dated 12.11.2009 extended the tenure period of deputation of the applicant till 31.08.2011. Again, vide order dated 08.08.2011, the deputation period of the applicant was extended till 31.08.2013.

3.2. Since both the daughters of the applicant, after he joined at Geneva on deputation, were admitted at schools in Geneva and were in crucial stage of their education period, and since it needs sufficient time to reallocate them to India, and any disturbance, would cause great loss to their academic career, the applicant vide his email dated 22.07.2013, requested the respondents to extend his tenure of deputation till 31.08.2014. However, the respondents vide the email/proceedings dated 27.03.2014, informed the applicant that his request for extension of tenure of deputation has not been acceded to by the Competent Authority and he was directed to return to parent cadre immediately. The applicant vide his representation dated 30.06.2014, while explaining his difficulties, particularly about the educational needs of his daughters, and his requirement to complete the project, once again requested the respondents to permit him to continue on deputation till end of August, 2014.

3.3. It is submitted that vide the email dated 05.07.2014 (Annexure A-4 Colly) that in order to process his request for extension of the tenure of deputation, he was asked to submit an undertaking that he will join the Ministry immediately after the completion of his daughters academic session 2014-15 and to indicate the probable date on which the applicant will join the Ministry. This mail was followed by another mail on 08.07.2014 (Annexure A-5). Accordingly, the applicant vide Annexure A-6 letter dated 14.07.2014 duly communicated his undertaking stating that the academic session ends in July, 2015 and he shall join the Ministry in late September, 2015, followed by detailed letters explaining the circumstances under which he need 2 months from July, 2015. However, the respondents vide their E-mail Message dated 11.08.2014 directed the applicant to return back immediately. Again, vide letter dated 10.03.2015 the respondents advised the applicant to report to the Ministry immediately and the implication of not doing so, is in violation of Para 11 of DOP&T OM dated 29.02.2008 and he shall be deemed to have resigned from service in case he fails to join the work within one month of the completion of his approved tenure with the concerned organisation. Accordingly, the applicant joined the Ministry on 01.09.2015.

3.4. Though the respondents initially directed the applicant to submit an undertaking that he will join the Ministry immediately after completion of his daughters academic session of 2014-15 and though the applicant submitted the said undertaking and though he joined on 01.09.2015, i.e., immediately after completion of his daughters academic session of 2014-15, but the respondents issued the impugned Annexure A-1 Notification dated 04.02.2016 declaring that the applicant is deemed to have resigned from service with effect from 01.04.2014.

4. Heard Shri Nidhesh Gupta, learned Sr. counsel with Shri Nilansh Gaur and Ms. Pallavi Singh, the learned counsel for the applicant and Shri Rajeev Kumar, the learned counsel for the respondents and perused the pleadings on record.

5. The relevant paragraphs of the Annexure A-3 Office Memorandum dated 29.02.2008, i.e., the Consolidated Guidelines on deputation/foreign service, in terms of which the applicant was sent on foreign deputation, read as under:-

"GUIDELINES FOR DEPUTATION / FOREIGN SERVICE OF CENTRAL GOVERNMENT OFFICERS

1.1 Central Staffing Scheme (CSS):-

Posts that are to be covered:

Ministries/Departments of Government of India

Procedure to be followed for appointment:

Civil Services Board (below JS), with ACC approval for IS and above.

Tenure to be applicable:

US level - 3 years

DS level - 4 years

Dir level - 5 years

JS/AS - 7 years (subject to 3 years in the second

post, and also subject further to a

minimum of 5 years the Centre.)

AS level - 4 years

Secy level - no ceiling

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2.1 International Organizations.

Posts that are to be covered:

i) UN Organizations

- ii) International Financial Institutions like World Bank, IMF, ADB, etc.
- iii) Multilateral organizations of which India is a member, like IAEA, WTO, Commonwealth Organization, 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 Organizations from which India receives technical/financial assistance like International Red Cross Society, Action Aid, Aga Khan Foundation etc.

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Tenure to be applicable:

Maximum of 5 years at a stretch.

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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 organizations 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 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 or Companies Act.

Procedure to be followed for appointment:

As in Para 2. I

Tenure to be applicable:

Maximum of 5 years at a stretch".

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2.4 The total period of foreign service under Para 2. I and 2.2 above shall not exceed a maximum of 7 years in the entire service

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Terms And Conditions For Foreign Service

I. The general principle of public interest shall be the overriding factor in deciding foreign service under this rule. The competent authority shall also see whether there is any enrichment of the experience of the officer by such deputation.

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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 service in case he/she fails to join the Government within one month of completion of his/her approved tenure with the concerned organization.

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19. Notwithstanding anything above, the Government shall have the absolute right to refuse permission or recall an officer from foreign service".

6. It is also relevant to refer to certain rules, to which Shri Nidhesh Gupta, the learned Sr. counsel appearing for the applicant drawn our attention, i.e., Indian Foreign Service (Pay, Leave, Compensatory Allowances and Other Conditions of Service) Rules, 1961 (as amended):-

"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.

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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.

(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".

7.1. The learned Sr. counsel appearing for the applicant submits that the applicant is a disciplined and meritorious IFS Officer and since his appointment in the year 1994, he has been working without any blemish and to the best satisfaction of one and all.

Even on his foreign deputation, he excelled in his work and that is why WHO permitted him to continue, in such a high position for a period of 5 years. Once the respondents themselves gave an impression to the applicant by seeking his undertaking, that they will permit him to continue on his foreign deputation till completion of his daughters academic session for the year 2014-15 by directing him to submit his undertaking to that effect and that when they have directed to join in the Ministry, and when he joined on 01.09.2015, i.e., within few days from the completion of the academic sessions of his daughters, declaring vide the impugned Annexure A-1 Notification dated 04.02.2016 that he deemed to have resigned from service w.e.f. 01.04.2014, i.e., retrospectively is illegal, arbitrary and against the principles of natural justice, fair play and also violative of the rules in vogue.

7.2. The learned Sr. counsel further submitted that once the respondents sought an undertaking from the applicant that he will join in the Ministry on completion of the academic session of 2014-15, and in response thereto the applicant has submitted his undertaking that he will join in the Ministry before the end of September, 2015 and accordingly when he, in fact, joined the Ministry on 01.09.2015 itself, issuing the impugned order on 04.02.2016, is against the principles of legitimate expectation.

7.3. The learned Sr. counsel further submits that, admittedly, the academic session of 2014-15 of his daughters came to an end in July, 2015 and that the applicant joined in the Ministry on 01.09.2015, i.e., at the most within 30 days delay, and terminating the services of the applicant, for the same, without even considering the unblemished service of the applicant, for a period of 20 years, is in clear violation of the principles of natural justice and also amounts to imposing a capital punishment on him without following due procedure of law.

7.4. The learned Sr. counsel placed reliance on D.K. Yadav Vs. J.M.A. Industries Ltd., (1993) 3 SCC 259 and Shree Krishna Chandra Pandey Vs. Kendriya

Vidyalaya Sangathan and Others, 2006 (92) SLJ190 (CAT) in support of his submissions.

8.1. Per contra, Shri Rajeev Kumar, the learned counsel for the respondents submits that under para 2.1 of the Annexure A-3 Office Memorandum dated 29.02.2009, i.e., the Consolidated Guidelines on deputation/foreign service, under which the applicant was sent on foreign deputation to WHO, the maximum tenure is 5 years at a stretch and under para 2.4, the total period of foreign service under paras 2.1 and 2.2 shall not exceed a maximum of 7 years in the entire service. He submits that once Para 11 of the OM dated 29.02.2008 categorically provides that "an officer shall be deemed to have resigned from service in case he/she fails to join the Government within one month of completion of his/her approved tenure with the concerned organisation", the action of the respondents is valid and legal, as the applicant admittedly failed to join the Government within one month of completion of his approved tenure. He further submits that under para 19 of the said OM, notwithstanding anything in the said OM, the Government shall have the absolute right to refuse permission or recall an officer from foreign service. Accordingly, the learned counsel submits that, the applicant was fully aware about the terms and conditions of his foreign deputation, and having accepted the same, and having joined as such on 02.03.2009, his continuation beyond the period of 5 years, i.e., beyond 02.03.2014, results in automatic cessation of his services with the Government of India and hence he cannot have any objection for termination of his services with effect from 01.04.2014. Once, under the terms of foreign deputation, when the applicant cannot continue beyond a period of 5 years, termination of his services, even retrospectively, with effect from 01.04.2014, is legal, valid and in accordance with the rules and service conditions applicable to the applicant.

8.2. The learned counsel for the respondents while drawing our attention to the email message dated 27.03.2014, categorically submits that once the applicant informed that his request for extension of tenure of deputation has not been acceded to by the competent authority and he was directed to return to his parent cadre immediately, he cannot contend that he was under an impression that his term of foreign deputation would be extended, as the respondents have sought for his undertaking to join in the Ministry within a particular period of time. No public servant can continue in any foreign deputation without due approval of the competent authority. Hence, the continuation of the applicant on foreign deputation after 02.03.2014, i.e., on expiry of 5 years period, is against his service conditions.

8.3. The learned counsel for the respondents further submits that the decisions on which the learned Sr. counsel appearing for the applicant is relying, have no application to the facts of the present case as the issue of deemed resignation was not an issue in those cases.

9. D.K. Yadav (Supra) is pertaining to a workman whose service conditions are governed by Standing Orders. Clause 13(2)(iv) of the Standing Order applicable

to the appellant therein, provides that "the workman not reporting for duty within 8 calendar days as mentioned above, shall be deemed to have automatically abandoned the services and lost his lien on his appointment and his name shall be struck off from the muster-rolls in such an eventuality". In spite of existence of such a Standing Order, the Hon'ble Apex Court held as under:-

"8. The cardinal point that has to be borne in mind, in every case, is whether the person concerned should have a reasonable opportunity of presenting his case and the authority should act fairly, justly, reasonably and impartially. It is not so much to act judicially but is to act fairly, namely, the procedure adopted must be just, fair and reasonable in the particular circumstances of the case. In other words application of the principles of natural justice that no man should be condemned unheard intends to prevent the authority from acting arbitrarily affecting the rights of the concerned person.

9. It is a fundamental rule of law that no decision must be taken which will affect the right of any person without first being informed of the case and giving him/her an opportunity of putting forward his/her case. An order involving civil consequences must be made consistently with the rules of natural justice.....". and also held in para 11 as under:-

"11. The law must therefore be now taken to be well-settled that procedure prescribed for depriving a person of livelihood must meet the challenge of Article 14 and such law would be liable to be tested on the anvil of Article 14 and the procedure prescribed by a statute or statutory rule or rules or orders affecting the civil rights or result, in civil consequences would have to answer the requirement of Article 14....."

Further, the Apex Court in para 14 held as under:-

"14. It is thus well-settled law that right to life enshrined under Article 21 of the Constitution would include right to livelihood. The order of termination of the service of an employee/workman visits with civil consequences of jeopardising not only his/her livelihood but also career and livelihood of dependents. Therefore, before taking any action putting an end to the tenure of an employee/workman fair play requires that a reasonable opportunity to put forth his case is given and domestic inquiry conducted complying with the principles of natural justice. In D.T.C. v. D.T.C. Mazdoor Congress the Constitution bench, per majority, held that termination of the service of a workman giving one month's notice or pay in lieu thereof without inquiry offended Article

14. The order terminating the service of the employees was set aside".

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.

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. No costs.