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IN THE CENTRAL ADMINISTRATIVE TRIBUNAL
NEW DELHI

O.A. No.
T.A. No.

44

1986

DATE OF DECISION 29.4.87

Shri R.B. Agarwala

Applicant
~~x~~Petitioner

Applicant in person

Advocate for the Petitioner(s)

Versus

Union of India & Others

Respondent s

Shri N.S. Mehta,

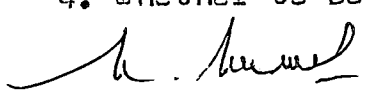
Advocate for the Respondent(s)

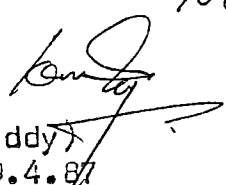
CORAM :

The Hon'ble Mr. Justice K. Madhava Reddy, Chairman

The Hon'ble Mr. Kaushal Kumar, Member

1. Whether Reporters of local papers may be allowed to see the Judgement ? Yes
2. To be referred to the Reporter or not ? Yes
3. Whether their Lordships wish to see the fair copy of the Judgement ? No
4. Whether to be circulated to all the Benches ? No


(Kaushal Kumar)
Member 29.4.87


(K. Madhava Reddy)
Chairman 29.4.87

CENTRAL

ADMINISTRATIVE
PRINCIPAL BENCH
NEW DELHI.

TRIBUNAL

REGN. NO. OA 44/86

Date of decision: 29.4.87

Shri R.B. Agarwala Applicant

Vs.

Union of India & Others Respondents

CORAM: Hon'ble Mr. Justice K. Madhava Reddy, Chairman
Hon'ble Mr. Kaushal Kumar, Member

For the Applicant Applicant in person

For the Respondents. Shri N.S.Mehta, counsel

(Judgement of the Bench delivered by Hon'ble
Mr. Justice K. Madhava Reddy, Chairman)

JUDGEMENT

This is an application under Section 19 of the Administrative Tribunals Act, 1985, by a Third Secretary (now retired) in the Embassy of India, Tokyo, to quash Order No.Q/Vig/842/24/78 dated 14.7.1983 by which the penalty of cut of 25% of monthly pension was imposed on him and to direct the Respondents to pay the pension due to him without any cut together with interest @ 18% per annum on the arrears. He also prays for a declaration that the recovery of Rs.4634/- recorded in his Last pay Certificate is void and illegal and seeks a direction against the Respondents to admit his Terminal T.A Bill amounting to Rs.6234/- as detailed in the application and also to treat the period from 7.3.77 to 31.11.79 as leave to which he is entitled and to add the said period to his qualifying service for purposes of calculating his pensionary benefits.

2. The applicant was working in the Ministry of External Affairs and was posted as Third Secretary in the Indian Embassy at Tokyo. He joined his duties

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there on 8th August 1974. He was transferred from that Embassy to the Government of India, Tourist Office, Tokyo, as an Administrative Officer in October 1974. He complains that this post was a post lower in rank than that of the post of Third Secretary and this posting amounted to reduction in rank. He made a representation to the Ministry of External Affairs against his "illegal transfer". He further complained that although he was entitled to draw diplomatic liquor, he was called upon to explain vide letter dated 4.9.75 about highly disproportionate quantity of liquor/alcohol alleged to have been drawn from the Commissariat of the Mission. He submitted his explanation on 18.9.75 and denied the charge. Notwithstanding the explanation, Shri R.K.Kalha under whom he had worked only for 67 days recorded his Confidential Report and sent it to the Ministry. The Government of India, Ministry of External Affairs ordered his retransfer to his original post forthwith, but that order was not implemented. When the applicant rejoined his original post, he was humiliated and was not given outfit allowance which had become due to him. He was granted leave and emergency Home Leave fares for himself and his wife for attending on his son who was hospitalised in London. It is the case of the applicant that under the Ministry of Tourism and Civil Aviation letter No.12-A/43-68 dated 24th December 1968 to Air India, he was entitled to a rebate of 40% on his journey by Air India from his place of posting to India or to a place where his dependant children were studying provided he paid the fares in foreign currency. The applicant wanted to travel by Air India and applied to the Indian Embassy, Tokyo. But the Drawing and Disbursing Officer, Shri M.K.Awataney, Respondent No.4 herein, refused to issue proper directives to Air India in this regard. As a result, the applicant was forced to travel by Aeroflot, a foreign airline and was thereby deprived of this rebate in air fare to which he was entitled. He was also obliged

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to take leave and visit London on two occasions- first in June-July 1976 and thereafter in December 1976-January 1977. This huge expenditure and mental worry caused him nervous breakdown in the third week of February 1977 when none of his family member was with him at Tokyo. Under these circumstances, he left for London on 5.3.1977 without informing anybody in Tokyo.

The applicant submits that this omission to inform the authorities before leaving Tokyo was not deliberate but was in the above circumstances. Immediately on reaching London, he informed the Head of Chancery, Embassy of India, Tokyo, telegraphically and prayed for grant of leave on grounds of his own and his son's illness.

Instead of granting leave, he was served with Memorandum No.Q/Vig/842/24/78 dated 27.1.1979 issued by the Ministry of External Affairs (Annexure 'D') levelling the following charges:-

ARTICLE I

That Shri R.B.Agarwala, a Section Officer belonging to Integrated Grades II & III of the General Cadre of Indian Foreign Service Branch "B" while working in the Embassy of India, Tokyo suddenly left the station on 5.3.77 without leave and without prior permission to leave the station, and has been absenting himself from duty in an unauthorised manner since 7.3.77, 5.3.77 and 6.3.77 being holidays.

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By his above act, the said Shri R.B.Agarwala has exhibited lack of devotion to duty and conduct unbecoming of a Government servant, thereby violating Rule 3(1)(ii) and (iii) of the Central Civil Services (Conduct) Rules 1964.

ARTICLE II

That the said Shri R.B.Agarwala disobeyed the orders of the Government of India transferring him from Embassy of India, Tokyo to Ministry of External Affairs, New Delhi.

By his above act, the said Shri R.B.Agarwala has exhibited conduct unbecoming of a Government servant thereby contravening Rule 3(1)(iii) of the

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Central Civil Services (Conduct) Rules 1964 and has also violated Rule 13 of the Indian Foreign Service (Conduct and Discipline) Rules 1961."

The applicant vide letter dated 28.10.76 requested for an immediate posting to ^{the} Mission in the United Kingdom to enable him to look after his ailing son. He was, however, informed of his transfer to the Headquarters vide letter dated 28.4.1977. It is his claim that he had never received this letter and ^{he} alleges that he has strong grounds to believe that this letter was deliberately suppressed and was not sent to him. He was, however, communicated a warning vide Memorandum No.Q/PB/6612/355/74 dated 6.9.78 asking him to report to duty in the Ministry of External Affairs by 12.10.78, failing which he was threatened with disciplinary action. He received the Memorandum dated 6.9.78 through the High Commission of India, London. The applicant submitted his reply to the Memorandum dated 6.9.78 vide letter dated 11/13.10.78. He also submitted his reply to the charge-sheet on 4.4.1979 explaining the circumstances under which he left Tokyo as detailed above.

The Enquiry Officer appointed in this behalf conducted an oral enquiry on 25.3.1981 on which date the applicant was present before the Enquiry Officer. He complains that he was not given any opportunity to see the documents or cross examine the witnesses and without giving any further opportunity, the impugned order imposing the penalty of 25% cut in his pension on permanent basis was imposed, which is challenged in this application.

3. It may be noticed that the applicant retired from service on attaining the age of superannuation on 30.11.1979 while the proceedings continued against him even thereafter and culminated in the ^{impugned} order dated 14.7.83. Although several facts are mentioned in the application, for disposal of this application we do not think it necessary

to go into all of them. It is unnecessary to consider the correctness or otherwise of the applicant's assertion that he was transferred without any justifiable cause from the Embassy to the Tourist Office and the allegation that he was falsely accused of drawing highly disproportionate quantity of liquor. As the attack is in regard to the cut in pension by continuing the Disciplinary Proceedings under Rule 9 of the Pension Rules after his superannuation, we confine our enquiry into the legality, regularity and propriety of these proceedings. One of the principal contentions raised by the applicant is that he was entitled to a notice after the enquiry report was made by the Enquiry Officer and before the order imposing a cut in the pension under Rule 9 of the Pension Rules was made. As already stated, two charges were levelled against the applicant and the Disciplinary Proceedings were initiated against him while he was still in service. He was served with the charge-sheet and was required to submit his explanation. He submitted his written explanation mentioning the facts stated above pleading primarily that he had to leave Tokyo in the circumstances mentioned therein and that, in any event, they did not amount to grave misconduct. He also pleaded that he was not given an opportunity to cross examine the witnesses. The Respondents have asserted in para 7(a)(8) of their reply to the application that a show cause notice against the proposed reduction in the pension of the applicant vide Memorandum No.Q/Vig/842/24/78 dated 7.7.82 was sent to him; but the applicant denies that it was received by him. Proceedings against the applicant having commenced while he was in service after the amendment to Article 311(2) of the Constitution, no second show cause notice proposing imposition of major penalty was required to be issued either under Article 311 of the Constitution or under Rule 14 of the Central Civil Services (Classification, Control and Appeal) Rules 1965 governing Disciplinary

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Proceedings. The issuance of the second show cause notice even for imposition of major penalty not being a Constitutional requirement and there being no specific provision in the Central Civil Services (Classification, Control and Appeal) Rules, requiring a second notice to show cause against the proposed penalty, failure to issue the same does not violate any statutory provisions. Since the applicant had retired even before the Disciplinary Proceedings had concluded, these proceedings were continued against him under clause (a) of sub-rule (2) of Rule 9 of the Central Civil Services Pension Rules. Sub rules (1) & (2) of Rule 9 which are relevant in this behalf read as under:-

9(1) The President reserves to himself the right of withholding or withdrawing a pension or part thereof, whether permanently or for a specified period, and of ordering recovery from a pension of the whole or part of any pecuniary loss caused to the Government, if, in any departmental or judicial proceedings, the pensioner is found guilty of grave misconduct or negligence during the period of his service including service rendered upon re-employment after retirement:

Provided that the Union Public Service Commission shall be consulted before any final orders are passed.

Provided further that where a part of pension is withheld or withdrawn, the amount of such pension shall not be reduced below the amount of rupees sixty per mensem.

(2)(a) The departmental proceedings referred to in sub-rule (1), if instituted while the Government servant was in service whether before retirement or during his re-employment, shall, after the final retirement of the Government servant, be deemed to be proceedings under this rule and

shall be continued and concluded by the authority by which they were commenced in the same manner as if the Government servant had continued in service:

Provided that where the departmental proceedings are instituted by an authority subordinate to the President, that authority shall submit a report recording its findings to the President."

In view of this Rule, it cannot be disputed that the Disciplinary Proceedings which had been instituted while the Government servant was in office could be continued even after his retirement. Of course, after the Government servant is allowed to retire, no question of dismissing, removing or reducing him in rank would arise. If it is decided to continue the proceedings against him, that can be done only under sub-rule (1) of Rule 9 of the Pension Rules. Under that Rule, the President has the right to withhold or withdraw whole pension or a part thereof whether permanently or for a specified period if the pensioner is found guilty of "grave misconduct". If the decision to continue the proceedings is taken, that rule enjoins such proceedings to be continued and concluded by the authority by which they were commenced in the same manner as if the Government servant had been in service. If the applicant had not retired from service and had continued in service and disciplinary proceedings were to continue, neither Rule 14 of the Central Civil Service (Classification, Control & Appeal) Rules 1965 nor Article 311 of the Constitution required a second show cause notice to be issued before a penalty was imposed. As a logical corollary, when those proceedings are continued under sub-rule (2) (a) of Rule 9 of the Pension Rules against a pensioner, a second show cause notice proposing

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the quantum of cut in pension cannot be legally insisted upon. The applicant, who ably argued in person, placed strong reliance on the latest judgement of the Supreme Court in the State of U.P. Vs. Shri Brahm Datt Sharma(1). In that case their lordships, while dealing with a case of cut in pension which was governed by Civil Services Regulations observed " though the Regulations do not expressly provide for affording opportunity to the Government Servant before order for the reduction in the pension is issued, but the principles of natural justice ordain that opportunity of hearing must be afforded to the Government servant before any order is passed. Article 311(2) is not attracted, nonetheless the Government servant is entitled to opportunity of hearing as the order of reduction in pension affects his right to receive full pension". This observation made, has to be understood in the context of the facts which led to the filing of the Writ Petition in the ^{High} Allahabad Court. That was a case where the previous Disciplinary Proceedings imposing a penalty on the petitioner were quashed by the High Court with the following observations:

" The petitioner will, however, be entitled to receive all the benefits which he would be entitled treating him as having been in service from the date of dismissal till the date of superannuation. The petitioner will also be entitled to receive the pensionary benefits which will be admissible to him if he continued in service/till the date of superannuation. It will be open to the respondents to draw fresh proceedings if it is permissible to do so."

In view of this order, after the petitioner had retired, a fresh notice was issued to show cause as to why his pension should not be cut. The allegations specified in the said notice which had formed the subject matter of the earlier Departmental Enquiry were quashed by the High Court. As the Disciplinary Proceedings had

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concluded against the petitioner and there were no proceedings pending against him, a fresh notice was therefore issued. When this notice was challenged before the High Court, that was allowed and the notice was quashed. The Supreme Court in that context observed that the notice should be issued before the pension is cut and the retired employee must be given an opportunity. The Supreme Court was not dealing with a case where the Disciplinary Proceedings had continued after retirement as envisaged by sub-rule (2)(a) of Rule 9 of the Pension Rules. The Supreme Court did not hold that a fresh notice or a second notice should be issued calling upon the pensioner to show cause why the whole or part of his pension should not be cut if proceedings are to be continued under sub-rule (2)(a) of Rule 9 of the Pension Rules. When no second show cause notice is required to be issued under law in Disciplinary Proceedings initiated against a public servant before his retirement, in the absence of specific Rule that cannot be insisted upon merely because the proceedings are continued under the Pension Rules. Some of the judgements which related to the Disciplinary Proceedings initiated prior to the amendment of Article 311 were relied upon. But they would be of little help because they lay down that the proceedings would not be valid if a second show cause notice is not issued. Those rulings can have no bearing on the question now before us for the Disciplinary Proceedings under Rule 14 of the Central Civil Services (Classification, Control & Appeal) Rules were initiated and continued under Rule 9(2)(a) of the Pension Rules after the amendment of the Article 311(2) and under Rules which do not require the second show cause notice to be issued in the Disciplinary Proceedings. We are, therefore, of the view that as a proposition of law, any failure to issue a show cause notice proposing a cut in pension or failure to give a fresh opportunity

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to such a pensioner to submit his representation against the report of the Enquiry Officer or against the cut in pension does not vitiate the proceedings.

4. However, in the instant case, the Disciplinary Authority itself thought it necessary to issue a show cause notice and did issue the same on 7.7.1982 and sent it to the High Commission of India, London for onward despatch for service on the applicant. The applicant denies that this notice was served on him. No record is placed before us to show that this notice was served on the applicant. There is no evidence even to show that the second show cause notice was despatched by the High Commission by post or delivered at the residence of the applicant. The applicant had already retired and there is nothing to show that the High Commission had sent it to the residential address of the applicant. We have, therefore, no option but to hold that it was not served on him. When the Disciplinary Authority itself, in this case, having regard to the facts and circumstances, thought it necessary to secure the explanation of the applicant before imposing a cut in pension and had actually sent a notice to the High Commission to be served on the applicant, in the absence of any evidence to show that the notice had in fact been served on the applicant and he had failed to send a reply to the same it could not have passed any final order in these proceedings imposing a cut in pension. From a reading of the final order dated 14.7.83, it is clear that this notice was sent to the applicant C/O High Commission of India, London. From the final order, it would also appear that the Disciplinary Authority was weighed by the fact that the applicant did not submit any explanation to the notice dated 7.7.82. In the final order it is observed that "Shri Agarwala was furnished a copy of the Inquiry Report,

informed of the aforesaid provisional conclusions of the President and given an opportunity of making representation on the proposed penalty vide this Ministry's Memorandum of even number dated 7th July, 1982. In spite of the show cause notice issued to Shri Agarwala, no reply was received from him. The Union Public Service Commission to whom the case was referred to for advice, have advised that the ends of justice would be met if 25% cut in his monthly pension on a permanent basis is imposed on Shri Agarwala". Obviously, the Union Public Service Commission was also informed that the applicant had not submitted any explanation to the show cause notice dated 7.7.82. When it is established that the notice itself was not served on the applicant, it must follow that if it had ^{been} served and ^a representation filed, the Respondents would have certainly taken that into consideration. We cannot presume as to what would have been the final order if the applicant's representation was filed and it was taken into account.

5. In the circumstances of the case, we have no doubt that had the notice been served on the applicant, he would have made a representation and the Disciplinary Authority would then have been obliged to take that into account. The Disciplinary Authority having once decided to call for a representation and having sent a show cause notice to be served on the applicant, was not justified in disposing of the matter without verifying whether the show cause notice was in fact served on the applicant or not. Much less could it proceed on the assumption which now transpires to be incorrect that notice was served on the applicant and yet he failed to make a representation. The Disciplinary Authority was clearly in error in drawing

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an inference adverse to the applicant on this score. For this reason, we hold that the impugned order directing a cut in the pension is unsustainable and accordingly quash the same.

6. The applicant has also raised another contention that the charges levelled against him do not amount to "grave misconduct" and in any event as the impugned order does not impose a cut in pension after holding that he was guilty of grave misconduct, any cut in pension could not have been imposed under Rule 9 of the Pension Rules. It is true that neither in the charge-sheet nor in the Enquiry Report, while imposing a cut in the pension, it is alleged that the applicant was guilty of "grave misconduct or negligence". However, from a perusal of the file, it would appear that the Disciplinary Authority was very much aware of the fact that the proceedings could be continued and cut in pension could be imposed only if one is found guilty of "grave misconduct or negligence". In the note dated 11.8.81 put up before the Minister concerned and approved by him, it was stated that Shri Agarwala (applicant) is guilty of grave misconduct. We are clearly of the view that the Respondents held him guilty of grave misconduct though communicated to him the order/does not say so in so many words. That cannot detract us from the fact that he was found guilty of dereliction of duty and leaving his place of posting at Indian Embassy in Tokyo without permission and without informing anyone. He not merely absented himself from duty but went to another country. Further, when he was transferred and posted to headquarters at New Delhi he did not join at Delhi. We have no doubt that once these allegations are proved, it is nothing short of grave misconduct and negligence on the part of a member of

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the Indian Foreign Office.

7. In this application, the applicant has also claimed certain amounts. The Respondents have no objection to trace the missing credits and pay the amounts due to him, if any, in respect of his G.P.F. The amount of G.P.F. has been paid to the applicant which was due and payable to him in cash vide letter dated 30.4.1983. He has also claimed interest on these delayed payments. The G.P.F. carries interest upto the date it is actually refunded; hence the question of payment of any further interest on this amount does not arise. The applicant has also claimed interest on pension. Whatever pension was paid to the applicant under the impugned order though belatedly, the applicant will be entitled to payment of interest @ 7% per annum for the first nine months after the expiry of first three months of his retirement and for the subsequent period @ 10% per annum till all arrears are paid. However, on the amount of pension which the applicant is entitled to receive pursuant to the present order ^{of} the Tribunal, he shall be paid interest if it is not paid within three months of the receipt of the copy of the order. The applicant would be entitled to payment of interest on this portion of pension if the same is not paid within three months from the date of the receipt of the order at the rate of 7% per annum upto the first nine months after the expiry of the said period of three months and at the rate of 10% per annum for the subsequent period.


8. It is now conceded that his claim of Rs.4634/- towards T.A. for travelling from Tokyo to Calcutta recorded in the applicant's Last Pay Certificate for being recovered, shall not now be recovered.

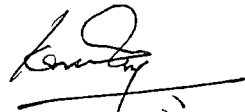
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9. The applicant's claim for terminal T.A.Bill is not admissible for the reason that neither in compliance of transfer order he reported for duty in Delhi nor did he travel from London to New Delhi after retirement. This claim is, therefore, rejected.

10. It is stated that the gratuity has been paid but since the applicant retired on 30.11.79 and the gratuity was paid only on 18.5.85, the applicant would be entitled to payment of interest at the rate of 7% per annum for a period of nine months after the expiry of first three months of retirement and at the rate of 10% per annum for the subsequent period.

10. In the result, this application is allowed to the extent indicated above. There will be no order as to costs.


(KAUSHAL KUMAR)
MEMBER
29.4.1987


(K. MADHAVA REDDY)
CHAIRMAN
29.4.1987