

IN THE CENTRAL ADMINISTRATIVE TRIBUNAL

NEW BOMBAY BENCH

O.A. No. 332/91
Rx~~xxxxxx~~

198

DATE OF DECISION 30-8-91

K. V. Mahadeva Rao

Petitioner

Dr. R S Kulkarni

Advocate for the Petitioner(s)

Versus

Union of India & Another

Respondent

Mr. M I Sethna

Advocate for the Respondent(s)

CORAM

The Hon'ble Mr. Justice U C Srivastava, Vice Chairman

The Hon'ble Mr. M Y Priolkar, Member (A)

1. Whether Reporters of local papers may be allowed to see the Judgement ? *Ye*
2. To be referred to the Reporter or not ? *Ye*
3. Whether their Lordships wish to see the fair copy of the Judgement ? *Ye*
4. Whether it needs to be circulated to other Benches of the Tribunal ? *Ye*

U C SRIVASTAVA
(U C SRIVASTAVA)
VICE CHAIRMAN

IN THE CENTRAL ADMINISTRATIVE TRIBUNAL
BOMBAY BENCH, No.6 "GULESTAN"
PRESCOT ROAD, BOMBAY-1

O.A. No.332/91

K V Mahadeva Rao
Director (Corporate planning)
NPC & Secretary, Atomic Energy
Commission
C/o. Mrs. Neelima S. Kanetakar
Advocate
Janardan Mandir
Parsee Colony; Dr. Chanti Road
Dadar; Bombay 400 014 ..Applicant

V/s.

1. Union of India
through Secretary
Dept. of Atomic Energy (DEA)
C.S.M. Marg;
Bombay - 400 039

2. Nuclear Power Corporation
Centre-I; 16th floor; World Trade
Centre; Cuffe Parade; Colaba; BB-5 ..Respondents

Coram: Hon. Shri Justice U C Srivastava, V.C.
Hon. Shri M Y Priolkar, Member (A)

APPEARANCES:

Dr. R S Kulkarni
Advocate (for Mrs. Nilima
Kanitkar) for the
Applicant

Mr. M I Sethna,
Counsel
for the respondents

JUDGMENT:
(PER: U C SRIVASTAVA, VICE CHAIRMAN)

DATED: 30 - 8 - 91

1. This application raises two mixed questions of great importance and significance and according to respondents of national interest. The questions are (i) whether a Scientist holding a sensitive post involving secrets regarding defence of country if sent on deputation by Government to an agency of United Nations located in a foreign country at its cost to gain

knowledge and experience and enrich the country with it during subsistence of service contract with India Government can enter into a contract with the foreign employer for serving it without taking permission of Government of India, (ii) can such a scientist after entering into such unauthorised contract and violating Government servant rules seek voluntary retirement under Fundamental Rule 56(k) without coming back to this country.

2. The applicant joined department of Atomic Energy (hereinafter known as DAE) in the year 1961. Initially he joined Bhabha Atomic Research Centre (known as BARC) and after completion of training and holding initial post was gradually promoted to higher posts in the ladder and ultimately rose to the position of Secretary, Atomic Energy Commission (India) a sensitive post according to the respondents. The applicant was deputed by this country to the International Atomic Energy Agency, an agency of UNO (for short, IAEA) having its headquarters at Vienna (Austria) for a period of 3 years with effect from 13.7.1988. Before the expiry of the said period, which was to expire on 12.7.91 the applicant on 20.6.90 applied for extension of his deputation period for a period of two years. This was done after he had already entered into a contract with IAEA for its service for a further period of two years without intervention or concurrence of the Government of India or without resigning from service

in India or even stating that his services would be deemed to have come to an end the day fresh contract with the loanee employer starts in case his prayer for extension of deputation is not acceded to. The Government of India rejected the afore mentioned prayer for extension of deputation which was conveyed to him vide letter dated 29.10.70.

3. After rejection of the said application the applicant sent a notice dated 26th November 1990 purporting to be under Fundamental Rule 56(k) seeking voluntary retirement from the service of India Government. This notice was thus sent during subsistence of deputation period and after entering into a fresh contract of service on his own accord for a period of two years with IAEA. His prayer in the said notice was not acceded to by the Government of India at that stage taking into account the position he was holding before joining IAEA, sensitivity of functions performed by him in DAE, the earlier willingness of the officer to return to India after stipulated tenure, the need to exploit his skill in the Department after his return. According to respondents the ultimate criteria is to ensure that the Department gets maximum benefit through such nominations while safeguarding our interest in the said international organisation. The rejection of his notice was conveyed to the applicant with the direction that he should return to India before his request for voluntary retirement is concerned. The applicant did not return to this country in response thereof and on the next day of the expiry of his deputation period viz., on 13.6.1991 filed instant application before this Tribunal through his counsel.

The application seems to have been signed sometime in May 1991 (date not given).

4. The applicant in support of his pleas has also given three instances of those who were in service of DAE but also took voluntary retirement, while on deputation to United Nations Organisations.

5. The respondents in their reply have stated that the case of applicant is on different footing with the cases referred to by him as in his capacity as Secretary of AEC he acquired sensitive information relating to DAE's activity and unlike them whose retirement is not quite close to retirement. It has rather been admitted by the applicant that IAEA is also one of the United Nations Organisations and this fact has also not been disputed by the respondents. According to them it is mere technicality that deputation to United Nations Organisation are not covered specifically under the proviso to FR 56 but such technical interpretation cannot override national interest. The applicant in his rejoinder, which has been signed by his counsel only, has been stated that the Chairman of same Atomic Energy Commission was allowed to retire under term and to continue with foreign agency and ~~one~~ of three instances referred to by him Shri P R Dastgir was not close to his retirement and as such the assertion made by the respondents in this behalf was not correct.

6. As pleadings were complete parties concerned desired that the case be finally heard and disposed of. We after admitting the application proceeded to hear the arguments of the parties.

FR 56(k) reads as under:

(k) 1. Any Government servant may by giving notice of not less than three months in writing to the appropriate authority retire from service after he has attained the age of fifty years if he is in Group 'A' or Group 'B' service or post (and had entered Government service before attaining the age of thirty five years) and in all other cases after he has attained the age of fifty-five years:

provided that

- a) Nothing in this clause shall apply to a Government servant referred to in clause(e) who entered Government service on or before 23rd July, 1966;
- 2(b) nothing in the clause shall also apply to a Government servant, including scientist or technical expert who (i) is on assignment under the Indian Technical and Economic Cooperation (I.T.E.C.) programme of the Ministry of External Affairs and other aid programmes, (ii) is posted abroad in a foreign based office of a Ministry/Department and (iii) goes on a specific contract assignment to a foreign Government unless, after having been transferred to India, he has resumed the charge of the post in India and served for a period of not less than one year; and
- c) it shall be open to the appropriate authority to withhold permission to a Government servant under suspension who seeks to retire under this clause.

(1-A)

- a) A Government servant referred to in sub-clause (1) may make a request in writing to the appointing authority to accept notice of less than three months giving reasons therefore;
- b) On receipt of a request under sub-clause (1-A)(a) the appointing authority may consider such request for the curtailment of the period of notice of three months on merits and if it is satisfied that the curtailment of the period of notice will not cause any administrative inconvenience, the appointing authority may relax the requirement of notice of three months on the condition that the Government servant shall not apply for a commutation of a part of his pension before expiry of the period of notice of three months.

(2) A Government servant, who has elected to retire under this rule and has given the necessary intimation to

that effect to the appointing authority, shall be precluded from withdrawing his election subsequently except with the specific approval of such authority:

7. On behalf of the applicant it was contended that FR 56 confers right on a Government servant who fulfills requisite condition regarding number of years of service as well as age which the applicant did, as his age was 51 years the respondents were bound to accept the notice of retirement and they had no option to accept or not accept the same.

8. In this connection learned counsel relied on the decision of Hon. Supreme Court of India in Dinesh Chandra Sangma V. State of Assam and others, AIR 1978 SC 17. In the said case apart from the question as to whether after acceptance of notice of voluntary retirement the Government can resile from it after accepting it, the question was as to whether fundamental rule 56 was subject to compliance with clause (3) of Rule 119 of Defence and Internal Security Rules while repelling this plea the Court with reference to Fundamental Rule 56 observed

"FR 56 is one of the statutory rules which binds the Government as well as the Government servant. The condition of service which is envisaged in rule 56(c) giving an option in absolute terms to a Government servant to voluntarily retire with three months notice after he reached 50 years of age or has completed 25 years of service cannot therefore be equated with a contract of employment as envisaged in Explanation 2 to Rule 119".

It was further observed ...

The High Court committed an error of law in holding that consent of the Government was necessary to give a legal effect to the voluntary retirement of the applicant under FR 56(c) ... since the conditions of FR 56 (c) are fulfilled ... the applicant must be held to have been lawfully retired as notified by him with effect from 2nd August 1976. according to the respondents

The applicant was covered by clause (b) to the proviso to FR 56(k) which enumerates the categories who are not entitled

to benefit of FR 56 for seeking voluntary retirement. Clause (b) which was added only in July 1985 excludes scientist or technical experts from the benefit of Rule 56(k) that is voluntary retirement from foreign country and to such person such a right has been made available only after one year of coming back to the country and joining over their services. The excluded class is divided into three categories viz., (i) who is on assignment under the Indian Technical and Economic Cooperation (ITEC) Programme of Ministry of External Affairs and other aid programme; (ii) is posted abroad in a foreign based office of a Ministry/Department; and (iii) goes on a specific assignment to a 'foreign Government' unless after having been transferred to India he has resumed the charge of the post in India and served for a period of not less than one year.

on behalf of the applicant
9. It was contended that the Agency in question i.e., even the United Nations Organisation of which IAEA is an agency having headquarters at Vienna is not a 'foreign government' within the meaning of clause (b) extracted above and it would only mean Government of a country administering country and its people as there can be no foreign Government without a country. The location of IAEA Head Office at Vienna that is Austria would not mean it is part of Austrian Government and service under it would not mean service with the Government of Austria, which is also a member of United Nations. As to the status of United Nations, learned counsel contended it is not a Government much less than a foreign Government. Reference was made to the opinion given by the International Court of Justice (by majority) dated

11 April 1949 in the matter of repairs to injuries suffered in the service of the United Nations

In the opinion of the court, the Organisation was intended to exercise and enjoy, and is in fact exercising and enjoying, functions and rights which can only be explained on the basis of the possession of a large measure of international personality and the capacity to operate upon an international plane. It is at present the supreme type of international personality. It must be acknowledged that its Members, by entrusting certain functions to it, with the attendant duties and responsibilities, have clothed it with the competence required to enable those functions to be effectively discharged.

Accordingly, the court has come to the conclusion that the Organisation is an international person. That is not the same thing as saying that it is a State, which it certainly is not or that its legal personality and rights and duties are the same as those of a State. Still less is it the same thing as saying that it is "a super-State", whatever that expression may mean. It does not imply that all its rights and duties of a State must be upon that plane. What it does mean is that it is a subject of international law and capable of possession international rights and duties, and that it has capacity to maintain its rights by bringing international claims.

On the basis of above observations made in a different context it was contended that United Nations Organisation is only an International Person and it is not a State but it is subject to international law possessing international right and duties. Thus according to learned Counsel it makes it clear not being a State and it has got offices, agencies but service in the same would not be service with 'foreign Government'.

10 The International Atomic Energy Agency has to perform number of functions. It has to conduct its activities in accordance with the purpose and principles of United Nations to promote peace and International Cooperation and in conformity with policy of the United Nations and to further establishment of other grouping world disarmament in

conformity with International agreement in pursuing to such policies. It has to submit its report to the Economic and Social Council and other Organisations of the United Nations on matters within the competence of this organisation. The said members of United Nations and any other peace loving countries who have signed the Declaration by United Nations can become its member. The Governing Body consists of representatives of various countries. The Agency has also staff head of which is the Director General. The permanent staff has to be kept to a minimum. The terms and conditions of appointed staff is governed as per the rules made by Board of Directors of Governors.

11. The Central Government has issued memorandum in 1971 to the offices of the Central Services deputed to foreign service with International Organisations like the United Nations Secretariat, FAO, ILO, Etc., on a tenure of one year or more allowing them join the United Nations Joint Staff Pension Fund as full members and the payment of retirement benefits accruing under the Regulations and Rules of the United Nations Staff Pension. Under Article 29 of the Regulations and Rules of the United Nations Joint Staff Pension Fund, retirement benefits shall be payable to a participant whose age on separation is sixty years or more. The Government of India has taken certain decisions regarding the terms and conditions in accordance to pay and allowances and the treatment of period spent on their assignment/ consultancy with the United Nations and International Agencies were Government of India/DPAR O.M. No.16011/3/81-Estt. (Allowances) dated 15th October 1983 read with O.M. dated 5th March 1984. In case where leave salary and pension continue are not paid either by the agency or by

the Government to the servant concerning the period spent in foreign service will not be counted as service and pension for determination of leave entitlement.

12. In order to understand the status and position of UNO and its agencies it would be appropriate to make a reference to the charter of United Nations. The United Nations has been constituted by various governments of the world under a Charter establishing an International Organisation. It has certain rights, functions and duties in regard to the member countries. It can also interfere in respect of matters relating to member countries even though the same may touch its internal affairs regarding its administrative policies particularly in regard to relation with other countries. Acts against humanism and social welfare and health schemes for the benefit of the inhabitants of a particular country. It has been given certain rights for solving disputes of particular nature and bring peace and has right to act in respect of their peace, breach of peace and act of aggression. The United Nations can also assume responsibility in the Administration of territories which have not attained a full measure of self government as provided in Article 33 of the Charter. It is its duty to develop self government to conduct, due account of political aspirations of the people and assess them in the progressive development of their through political institutions according to the circumstances of each country and its people. The United Nations has to establish an authority of international trustee, for the administration and consider functions of such territory as may be placed there under by subsequent individual accordingly and this territory is referred as trustee territories. Its judicial organisation is International

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Court of justice. The United Nations has got its own Secretariat which the Secretary General is the head and it has got its own staff which includes freshers from various countries and deputationists and employees on contract and are governed by service regulations including pay, fund and pensionary benefits (Article 29 of Regulations and Rules deals with joint staff fund retirement benefits etc.) The United Nations has got a flag and it can have an Army at its disposal whenever required which it gets from member countries. The U.N.O. does not legislate but the deliberations of the assembly have much resemblance with legislature and at times its decision partake the nature of legislation. International Court of Justice can be said and is known as a judicial wing of U.N.O. The Executive wing includes its Secretariat, various organisations and bodies like Security Council, UNICEL, WHO, FLO, ILO etc. Though U.N.O. has not got any particular territory of its own to govern or rule, its jurisdiction and sphere is spread throughout the world though to a limited and extent. There is reciprocal arrangement of U.N.O. with various member countries in respect of certain matters and being an international ~~body~~xx

Person also is subject to international law, can be said and is rightly known to be 'World Government' in restricted sense having its head-quarters in a foreign country so far as India is concerned. Even if U.N.O. could not be said to be Government it could be deemed to be such having semblance of a Government.

13. The service in a foreign country would be 'foreign service' as defined in Fundamental Rules, Rule 9(7) defines 'foreign service' as follows - 'in which foreign servant receives his pay with the sanction of Government from any source other than consolidated fund of India or Union Territory'. Thus definition covers not only service but of department in India but also act of India of the Government servant receives pay with sanction of Government from any other fund than mentioned which may include foreign employer with sanction of India which may include deputationist will be deemed to be in foreign service within the meaning of Fundamental Rules. If a person enters into a contract with foreign employer and gets salary from it without sanction of India Government he cannot be treated in 'foreign service' within the meaning of Fundamental Rules and his status as such may cease. Superimposition of a new service contract without formally resinding the earlier one which is against law would not only amount to breach of contract but may result in recision of earlier contract.

14. The word 'Government' has not been defined in the Fundamental Rules. But General Clauses Act gives its definition as including Central as well as State Government meaning thereby the definition is exhaustive. When this definition was given 'foreign Government' was not in contemplation as apart from British Government. The definition of a word or phrase not defined to be seen in

the context the same has been used and its aims and purpose. The phrase 'foreign Government' has been used in proviso(4) to Fundamental Rule 56(k) for the first time in 1985 apparently not to drain out Indian talent to other countries, for enriching this country with knowledge and experience derived there. Its purpose is not to allow Indian Officers and other employees to go to foreign country at its behest and settle elsewhere frustrating the object for which they have been sent. Proviso (b) to Rule 56(k) though exhaustive specifically excludes doctors and scientists from the benefit of Rule 56(k) if they fell in one or the other category enumerated therein. The meaning and import of phrase 'foreign Government' is very wide and comprehensive and in the context the same has been used it would mean not only Government of some foreign country but also bodies and institutions having semblance and trapping of Government stationed in some foreign country. In this view the IAEA having headquarters at Vienna would be a 'foreign Government' within the meaning of proviso (b) to Fundamental Rule 56(k). As such the applicant was not entitled to seek voluntary retirement without coming back to India as provided.

15. In Dinesh Sangama's case (supra) the question was as to whether the rights conferred by Fundamental Rule 56(k) (then 56 c) can be controlled by Rule 119 of the Defence of India Rules and it was held that the provisions of Fundamental Rules are statutory in nature and will prevail over rule 119 which cannot take away the right given to employees to seek voluntary retirement under the said rules and the Government has no power to disallow the employee to retire voluntarily from service on the basis of Rule 119 of the said rules. In the instant case not only

the facts of the applicant are different but also the question involved is also somewhat different. In that case the Government servant did not enter into a contract with that employer without intervention of Government of India and there was no such case of riding two horses breaking service contract and action against conduct rules and attempting to get benefit from his country as well as foreign Government.

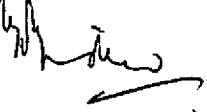
15. We have come across Government of India, Department of Personnel & Training O.M. No.F.18/10/91-FA(UN) dated 20.6.1991 issuing certain instructions in supersession of earlier instructions of 29.1.1988. It will be sufficient to state that the instructions cannot override the fundamental rules. Even in these instructions it has been provided that persons deputed to the UN agencies and other international organisations if they choose to continue on foreign assignment beyond the permissible duration may resign from service without returning to India and to their parent department. So far as the three restrictions which are contained in the fundamental rules, it has been stated that a person should be retired voluntarily without making specific reference to three assignments enumerated in FR 56, with reference to these three it has been

mentioned that the person should be allowed to retire voluntarily unless after having been transferred to India, he has resumed the charge of the post in India and served for a period of not less than one year. However, this will not be applicable to the persons who are on deputation to the UN/ International Organisation. As such, it is stated above, the instructions cannot override fundamental rules and even otherwise these instructions become applicable only from 20.6.1991 i.e., some 8 days after the termination of deputation period of the applicant and a couple of months after his prayer for voluntary retirement was not accepted.

16. The plea of discrimination taken by the applicant who has given three instances where employees while in foreign country were allowed to seek retirement is also shaky. He has given 3 examples and subsequently one more that is of Chairman, Atomic Energy Commission in his rejoinder which has not been signed by the applicant but his counsel, the applicant being out of country. Firstly it is not known whether they were allowed to seek retirement before introduction of proviso (b) to Fundamental Rule 56(k) or thereafter. The respondents have stated that these persons were on the verge of retirement unlike the applicant who has yet to serve few more years but in the applicant's rejoinder in respect of one such officer it has been stated his retirement was not close and he too was yet to remain in service for few more years. It is not known whether he was holding any sensitive post or not or that he was sent for getting more knowledge and experience which may

benefit the country. In the absence of full facts and details it is difficult to accept the plea of discrimination. Even otherwise a wrong precedent would not make a good law and would have a binding effect. ~~in future~~ So far as equity is concerned it is not in favour of applicant as one who seeks equity must do equity which along with fairness is wanting in the instant case. In the end we are of the view that there is not merit in this application which is liable to be dismissed.

17. It is accordingly dismissed but there will be no order as to costs.


(M Y PRIOLKAR)
MEMBER (A)


(U C SRIVASTAVA)
VICE CHAIRMAN