

IN THE CENTRAL ADMINISTRATIVE TRIBUNAL

MUMBAI BENCH

ORIGINAL APPLICATION NO: 1337/95

Date of Decision: 17-4-1997

P.G. Baby

.. Applicant

Mrs. K.J. Nagarkatti

.. Advocate for
Applicant

-versus-

U.O.I. & Ors.

.. Respondent(s)

Shri R.K. Shetty

.. Advocate for
Respondent(s)

CORAM:

The Hon'ble Mr. M.R. Kolhatkar, Member(A)

The Hon'ble

(1) To be referred to the Reporter or not?

(2) Whether it needs to be circulated to other Benches of the Tribunal?

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M.R. Kolhatkar
(M.R. KOLHATKAR)
M(A)

BEFORE THE CENTRAL ADMINISTRATIVE TRIBUNAL
MUMBAI BENCH

O.A.1337/95

THURSDAY this the 17th day of APRIL, 1997

CORAM:

HON'BLE SHRII M.R.KOLHATKAR, MEMBER(A)

Panicker Gangadhar Baby,
630/1, Type-II,
Sarvatra Nagar, Dehu Road,
Pune - 412 101.

By Advocate Mrs.K.U.Nagarkatti .. Applicant

-versus-

1. Union of India
through
The Secretary,
Ministry of Defence,
South Block,
New Delhi - 110 011.
2. Director General of
Ordnance Services(DGOS)
Army Headquarters, DHQ
P.O. New Delhi - 110 011.
3. Major General Army Ordnance Corps,
H.Q. Southern Command,
Pune - 411 001.
4. The Controller of Defence
Accounts,
Southern Command,
Pune - 411 001.
5. The Commandant,
Ordnance Depot,
Talagaon Dabhade.
6. The Asstt.Controller of
Defence Accounts,
O/O the A.C.D.A in-charge,
A.A.O.(CDA SC)DEHU ROAD,
Pune - 412 101.

By counsel Shri R.K.Shetty .. Respondents

- : O R D E R : -
(Per M.R.Kolhatkar, Member(A))

This O.A. has a chequered history.

The applicant has challenged the recovery of T.A. amount from
initially drawn by way of advance in connection with
his duty as part of Operation Pawan in Sri Lanka.

There were three spells in which the applicant
worked as head of 10 member Tent Repair Unit
in Sri Lanka. The spell in issue relates to

4-7-88 to 7-10-88, a total period of 96 days.

The applicant is aggrieved by the decision of the respondents to make recovery by making applicable to him orders of the Govt. from Ministry of Finance dt.15-2-1990(Ex.11) instead of orders of the Ministry of External Affairs dt. 16-8-1988(Ex.10). The second reason for the non-recovery is the acceptance of the certificate produced by the applicant that he was not provided lodging and boarding at Govt. cost during the period of tour by which also applicant is aggrieved.

2. In O.A. 127/92 between the same parties the respondents had contended that the applicant was provided free Boarding and Lodging. Though the detention certificate initially given by the applicant did not state that applicant was provided with free boarding and lodging but the detention certificate issued subsequently after three years stated that he was not provided free boarding and lodging. But as the certificate could not be believed the matter was subjected to a one man enquiry whose conclusion was that the applicant and his team might have been provided free boarding and lodging. The Tribunal however was not happy with the manner in which one man enquiry was conducted and therefore directed the respondents to hold an additional enquiry, wherein the officers who issued the detention certificate should be examined and the applicant should be allowed to be present throughout the enquiry, to cross-examine the witnesses and make his own statement.

3. Pursuant to the above the respondents have further passed a non speaking order but after directions of the Tribunal the respondents have passed a detailed speaking order on 13-6-1995 and it is this order

which has been challenged by the applicant in this O.A. By this order the Govt. has rejected the findings and opinion of the court of enquiry ordered by Southern Command. The opinion of the court is in two part and the same may be reproduced for ready reference.

* The court is of the opinion that in the absence of records like Ration return/Admin. Check, it cannot be clearly ascertained whether free boarding and lodging facilities have been provided to the following during the periods mentioned below :-

(a) T/No.1203 Shri PG Baby, T/No.5444 Shri VT Disade and T/No.5480 Shri P.T. Chavan from 06 Feb 88(AN) to 22 Mar 88 (AN) while on temp duty with 54 Inf.DOU

(b) NYA Chargeman Shri PG Baby and 10 individuals from 21 Jul 88 to 06 Sep 88 while on temp duty with 36 Inf.DOU

(c) NYA Chargeman Shri PG Baby along with 10 Civ.employees from 08 Sep.88 to 11/28 Oct.88 while on temp duty with 54 Inf DOU

2. From the evidence available on record, the court is of the opinion that free boarding and lodging facilities were not provided to Shir PG Baby and his team while on temp duty to Sri Lanka during 'OP PAWAN' "

4. In this background the Govt. i.e. the Ministry of Defence has rejected the request of the applicant for stoppage of recovery on the following grounds :

"(a) All Central Govt. officials who had been deputed to operational Area of Sri Lanka on Ty Duty are governed by the orders issued by Min. of Fin. Dept. of Expenditure OM No.F.19036/8-89-E.IV, dated 15-2-1990 and not by the Orders of Min. of External Affairs (FD Section) letter No.Q/FD/695/1/85

dated 16 Aug 88. Accordingly those officials who have been provided with Free boarding/ lodging are not entitled of cash allowance.

(b) Further, in obedience of CAT Bombay order on OA no.127/92, a Court of Inquiry was ordered by Southern Command to ascertain the veracity of the detention certificates issued by 54 Inf DOU & 36 Inf DOU initially during 1987-88 and subsequently modified based on the request of the Unit. As per CAT's order officers who issued Detention Certificates are supposed to be examined by Court of Inquiry but Court of Inquiry did not examine according to CAT's order;

(c) Out of the three witnesses, two witnesses(Lt.Col) were neither the concerned Commanding Officers of 54 Inf DOU nor 36 Inf DOU during 'OP-PAWAN' in 1988, Further both the witnesses No. 1 & 2 had during inquiry revealed before Court of Inquiry that they have no knowledge regarding their (TRU Teams) boarding and lodging as they were not posted in the respective units during OP-PAWAN and that there is no record available with their units to substantive facts. Therefore the statement of 1st and 2nd witnesses which is based on second detention certificates have no veracity.

(d) Witness No.3(Sr.Chargeman Shri P.G.Baby) also could not produce any documentary evidence in original or CTG certificates before the Court of Inquiry.

(e) Except Shri P.G.Baby, no member of the Team(Out of 11 members) has been witnessed/ examined.

(f) The original or True Attested copies of certificates obtained in 1988-89 and submitted to GDA along with their original claims/bills have not been obtained/ produced either before the Court of Inquiry or to the CAT in evidence.

when the temporary duty was organised, advance D.A/TA, was paid agreeably with the knowledge of entitlement of such allowances. If applicant was to be provided free boarding and lodging this ~~question~~ would not have arisen. It is contended that the war accounting system was followed in respect of "OP-Pawan" and therefore the action of the authorities to subject the TA claims to the audit itself is not in accordance with the war accounting procedure. It is contended that ^{the} reasoning of the Govt. in Defence Ministry is based on pure ~~speculation~~ speculation and not on any evidence. Further it is contended that it was wrong on the part of the Govt. to apply the procedure of the Ministry of Finance OM dt. 15-2-90. It may be noted here that according to the orders of the Ministry of Finance dt. 15-2-90 all central Govt. officials deputed in operational areas of Sri Lanka on temporary duty when provided with free boarding and lodging on Govt. expenses will not be entitled to any cash allowance. It may further noted that in terms of Ministry of External Affairs order dt. 16-8-1988 where an officer is treated as State Guest or has been provided both accommodation and meals free, 25% of the DA shall be admissible. Therefore the stand of the respondents that applicant is not entitled to any cash allowance is not correct and it is argued that in any case he should be ^{held} entitled to the benefits of Ministry of External Affairs order dt. 16-8-1988.

6. The applicant by way of rejoinder has filed affidavit of co-workers stating that they were not provided free boarding and lodging and they ~~had~~ to make their own arrangements. The counsel for the applicant at the argument stage also filed copies of the inland letters in Hindi addressed by the applicant to his office from which it is contended that it is

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apparent that the applicant was in great difficulty.

7. Respondents have opposed the O.A. They have contended that the speaking order passed by the Ministry of Defence which is reproduced in extenso needs no interference. According to the respondents lower formation did not organise the second enquiry properly probably with a view to help the applicant in his claim. The enquiry committee examined Lt. Col. I.S.Rao and Lt. Col K.C.Malhotra. Both Lt. Col. I.S.Rao and Lt. Col. K.C.Malhotra had admitted during the course of enquiry that they had no personal knowledge whether or not the applicant had partaken ^{of} ~~of~~ boarding and lodging facilities of army units when on temporary duty at Sri Lanka. The report of court of enquiry itself is ambivalent. The applicant has relied on the second para of the opinion of the court of enquiry but the opinion of the court of enquiry should be read as a whole and the first para contradicts what is stated in the second para of the opinion of the court of enquiry. According to respondents the detention certificates produced by the applicant were objected to by audit and they have every right to investigate and there is no presumption of the correctness of the detention certificates. The one man enquiry committee had gone against the applicant but the second court of enquiry ~~which was constituted at the instance of the~~ ~~Tribunal~~ had not followed the procedure envisaged by the Tribunal. Advance of TA, DA at the rate applicable within the country was paid to the applicant before his move to ensure that in case free boarding and lodging due to exigency of service was not made available to him, he can utilise the TA/DA paid to him but that does not raise a presumption that free boarding and lodging was not provided.

8. Respondents particularly referred to order Ex.V to written statement dt. 16-8-88 on the subject "Detailment of TRU Team for the year 1988", in para-4 of which it is stated that "As the TRU Team comprised of civ workers, it may please be ensured that they are provided that comfort and amenities and due courtesy extended to them." According to respondents this would imply that they would be provided with free boarding and lodging. Importantly the logic of the situation was such that there was a war like situation in Sri Lanka and curfew was in force, free movement was not possible, environment outside the army unit was hostile and therefore it was not conceivable that members of civilian tent repairing unit would fend themselves in the matter of boarding and lodging. While objecting to the counsel for the applicant relying on personal letters written by the applicant at the argument state counsel for the respondents pointed out that these letters do not state anywhere difficulties about boarding and lodging. The basic point made in the letter is that they want their money be paid in Sri Lankan currency.

9. In a sur-rejoinder filed by the respondents it is contended that the affidavit filed by co-workers who are interested parties cannot be relied upon. The respondents have filed an affidavit by Lt.Col. Virinder Kanwar dt. 4-12-1996, in para 3 and 4 of which it is stated as below :

"3. I say that the certificate for the period from 8 Sep 88 to 28 Oct.88 was issued on my behalf by Capt CB Lal (page 45 of the written statement) I say that as a practice food and shelter was provided to the Civilians in the war scenario of Sri Lanka. I say that Shri PG Baby, Chargeman and his team was under my control during the said period ie 8 Sep.88 to 28 Oct. 88.

4. I further say that during their stay at Sri Lanka as a rule they should have been provided with food and shelter by the units with whom they were attached for performance of their duties. I say while the TRU team was in my location, they were provided with free boarding and lodging. I further say that during the period they stayed in other locations in Sri Lanka they would have been provided with same facilities. I say that under the rules even, if a person takes food outside, he is not entitled to re-imbursement of the cost of boarding and lodging. With reference to para 7(e) of re-joinder dt. 4-6-96 I say that the averments of deponents that they were not provided with free boarding and lodging is not true and even if they take food outside they are not entitled to re-imbursement without production of documentary proof. I say that no such documentary proof was produced by the applicant and his team mates while at Sri Lanka to me. "

10. It would be seen from the above pleadings that there are two separate issues to be considered. The first issue relates to the action of the respondents in doubting the authenticity of the detention certificate and the opinion of the court of enquiry and holding that free boarding and lodging was in fact provided to the applicants. On this point I am not inclined to accept the contention of the applicant that the opinion of the second court of enquiry was binding on the Govt. As quoted by me the opinion of second court of enquiry is ambivalent and in ~~any case the enquiry is~~ apparently ~~any case the enquiry is~~ vitiated as it failed to follow the correct procedure. At the same time it needs to be noted that the first enquiry though vague did not accept the contention of the applicant. I am inclined to

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attach weight to the affidavit of the Lt Col Virinder Kanwar who had actually worked in the operational area and who has attested that, as a practice food and shelter was provided to the civilians in the war scenario of Sri Lanka and his clear statement that while the TRU team was in his location, they were provided with free boarding and lodging. This affidavit is clearly in consonance with the probability of the situation. I also observe that letters produced by the counsel for the applicant do not help the applicant's case because they have no reference to the problem of boarding and lodging. I am unable to accept the contention of the applicant that detention certificate are conclusive of the fact of free boarding and lodging not being provided. The counsel for the applicant has stated that in fact an original certificate with signature was produced before the court of enquiry. Inspite of this the court of enquiry finding is ambivalent in para-1 of its report. I am therefore of the view that the Ministry of Defence is right in rejecting the claim of the applicant for TA/DA to the extent it proceeds on the footing that he was not provided free boarding and lodging and he defended himself.

11. However, there is a second issue viz. the retrospective application of the Ministry of Defence O.M. dt. 15-2-90 in preference to application of O.M. of External Affairs dt. 16-8-80. The counsel for the respondents has argued that it is not correct for the respondents to apply the OM dt. 15-2-90 retrospectively. In this connection she has relied on Supreme Court judgment in the case of The Income-tax Officer, Alleppey v. M.C. Ponnoose and others, AIR 1970 SC 385. In para 5 of the judgment the Hon'ble Supreme

has observed as below :

"5. Now it is open to a sovereign legislature to enact laws which have retrospective operation. Even when the Parliament enacts retrospective laws such laws are-in the words of Willes, J. in Phillips v. Eyre, (1870) 40 LJ QB 28 at p.37 - "no doubt *prima facie* of questionable policy and contrary to the general principle that legislation by which the conduct of mankind is to be regulated ought, when introduced for the first time, to deal with future acts, and ought not to change the character of past transactions carried on upon the faith of the then existing law." The courts will not, therefore, ascribe retrospectivity to new laws affecting rights unless by express words or necessary implication it appears that such was the intention of the legislature. The Parliament can delegate its legislative power within the recognised limits. Where any rule or regulation is made by any person or authority to whom such powers have been delegated by the legislature it may or may not be possible to make the same so as to give retrospective operation. It will depend on the language employed in the statutory provision which may in express terms or by necessary implication empower the authority concerned to make a rule or regulation with retrospective effect. But where no such language is to be found it has been held by the Courts that the person or authority exercising subordinate legislative functions cannot make a rule, regulation or bye-law which can operate with retrospective effect: (See Subba Rao J., in Dr. Indramani Pyarelal Gupta v. W.R. Nathu, (1963) 1 SCR 721 = (AIR 1963 SC 274) - the majority not having expressed any different opinion on the point; Modi Food Products Ltd. v. Commr. of Sales Tax, UP, AIR 1956 All 35; India Sugar

Refineries Ltd. v. State of Mysore, AIR 1960 Mys 326 and General S. Shivdev Singh v. State of Punjab, (1959) 61 Pun LR 514 = (AIR 1959 Punj 453)(FB)"

I am inclined to agree with the counsel for the applicant that there was no intention to apply the provisions of Ministry of Finance OM dt.

15-2-1990 retrospectively and even if there was recital to that effect, the court would be slow to give retrospective effect to the same. As observed above, the effect of application of Ministry of External Affairs order dt. 16-8-88 is that the applicant would be entitled to get 25% of the TA/DA.

12. I am of the view that the applicant is entitled to TA/DA as per the order of Ministry of External Affairs dt. 16-8-1988.

13. In the light of above discussion I am of the view that OA is required to be dismissed except to the grant of limited relief viz. the declaration that the applicant is entitled to have his TA/DA advance drawn in connection with his duty in Sri Lanka for the relevant period adjusted in accordance with Ministry of External Affairs OM dt. 16-8-1988. He should be paid TA/DA accordingly and the respondents are free to make recovery of balance advance as per the finding in para 10 supra.

14. There will be no order as to costs.

M.R. Kolhatkar

— (M.R. KOLHATKAR)

Member(A)

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