

**Central Administrative Tribunal
Principal Bench**

OA No.696/2012

Reserved on : 08.04.2015
Pronounced on : 12.08.2015

**Hon'ble Mr. Justice Syed Rafat Alam, Chairman
Hon'ble Dr. B. K. Sinha, Member (A)**

Swapan Roy Chowdhury
S/o Late Shanti Roy Chowdhury
R/o M-112, Connaught Circus,
New Delhi 110 001.

Presently residing at 11 Montrose Crescent,
Finchley, London-N 12 O ED (U.K.) ... Applicant.

(By Advocate : Shri L. R. Singh)

Versus

1. Union of India
Through the Foreign Secretary
Govt. of India,
Ministry of External Affairs,
South Block,
New Delhi.
2. The High Commission of India
Through Joint Secretary
Europe West Division,
South Block,
New Delhi. ... Respondents.

(By Advocate : Shri M. K. Bhardwaj with Ms. Priyanka Bhardwaj)

: O R D E R :

Justice Syed Rafat Alam, Chairman :

In the instant Application under Section 19 of the Administrative Tribunals Act, 1985, the applicant is aggrieved by the order of the respondents dated 31.10.2012 (Annexure A-1). He has prayed for the following reliefs:-

- “(a) quash and set aside the impugned order dated 31.10.2011 issued by respondent No.2.
- (b) direct the respondent No.2 to refund the deductions made from the salary of the applicant herein, and/or
- (c) pass any other order (s) or direction (s) which this Hon'ble Tribunal may deem fit and proper in the facts and circumstances of the instant case as well as in the interest of justice.”

2. The case of the applicant, briefly stated, is that on 24.08.1973 he was recruited in the Indian High Commission at London (hereinafter referred to as the Mission) and was appointed as a temporary labourer; he was confirmed in 1974 as a regular employee of the High Commission; on 24.12.1981, he was appointed as Clerk-Typist in the Mission. In September, 1989 he suffered from Prolapsed Disc problem and was advised complete rest and also sanctioned six months leave w.e.f. 01.03.1991. He applied for its extension on 05.09.1991. Thereafter, he periodically applied for extension of leave but the applicant was never informed about the fate of his prayer for extension of leave. On 27.07.1992, the respondent No.2 called upon the applicant to report for duty and when he failed to do so as he was convalescing in hospital, his services were terminated vide letter dated 05.08.1992. The applicant made a representation on his recovery regarding injustice meted out to him to respondent No.2 who appointed him as a locally recruited contingency clerk on 23.11.1993. Subsequently, the applicant was appointed as a locally recruited clerk on temporary and ad hoc

basis and w.e.f. 10.10.2001 the applicant was appointed as Receptionist. In the meantime, the applicant continued with his endeavour by means of representation seeking regularisation of his services from 04.09.1992 to 23.11.1993. Ultimately, on 29.06.2005, the applicant was intimated that his services were to be counted as continuous from 06.09.1973 till date ignoring the period from 04.09.1992 to 23.11.1993, and that there would be no change in the seniority of the applicant as he had since been appointed as a receptionist w.e.f. 10.10.2001 subject to his furnishing an undertaking not to pursue this matter as the same meets to his full satisfaction.

3. On 29.02.2008, the respondent No.1 issued office order revising the pay of the local staff w.e.f. 01.10.2007 wherein the pay of the applicant was fixed taking into account his thirty four years and one month of service, out of which, one year and two months are to be treated as on extraordinary leave. Computing the errors, it was allowed to be corrected by issuance of a fresh order dated 16.04.2008 (Annexure A-4). The grievance of the applicant is that after a lapse of more than three and a half year, the respondent No.2 issued the impugned order dated 31.10.2011 revising the pay of the applicant retrospectively with effect from 01.10.2007 counting the service rendered by him as ten years and two months, and his salary was fixed at 1080 pounds in place of 1200 pounds

with direction to refund the excess payment of 5678 Pounds made to him in instalment.

4. The applicant has mainly assailed the impugned order on the ground of violation of principles of natural justice. The stand of the applicant *inter alia* is that once the competent authority had considered the representation and taken a conscious decision to count the entire service of the applicant as continuous from 06.09.1973 including the period from 04.09.1992 to 23.11.1993 with, the stipulation that there would be no change in the seniority the respondents are estopped from issuing the impugned order. This order would have the effect of wiping out the seniority of the applicant from 06.09.1973 till 22.07.1997 in an arbitrary and illegal manner behind his back without being given any opportunity of hearing. Thus, it suffers from the vice of violation of principles of natural justice.

5. On the other hand, the respondents in their counter affidavit have admitted that it came to the notice of the Mission in 2011 that while implementing the Ministry's order dated 22.02.2008, applicant's pay had been revised in 2008 by providing benefit of length of service of over 25 years with the Mission in terms of para 2 (d) of the said order. This has been done erroneously whereas the applicant's service should have been reckoned from 23.07.1997 on the basis of the OM dated

29.06.2005. The respondents further submit that this OM is not valid as the Mission was not vested with the powers/authority to issue it under its delegated powers as also the period from 23.11.1993 till 22.07.1997 when he was working as a contingency staff. The terms and conditions of the contingency employment cannot be treated as regular and is not to be counted for any benefits, financial or for establishing seniority.

6. In reply to the grounds in the OA, the respondents have submitted that the applicant was a locally recruited employee of the Mission in terms of which his employment was liable to be terminated at any time without assigning any reason within thirty days of the notice given on either side. The appointing authority reserves the right of terminating the services of the applicant forthwith before the expiry of the stipulated period of notice by making payment to him/her of one month's salary for the period of notice or for the unexpired period thereof.

7. The respondents have filed another additional affidavit stating that the applicant was employed on contract basis under the terms of which his services were liable to be terminated without assigning any reason with one month's prior notice. He was appointed as a temporary labourer on 06.09.1973 and subsequently as a clerk/typist on 24.12.2008. The services of the applicant were terminated on 04.09.1992

after having given ample opportunities to him to respond to the Mission's Memorandum. He was again appointed as a contingency clerk w.e.f. 23.11.1993 which was a fresh appointment, distinct from his earlier appointment, and was appointed as a regular clerk on 23.07.1997 with a probation period of one year. These facts remain uncontroverted by the applicant.

8. The respondents stated that the OM dated 29.06.2005 had not been issued by the competent authority and has, therefore, no force of law. The contingency employment from 23.11.1993 to 22.07.1997 cannot be combined with regular service w.e.f. 23.07.1997, nor his services can be treated as continuous and regular as it involves period of contingency service, unauthorized absence, termination w.e.f. 04.09.1992. Therefore, the respondents have opposed the prayer of the applicant.

9. We have heard Shri L. R. Singh, learned counsel for the applicant and Shri M. K. Bhardwaj, learned counsel for the respondents.

10. Looking to the pleadings of the parties and their submissions made before us, in our view, the only issue which arises for our consideration is as to whether the services of the applicant from 06.09.1973 to 29.06.2005 excluding the period from 04.09.1992 to 23.11.1993, be treated as extraordinary

leave is to be restored by quashing the impugned order dated 31.10.2011 or the plea of the respondents be accepted to dismiss the OA.

11. Admittedly, the applicant is covered by the Terms and Conditions of Service of Locally Recruited Personnel of the High Commission of India, London. For sake of clarity, the provisions of Rule 1 are being reproduced as below:-

“I. CONTINUANCE:-

- (a) All appointments to local posts will be temporary
- (b) Subject to the following conditions, the High Commission may retain the services of any locally recruited person till he/she attains the age of 65 years.
 - (i) If the Government of India decides that a local post should be abolished or converted to an India-based one, the services of the incumbent thereof are liable to be terminated after giving two months notice;
 - (ii) The incumbent of any post may resign from service after giving the High Commission two months notice;
 - (iii) However, the services of any incumbent may be terminated on medical grounds or for reasons of insubordination, intemperance, misconduct and breach of discipline, without any notice.”

12. It appears from the perusal of the above that all the local appointments will be temporary and are liable for termination with two months' prior notice, and can also be dispensed with as per conditions provided under Rule I (i) & (iii).

13. It is well accepted as a legal proposition that right of a contract employee does not extend beyond what is provided

within the terms of the contract. In the instant case, the term of the contract which has been accepted by the applicant provides for termination simplicitor with two months' prior notice which can also be waived under the conditions expressed under Rule I (iii) above.

14. In the case of ***Balwant Rai Saluja and Anr. etc. etc. vs. Air India Ltd. and Others*** JT 2013 (14) SC 445, it has been clearly held that the contract employees have no more rights than what is provided in the contract or prescribed in the statute. Therefore, the act of termination of the applicant vide order dated 04.09.1992 cannot be questioned and the contract expired with the act of termination.

15. In an earlier decision, the Hon'ble Supreme Court of India in ***Delhi Transport Corporation vs. D. T. C. Mazdoor Congress and Ors.*** reported in AIR 1991 SC 101 referring to an earlier decision in ***West Bengal State Electricity Board and Ors. v. Desh Bandhu Ghosh and Ors.*** 1985 ILLJ 373 SC, where contract so provides that services of a contractual employee can be terminated without notice. The Hon'ble Supreme Court drew a distinction between a servant protected by the constitutional provision and a contract employee. Para 16 & 17 reads as under:-

“16. Reliance was placed on this decision by the High Court in the Judgment under appeal. The High Court in our opinion rightly pointed out, however, that the

decision was on a different basis and could not be availed of in deciding controversy involved in the present determination. In *Air India Corporation, Bombay v. V.A. Rebellow and Anr.* : (1972)ILLJ501SC , this Court dealing with the power of the Air India to terminate the services of a person who was alleged to have misbehaved with air hostesses, observed on page 616 of the report that the anxiety of the Legislature to effectively achieve the object of duly protecting the workmen against victimisation of unfair labour practice consistently with the preservation of the employer's bona fide right to maintain discipline and efficiency in the industry for securing the maximum production in peaceful, harmonious atmosphere is obvious from the overall scheme of these sections. This Court on page 620 of the report observed that the record merely disclosed that the appellant had suspicion about the complainant's suitability for the job in which he was employed and this led to loss of confidence in him with the result that his services were terminated under Regulation 48. Loss of confidence in such circumstances could not be considered to be mala fide, it was held. Similarly in *Municipal Corporation of Greater Bombay v. P.S. Malvenkar and Ors.* : (1978)ILLJ168SC , where it was alleged that the services of an employee of Bombay Municipal Corporation were unsatisfactory, this Court held that the powers of dismissal after an inquiry and the powers of simpliciter termination are to distinct and independent powers and as far as possible neither should be construed so as to emasculate the other or to render it ineffective. One is the power to punish an employee for misconduct while the other is the power to terminate simpliciter the service of an employee without any other adverse consequence.

17. It may be mentioned that the case of civil servants is, however, governed by their special constitutional position which accords them status; the legal relationship (between the Government and its servants) is something entirely different, something in the nature of status. It is much more than a purely contractual relationship voluntarily entered into between the parties. The duties of state are fixed by the law and in the enforcement of these duties society has an interest. In the language of jurisprudence status is a condition of membership of a group of which powers and duties are exclusively determined by law and not by agreement between the parties concerned. See the observations of this Court in *Roshan Lal Tandon v. Union of India* :

(1968)ILLJ576SC D-E. But even then the services of a temporary civil servant (although entitled to the protection of Article 311 of the Constitution) is subject to termination by notice. But beside the above, the government may find it necessary to terminate the services of a temporary servant if it is not satisfied with his conduct or his suitability for the job and/or his work. See the observations of this Court in Champak Lal Chiman Lal Shah v. The Union of India : (1964)ILLJ752SC . The services of a temporary government servant, further, may be terminated on one month's notice whenever the government thinks it necessary or expedient to do so for administrative reasons. It is impossible, this Court observed, to define before hand all the circumstances in which the discretion can be exercised. The discretion was necessarily left to the Government. See observations of this Court in Ram Gopal Chaturvedi v. State of M. P. : (1970)ILLJ367SC .

16. In this context, we also take note of the office memorandum dated 29.06.2005 restoring the seniority of the applicant. For the sake of convenience, the same is reproduced as below:-

“

Office Memorandum

With reference to the representation of Shri Swapan Roy Chowdhury regarding restoration of past services, the competent authority has decided as follows:-

- i) Services of Shri Roy Chowdhury shall be counted as continuous from 06.09.73 till date excluding the period from 04.09.92 to 23.11.93. The excluded period will not qualify for terminal benefits.
- ii) There shall not be any change in his seniority as he has since been appointed as Receptionist w.e.f. 10.10.2001.
- iii) Shri Swapan Roy Chowdhury's pay shall be protected by allowing notional increments in the scale existed as on 04.09.92 till the date of his promotion to

the post of Receptionist. This grant of increments shall be purely notional so as to arrive at his pay as on 10.10.2001 for fixation of his pay in the scale of Receptionist. Due to the aforementioned position, Shri Roy Chowdhury shall not be paid any arrears of pay for any period (s) prior to 01.07.2005. In other words, Shri Roy Chowdhury will not receive any financial benefits retrospectively.

- iv) Implementation of the above decision is subject to Shri Roy Chowdhury's undertaking, in writing, that the proposed action meets his full satisfaction and that he will not resort to any representation or legal action hereinafter."

The enclosed chart with the above office memorandum mentioned the applicant's service as thirty four years and one month. However, the subsequent plea of the applicant is that this order has been issued without authority as a matter of error.

17. In the case of **R. K. Mittal & Ors. Vs. State of Uttar Pradesh and Others** 2012 (2) SCC 232, the Hon'ble Supreme Court held that where the order is issued sans authority, it is *void ab initio*. The Hon'ble Apex Court in para 28 of the decision observed as under:-

“28. The authorities while reconsidering such matters are expected to act reasonably and cautiously. They deal with larger public interest and, therefore, have a responsibility to act with greater degree of sensitivity and proper application of mind. If the Development Authority aids the violation of the statutory provisions, it will be a perversity in the discharge of statutory obligations on the part of the Development Authority.

The public interest, as codified in the statutory Regulations and the provisions of the Act, should control the conduct of the Development Authority and its decision making process, rather than popular public demand guiding the exercise of its discretion, that too, in a somewhat arbitrary manner. To illustrate the dimensions of exercise of such powers, we may refer to the judgment of this Court in the case of *Bangalore Medical Trust v. B.S. Mudappa and Ors.* (1991) 4 SCC 54, wherein this Court was concerned with the provisions of the Bangalore Development Authority Act, 1976 with particular reference to Sections 33, 38 and 38(A) of that Act. A site intended for a public park was sought to be converted into a hospital/nursing home, under the garb of the latter being a 'civic amenity'. This Court formed the view that such conversion of an open space reserved under the scheme for a public park into a civic amenity site by constructing hospital and allotment of the site to persons or body of persons, was opposed to the objects of the Act and would be ultra vires the same. This Court held as under:

"46... No one howsoever high can arrogate to himself or assume without any authorisation express or implied in law a discretion to ignore the rules and deviate from rationality by adopting a strained or distorted interpretation as it renders the action ultra vires and bad in law. Where the law requires an authority to act or decide, 'if it appears to it necessary' or if he is 'of opinion that a particular act should be done' then it is implicit that it should be done objectively, fairly and reasonably. Decisions affecting public interest or the necessity of doing it in the light of guidance provided by the Act and rules may not require intimation to person affected yet the exercise of discretion is vitiated if the action is bereft of rationality, lacks objective and purposive approach. The action or decision must not only be reached reasonably and intelligibly but it must be related to the purpose for which power is exercised. The purpose for which the Act was enacted is spelt out from the Preamble itself which provides for establishment of the Authority for development of the city of Bangalore and areas adjacent thereto. To carry out this purpose the development scheme framed by the Improvement Trust was adopted by the Development Authority.

Any alteration in this scheme could have been made as provided in Sub-section (4) of Section 19 only if it resulted in improvement in any part of the scheme.

As stated earlier a private nursing home could neither be considered to be an amenity nor it could be considered improvement over necessity like a public park. The exercise of power, therefore, was contrary to the purpose for which it is conferred under the statute.”

18. In **Maharashtra State Board of Secondary and Higher**

Secondary Education and Anr. Vs. Paritosh

Bhupeshkumar Sheth and Ors. and others 1984 (4) SCC

27, the Hon’ble Supreme Court has held that the right to correct one’s error is an integral part of one’s functioning and exercise of the same cannot be questioned on this count.

This view is reiterated in **Union of India (UOI) and Ors. vs. Shri Kant Sharma and Ors.** reported in 2015 (3) SCALE

546. Therefore, in view of the discussions made above and enunciation of law by the Apex Court, we do not find any error or illegality in the impugned order so far as the fixation of pay of the applicant is concerned.

19. Now coming to the second grievance of the applicant

regarding recovery of the excess payment of salary made to

him w.e.f. 01.10.2007 till October, 2011. It is to be noted that

the Apex Court in the case of **State of Punjab & Others**

Rafiq Masih (Whitewasher) [Civil Appeal No.1527/2014

decided on 18.12.2014] having taken note of its earlier

judgments in **Syed Abdul Qadir vs. State of Bihar** [(2009) 3

SCC 475] ; **Chandi Prasad Uniyal and Ors. versus State of**

Uttarakhand and Others [AIR 2012 (SC) 295]; **Shyam Babu**

Verma vs. Union of India [(1994) 2 SCC 521]; **Col. B. J. Akkara vs. Government of India** [(2006) 11 SCC 709] and **Sahib Ram Verma vs. Union of India** [(1995) Supp.1 SCC 18], was of the view that though no hard and fast rule can be laid down as to whether a sum erroneously paid to an employee shall be subject to recovery or not, laid down the following conditions in para 12 of the judgment, which is reproduced hereinunder :-

“12. It is not possible to postulate all situations of hardship, which would govern employees on the issue of recovery, where payments have mistakenly been made by the employer, in excess of their entitlement. Be that as it may, based on the decisions referred to herein above, we may, as a ready reference, summarise the following few situations, wherein recoveries by the employers, would be impermissible in law:

- (i) ***Recovery from employees belonging to Class-III and Class-IV service (or Group ‘C’ and Group ‘D’ service).***
- (ii) ***Recovery from retired employees, or employees who are due to retire within one year, of the order of recovery.***
- (iii) ***Recovery from employees, when the excess payment has been made for a period in excess of five years, before the order of recovery is issued.***
- (iv) ***Recovery in cases where an employee has wrongfully been required to discharge duties of a higher post, and has been paid accordingly, even though he should have rightfully been required to work against an inferior post.***
- (v) ***In any other case, where the Court arrives at the conclusion, that recovery if made from the employee, would be iniquitous or harsh or arbitrary to such an extent, as would far outweigh the equitable balance of the employer’s right to recover.”***

In the instant case, it is to be noted that the applicant being a contractual employee of Class-III/IV, is covered under category (i) laid down by the Hon'ble Supreme Court, and as such the recovery cannot be allowed as it would be extremely iniquitous and arbitrary to seek refund of the payments mistakenly made to him, for which he is not found responsible. In view of the aforesaid discussions, we find that the decision to make recovery is not justified.

20. In conclusion, we are of the view that the applicant being a contractual employee would be governed by the terms and conditions of his employment and his services could be terminated under the conditions of service of locally recruited personnel of the High Commission of India, London by an order of termination simplicitor. We are further of the view that the respondent No.2 had no authority to regularise the services of the applicant and no such powers have been vested with him under the rules. We, therefore, find force in the submission made on behalf of the respondent No.1 that in the absence of such power being vested in respondent No.2, exercise of the same was illegal. Therefore, it is always open to the concerned authority to rectify such mistake whenever it comes to notice. We, therefore, do not find any reason to quash the impugned order dated 31.10.2011. However, as noted above, the amount sought to be recovered by means of

the impugned order, in view of the legal position as discussed above, cannot be allowed to be recovered.

21. We, therefore, decline to interfere with the impugned order dated 31.10.2011. However, para 2 of the aforesaid order directing recovery of the excess payment made to the applicant cannot sustain in view of the judgment of the Apex Court in ***State of Punjab versus Rafiq Masih*** (supra). The same is, therefore, set aside.

22. In the result, the Application is partly allowed in terms of the aforesaid order, but without costs.

(Dr. B. K. Sinha)
Member (A)

(Syed Rafat Alam)
Chairman

/pj/