

**Central Administrative Tribunal
Principal Bench**

OA No. 4518/2013

MA No. 3450/2013

Order pronounced on: 23.07.2016

Hon'ble Mr. V. N. Gaur, Member (A)

Sushanta Bhattacharya,
220 Maitri Apartments,
28, I.P.Extension,
New Delhi-110092.

- Applicant

(By Advocate: Sh. A.K.Ojha)

Versus

1. Secretary (R),
Cabinet Sectt.,
Bikaner House Annexe,
Shahjahan Road,
New Delhi-110001.

2. Secretary,
Ministry of External Affairs,
South Block,
New Delhi-110011.

- Respondents

(By Advocate: Sh. Satish Kumar)

ORDER

The matter pertains to the claim of arrears of servant allowance when the applicant was posted in a foreign mission under cover from 30.07.2000 to 30.11.2003 at a post lower than what he held at the Headquarters. The relevant rule provides that when an officer holds a lower post while posted in the mission than his own post in the headquarters, he shall get

pay and allowances attached to the lower post, but he can claim the difference in the pay and specified allowances, including the servant allowance, after returning to the Headquarters. However, when he failed to get his claim in terms of the aforesaid rule, he filed this OA on 19.12.2013 with the following prayer:

- “8.1 To direct the Respondent No.1 to make payment of arrears of Foreign Allowance (local servant allowance component) to the applicant for the period 30.07.2000 to 30.11.2003 at the rates prescribed under para 3 of item V of various Foreign Allowance orders issued by the Ministry of External Affairs on 27.07.2000, 13.08.2001, 21.02.2002, 12.06.2002 and 20.05.2003 with interest thereon @ 9% p.a.
- 8.2 To allow arrears of Rs.2,84,800 as local servant allowance component and Rs.3,46,320 as interest on the arrears.
- 8.3 To award the cost of the case.
- 8.4 To grant any other relief as may be deemed fit in facts and circumstances of the case.”

2. The respondents have taken the preliminary objection of limitation. According to learned counsel, the cause of action for the applicant arose when he was reverted to the headquarters in the year 2003 but he has chosen to approach this Tribunal after about 10 years. In the MA filed for condonation of delay no cogent ground has been given explaining such an inordinate delay in filing the OA. He further referred to the view taken by this Tribunal in **OA No.140/2014** decided on 16.01.2014 in which the OA was dismissed on the ground of limitation alone.

The contention of the applicant in that case, which is the same in the present case, was that para 9.49 of NGO Handbook of Administrative Instructions in respect of sensitive assignments debarred the applicant from approaching a court of law. The aforesaid instruction states that:

“No action should be taken under any circumstances, including recourse to courts of law, that would directly or indirectly result in breach of security and enable outsiders and unauthorised personnel to come to know about the manner in which our officers are deputed abroad.”

3. The Tribunal was not convinced of this plea of the applicant and dismissed the OA on account of limitation. The matter went before the Hon'ble High Court in WPC no.3486/2016 - **Ashwani Kumar Sharma vs. Union of India & anr.** and Hon'ble High Court in the order dated 27.04.2016 agreeing with the view taken by the Tribunal upheld the order of the Tribunal dated 16.01.2014. In another matter with similar facts, the same bench of the Tribunal in **OA No.4335/2013** with MA No.3312/2013 and **OA No.4365/2013** with MA No.3334/2013 condoned the delay after taking note of the same departmental instructions that barred a serving officer from approaching the court of law, and allowed the OAs, and ordered payment of arrears on account of difference in foreign allowance/servant allowance etc. with interest on delayed payment at the rate applicable to the GPF deposits. The respondents approached the Hon'ble High Court in WPC

No.10190/2015 – **Secretary (R), Cabinet Secretariat & anr. Vs. Sharad Sharma** wherein the submission of the learned Additional Solicitor General was that the petitioners therein (the Government) were primarily aggrieved by the grant of interest by the Tribunal to the respondents. The Hon'ble High Court while issuing notices by order dated 02.11.2015 has stayed the order of the Tribunal only to the extent of payment of interest, with a further direction that the principal amount shall be paid to the respondents in the writ petition within four weeks. In such a scenario, there are two conflicting views taken by the Tribunal on the issue of limitation, and both upheld by the High Court. According to the learned counsel for the respondents, in the circumstances it would be appropriate to refer this matter to a larger bench. With regard to the issue of limitation he also referred to Section 21 of the Administrative Tribunals Act, 1985 and the pronouncements of Hon'ble Supreme Court in **S.S.Rathore vs. State of Madhya Pradesh**, AIR 1990 SC 10, **State of Haryana & Ors. Vs. Miss Ajay Walia**, JT 1997 (6) SC 592, **State of Punjab vs. Gurdev Singh**, (1991) 4 SCC 1, **UOI vs. Ratan Chandra Samanta**, JT 1993 (3) SC 418 and **Harish Uppal vs. UOI**, JT 1994 (3) 126 and **D.C.S.Negi vs. UOI**, SLP (C) CC No.3709/2011.

4. On merits the learned counsel for the respondents did not dispute the provisions contained in Rule 134 (2) of R&AW

(RC&S) Rules 1975. He submitted that following the recommendations of the V Pay Commission the post of SFO (GD), the post held by the applicant, was upgraded to Group A post equivalent to Second Secretary in the Missions but on special assignments such an officer is posted as Assistant/ Attaché. Therefore, the officer was eligible for arrears of pay and allowances attached to the post of Second Secretary under Rule 134(2) of R&AW (RC&S) Rules, 1975. He further submitted that the arrears of pay and allowances entitled to the post of Second Secretary in the Mission were paid to the applicant and other SFOs on the basis of the opinion of the Finance Division of MEA who did not agree to the payment of arrears of servant allowance. The opinion was supported by the fact that servant allowance is admissible only to the officers above the rank of Third Secretary who are entitled to employ Indian servants and have discretion to replace them with local servants. However, taking into account subsequent developments the matter is under review in consultation with Ministry of Finance, Ministry of Law, Ministry of External Affairs and DOP&T, and therefore, presently they are not in a position to pay the arrears of servant allowance.

5. I have heard the learned counsels and perused the record. I will first deal with the issue of limitation and the MA filed for condonation of delay.

6. **MA No. 3450/2013** – In this MA while explaining the delay the learned counsel for the applicant has drawn attention to the Para 9.49 of NGO Handbook of Administrative Instructions quoted earlier in this order. It has been argued that as a disciplined employee of the department he had diligently abided by these instructions and refrained from approaching Court of Law for redressal of his grievances. He has been making representations to the respondents including a legal notice ventilating his grievance, but the respondents did not act on the same. In my view the applicant has given a valid explanation for not approaching a court of law for the redressal of his grievance in the past. The applicant, as a disciplined employee of a sensitive security organisation whose employees are posted at various locations under cover or otherwise, had in the larger interest of the organisation chosen to strictly follow the departmental instructions of not resorting to the legal options. At this stage to throw this OA out on the ground of limitation would amount to double whammy. At first the applicant was forbidden by the rules from seeking legal remedy. When the respondents admittedly could not decide the matter for more than a decade, and the applicant has now approached this Tribunal, the respondents take the plea of limitation pleading that the cause of action arose when the rule was amended in 2003! It is pertinent to note here that the

respondents in their counter have themselves taken a view that the present OA is violating Para 9.49 *ibid* i.e. this instruction did come in the way of the applicant in seeking legal remedy earlier. The relevant para of the counter reply is reproduced below:

“Being a security organization, any employee serving or retired is bound to adhere to the various departmental security instructions in public interest. The officer had always been updated with the proceedings of the case and Department’s stand in favour of its employees. But the officer, while filing the case in court have breached the security instructions and at large have disclosed the entire procedure of deputing our officers on special assignment in cover job.”

7. It may be noted here that most of the averments in this OA are already part of judicial record and orders in the earlier court cases referred to above.

8. With regard to the conflicting decisions of the Tribunal on the issue of limitation in similar circumstances, it is noted that OA No.140/2014 was disposed of on 16.01.2014 by an oral order at the admission stage without issuing notice to the respondents. A view was taken that the instructions contained in Para 9.49 of the NGO Hand Book of Administrative Instructions only said that the employee should not take recourse to Court of Law which would directly or indirectly result in the breach of security and the outsiders and unauthorised personnel would come to know about it. The Tribunal was of the view that the OA before them did not come

under the said category. The relevant portion of that order is reproduced below:

“I also do not agree with the submission of the learned counsel for the applicant that there was embargo upon him in approaching this Tribunal earlier. The instructions contained in para 9.49 referred to above only says that the employee should not take recourse to Courts of Law in matters which would directly or indirectly result in breach of security and the outsiders and unauthorized personnel would come to know about it. This case is not a case coming under the said category.

9. The order of the Tribunal in OA 140/2014 was upheld by the Hon’ble High Court vide order dated 27.04.2016. When the same issue came up before this Tribunal in OA No.4335/2013 with MA No.3312/2013 and OA No.4365/2013 with MA No.3334/2013, the Tribunal in its order dated 11.02.2015, passed after hearing both the sides, and discussing their submissions in its order, did not agree with the stand of the respondents that the case was hit by the law of limitation. Noting that the respondents own instructions prohibited the applicant from approaching the Tribunal, the applicant had no option but to make representations and wait for the decision of the respondents. But the respondents did not decide those representations for years together, and therefore, the MA for condonation of delay was allowed. The relevant portion of that order is reproduced below:-

“17.First of all, I do not agree with the Respondents’ counsel that this case is hit by law of limitation. The Applicant is seeking payment of difference of servant allowance for the period from 27.01.2006 to 01.05.2009. The first Respondent’s own instructions

prohibit the Applicant from approaching the Tribunal. According to para 9.49 of the NGO Hand Book of the Respondents “no action should be taken under any circumstances, including recourse to courts of law that would directly or indirectly result in breach of security and enable outsiders and unauthorized personnel to come to know about the manner in which our officers are deputed abroad”. Therefore, the only option for the Applicant was to make representations and wait but the Respondents have not considered those representations. He has, therefore, no option but to approach this Tribunal. Therefore, the condonation of delay sought by the Applicants is allowed.”

10. This order came up before the High Court of Delhi in WPC No.10190/2015 and 10260/2015 and the High Court passed the following order on 02.11.2015:

“Challenge in these writ petitions is to the common orders passed by the Central Administrative Tribunal dated 11.02.2015. Mr. Jain, learned ASG submits that the petitioners are primarily aggrieved by the grant of interest by the Tribunal to the Respondents. He submits that there is no provision for grant of interest.

Issue notice to the respondents to show cause as to why Rule nisi be not issued. Notice in the stay application as well. The petitioners will take steps to serve the respondents. Till the next date of hearing, the operation of the impugned order only with respect to grant of interest shall remain stayed. It is expected that the principal amount shall be paid to the respondents within four weeks.

List on 22.02.2016.”

11. As can be inferred from the submission of the learned ASG that neither the Tribunal’s decision on limitation nor that about the principal amount to be paid on account of difference of foreign allowance as ordered in the order dated 11.02.2015 has been disputed by the petitioner-respondent in WPC No.10190/2015 and 10260/2015. To be specific the learned ASG submitted that the petitioners were primarily aggrieved by the grant of interest by the Tribunal as there was no provision

for grant of interest. Hon'ble High Court while staying the operation of impugned order only to the extent of grant of payment of interest expressed that "it is expected that the principal amount shall be paid to the respondent within four weeks." It is logical to conclude that with the unconditional order of the High Court in respect of payment of the principal amount there is no hurdle in the implementation of the order of the Tribunal dated 11.02.2015, including the issue limitation. In other words the respondents have accepted the verdict of this Tribunal except the component of interest.

12. For the aforesaid reasons, I am inclined to follow the view taken by this Tribunal in the order dated 11.02.2015 on the point of limitation. The MA for condonation of delay is allowed.

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13. The Rule 134 of the R&AW (RC&S) Rules, 1975 prior to 2003 read as follows:

"134. Protection of rank and pay on cover assignment

1. The Head of the organization may, for reasons to be recorded in writing, depute an officer of the organization to a place abroad to hold a cover post lower than his own in the organization, provided that such officer shall not be of a grade equal to or higher than that of the Mission of India at such a place.

2. During the period of such deputation, the officer concerned shall be allowed to draw the pay and allowances pertained to the post held by him during such period.

The amount by which such pay and allowances fall short of the pay and allowances, other than the representation grant, *and any extra allowance admissible on account of wages of servant,*

which would have been admissible to him had he been appointed during the cover assigned to a post equivalent to the post held by him in the organization, shall be payable to him in Indian currency on his reversion to the organization from the cover assignment.”

14. The rule was amended on 18.09.2003 and the amended rule reads thus:

“Rules 134 (2) was amended vide Cabinet secretariat O.M. No.A-76/29/2002-Do-11A dated 18.09.2003 as under:

2. In the Research and Analysis Wing (Recruitment, Cadre and Service) Rules, 1975, for the existing sub-rule (2) to Rule 134, the Following shall be substituted namely:-

“During the period of such deputation, the officer concerned shall be allowed to draw the pay and allowance pertaining to the post held by him during such period.

The amount by which such pay and allowances fall short of the pay and allowances, other than the representation grant, which would have been admissible to him had he been appointed during the cover assignment to a post equivalent to the post held by him in the organization, shall be payable to him Indian currency on his reversion to the organization from the cover assignment.

Explanatory Memorandum

The amendment in the rules is being given retrospective effect from the 1st January 1998 as this has been necessary due to introduction of new indexation of FA (Foreign Allowance) scheme by the Ministry of External Affairs with effect from 01.01.98. It is certified that retrospective effect being given to the rules will not prejudicially or adversely affect the interest of any Government servant.”

15. Following the amendment of the Rule 134 with retrospective effect from 01.01.1998, the applicant became entitled to servant allowance as admissible to a Second Secretary in the Mission but it was not paid to him when he submitted a claim after returning to the headquarters. In the counter filed in April 2015, the admitted position of the

respondents is that the matter regarding payment of arrears of foreign allowance at higher rate is still under review in consultation with Ministry of Finance, Ministry of Law, Ministry of External Affairs and DOP&T. Relevant portion of the reply is reproduced below:

“With Subsequent Developments, matter regarding payment of arrears of Foreign Allowances at higher rates i.e., DFA is under review in consultation with Ministry of Finance, Ministry of Law, Ministry of External Affairs and DoPT. Therefore as of now, the Department is not equipped to pay the arrears on the basis of DFA as being claimed by the affected officers till the matter is decided by concerned authorities.”

16. The counter does not indicate as to how much more time it is likely to take to ‘review’ the matter, but it expects even a retired employee to abide by the restriction on approaching a court of law in the public interest. However, in the background of the decision of this Tribunal in **Vinod Kumar Jain** (supra), the matter is no more *res integra*. This Tribunal had already taken a view that while being posted under cover at a lower stage the servant allowance to the applicant would be admissible on the rates applicable to Second Secretary. The relevant portion of the order is reproduced below:

“8. We are not persuaded by the arguments of the Respondents that the Applicant would be entitled to the allowance for employing a servant only if he worked as Second Secretary. It seems that the Respondents have not considered the amendment to Rule 134(2), to which we have made references in the preceding paragraphs. An Office Memorandum dated 14.01.2004 has been placed at Annex R-2 of the counter affidavit, which reads thus:

“Sub:- Amendment to Rule 134 (2) of R&AW (RC&S) Rules 1975 clarification regarding.

With reference to this Secretariat notification of even number dated 18/09/2003 regarding amendment to sub-rule 2 of Rule 143 (2) of R&AW (RC&S) Rules, 1975, the following clarification regarding treatment of allowances admissible on account of wages of Indian servant while calculating the arrears of difference of pay and allowances of R&AW officers posted on special assignment in a below capacity may kindly be taken note of for the said purpose:

“The R&AW officers who employ Indian servant on their posting on special assignment and are entitled to Standard Foreign Allowance (SFA), the component of wages of Indian servant as shown in the FA Orders would be deducted from FA admissible (SFA) of the post held by the officer while on special assignment and the post held by him in the Department, had he not gone on special assignment, while calculating the arrears of difference of pay and allowances in terms of Rule 134 (2) *ibid.*”

This is regarding officers who employ Indian servant on their posting on foreign assignment and are entitled to SFA. The Applicant has repeatedly stressed that he had not taken any Indian Servant. He had employed a local servant, for which he would be eligible for the allowance prescribed for Second Secretary in paragraph/table 3 of the Foreign Allowance Order on his reversion to the cadre. As Assistant in the embassy, he was not eligible for keeping a servant. In his post on special assignment he was not eligible for SFA or DFA. The post of the Applicant in his parent cadre is equivalent to Second Secretary as seen from the Order Number Q/FD/6910/1/99 dated 14.05.1999, given by the Respondents, and as also admitted by the Respondents. As Second Secretary he would have been eligible for Foreign Allowance, if he employed local servant, at the rate prescribed in paragraph/table 3 of the Foreign Allowance order. As per the amended Rule 134(2), he is entitled for all allowances except Representational Grant. This leaves no room for doubt about his eligibility for the Foreign Allowance prescribed in paragraph 3 of the order for Foreign Allowance. If it were not so, one could as well ask as to what purpose would the amendment to Rule 134(2) serve. The copy of the notification amending the Rule 134(2) has been produced by the Respondents on our direction, which we have taken on record. There is a noting by the Joint Secretary of R&AW submitted to the Special Secretary (R) stating thus:

“May kindly see at dak stage. Quite a number of officers would benefit.”

Obviously, if the interpretation of the Respondents in the counter affidavit is to be accepted, then no one will benefit and the amendment would be rendered meaningless.

9. From the above discussion we have no doubt about the admissibility of Foreign Allowance to the Applicant on the rates as admissible to Second Secretary in paragraph 3 of the Foreign Allowance order. We had directed the Respondents to produce the ‘due and drawn statement’ in regard to the Applicant, which has been produced by the learned counsel for the Respondents. An

amount of Rs.1450/- has been deducted from the Foreign Allowance due. It seems to be the component for Indian servant in paragraph 2 of the Foreign Allowance order. Another amount of Rs.4440/- has been deducted, which has nowhere been explained. The Respondents are directed to re-calculate the Foreign Allowance due to the Applicant on the basis of the rate given in paragraph 3 of the Foreign Allowance orders for the periods, when the Applicant was posted in the embassy of India in Seoul, on the basis of the Applicant's eligibility for the allowance for local servant and pay the arrears to him. We reject the Respondents' contention that the Applicant was not eligible for allowance due for local servant because he did not work actually as Second Secretary in the Mission at Seoul.

10. The above direction would be complied with within two months from the date of receipt of a certified copy of this order. We also direct the Respondents that a copy of the calculations for arriving at the correct amount of Foreign Allowance would be given to the Applicant. Needless to say the Applicant would be at liberty to challenge the payment of Foreign Allowance, calculated by the Respondents on our direction, if his grievance still survives. No costs."

17. Taking note of the Division Bench order in Vinod Kumar Jain (supra) the Single Bench of this Tribunal in OA No.4335/2013 and OA No.4365/2013 has allowed the OAs and directed the payment of arrears of foreign allowance for the period the applicants in those cases were posted in the foreign missions. The Tribunal further allowed interest on delayed payment at the rate applicable to the GPF deposits. The relevant portion of the order is reproduced below:

"18. On merits, I find that the cases of both the Applicant are squarely covered by the judgment in the case of Vinod Kumar Jain (supra). The Applicant Shri Joginder Pal Jyoti in OA No.4335/3013 was admittedly serving as a Senior Field Officer with the Respondent No.1. He was posted on Foreign assignment/deputation as Attache (Consular) in Embassy of India, Kathmandu, Nepal from 27.01.2006 to 01.05.2009 which was a lower post than his original post held in Cabinet Secretariat. He was paid servant allowance admissible for the post of Attache whereas he was eligible for the same at higher rates admissible to 2nd Secretary equivalent to his original post of Senior Field Officer held in Cabinet Secretariat in the pay scale of Rs.8000-13500. Further, the Rule 134 of R&AW (RC&S) Rules 975

provides for "Protection of Rank and Pay on Cover Assignment", and Cabinet Sectt. OM No.A-76/29/2002-DO II(A) dated 18.09.2003 provides for payment of arrears/difference of pay and allowances by R&AW in Indian rupees on the reversion of deputation from foreign assignment. The Applicant Shri Sharad Sharma in OA No.4365/2013 was also serving Senior Field Officer in Cabinet Secretariat and was posted on Foreign assignment/deputation in Embassy of India, Washington from 23.08.2004 to 23.10.2007 which was a lower post than the said post held in Cabinet Secretariat. He was also paid servant allowance admissible for the post of Attaché whereas he was eligible for the same at higher rates admissible to 2nd Secretary equivalent to his original post of Senior Field Officer held in Cabinet Secretariat in the pay scale of Rs.8000-13500. I, therefore, allow these OAs. Consequently, I direct the Respondents to pay arrears of Foreign Allowance for the period from 27.01.2006 to 01.05.2009 to the Applicant Shri Joginder Pal Jyoti in OA No.4335/2013 and to the Applicant Shri Sharad Sharma for the period from 23.08.2004 to 23.10.2007 in OA No.4365/2013 at the higher rate. Both the Applicants are also entitled for interest on delayed payment at the rate applicable to the GPF deposits. The Respondents shall accordingly calculate the arrears payable to the Applicants along with interest and pay the same within a period of 2 months from the date of receipt of a copy of this order. They shall also furnish a due and drawn statement for the convenience of the Applicants."

18. Considering that the facts of the present OA are identical to Vinod Kumar Jain (supra), the OA is allowed. The respondents are directed to make payment of arrears of local servant allowance to the applicant for the period he was posted in the foreign mission under cover in accordance with the amended Rule 134 (2) read with Rule 134 (1) within a period of two months. The applicant shall also be paid interest on delayed payment at the rate applicable to the GPF deposits subject to the outcome of WPC No.10260/2015.

(V.N. Gaur)
Member (A)

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