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IN THE HIGH COURT OF DELHI AT NEW DELHI

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**Judgment reserved on: 28.10.2009
Judgment delivered on: 04.11.2009**

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W.P. (C) No.343/2008

Union of India & Anr.....

..... Petitioners

Through: Dr. A. K. Bhardwaj, Advocate.

versus

Shri R.S.Sahdev & Anr

.....Respondents

Through: Mr. Arvind Kumar Shukla,
Advocate.

CORAM:

**HON'BLE MR. JUSTICE ANIL KUMAR
HON'BLE MR. JUSTICE VIPIN SANGHI**

1. Whether the Reporters of local papers may be allowed to see the judgment?
2. To be referred to Reporter or not? Yes
3. Whether the judgment should be reported in the Digest? Yes

VIPIN SANGHI, J.

1. The petitioners have filed this writ petition under Article 226 of the Constitution of India to impugn the order dated 12.7.2006 passed by the Central Administrative Tribunal, Principal Bench, New Delhi in O.A. No.2759/2004 and the order dated 8.1.2008 passed by it in C.P.No.285/2007.

2. The aforesaid O.A had been filed by Shri R.S. Sahdev and Shri S.P. Saxena who are arrayed as respondents 1 and 2 respectively in this writ petition. While in respect of respondent no.1, Shri R.S.

Sahdev, the petitioners have implemented the decision of the Tribunal and, therefore, no grievance in relation to respondent No.1's claim survives, in respect of respondent no.2, Shri S.P. Saxena the petitioners are aggrieved, inasmuch as, the Tribunal sought to initiate contempt proceedings against the petitioners despite the petitioners having passed the orders dated 14.11.2007 and 22.11.2007 in purported compliance of the order passed by the Tribunal in O.A. No.2759/2004 dated 12.07.2006. We are, therefore, detailing some of the relevant facts in relation to the case of Shri S.P. Saxena, respondent no.2 alone.

3. The respondent no.2 was working as Scientist 'C' with the petitioner no.2. On 28.4.1988 a memorandum of charge-sheet for imposing major penalty was issued to him. Two articles of charge were framed against the said respondent which read as follows: -

" ARTICLE-I

"That the said Shri S.P. Saxena while posted and functioning as Scientist 'C' in Defense Electronics Application Laboratory (DEAL), Dehradun during the years 1983-86, failed to maintain absolute integrity and engaged himself in trade or business without previous sanction of the Department in as much as he carried on the business in the names of the firms M/s. Blue Bird Electronics, 110 Tagore Villa, Dehradun and M/s. Doon Processors, 110 Tagore Villa, Dehradun in which the father-in-law and mother of Shri S.P. Saxena were the partners and which firm, dealt with Defense Electronics Application Laboratory, Dehradun in various supplies. Thereby he contravened the provisions of Rule

3(1)(i) and Rule 15 of CCS (Conduct) Rules, 1964.(emphasis supplied).

ARTICLE-II

That the said **Shri S.P. Saxena, Scientist `C' Defense Electronics Application Laboratory (DEAL), during the year 1986** failed to maintain absolute integrity and committed mis-conduct in as much as he **was found in possession of a secret document belonging to IRDE, Dehradun which as recovered from his house at Dehradun on 10.09.1986 and which contained secret informations belonging to the Defense Establishment of contry.** By this action of his, the contravened the provisions of Rule 3(1)(i) of CCS (Conduct) Rules, 1964. (emphasis supplied)."

4. A departmental enquiry followed which exonerated the said respondent from the second charge. However, the first article of charge was held to be partly proved to the extent of indirect involvement in trade and business, in view of certain financial transactions taken note of in the enquiry report. The disciplinary authority to whom the report was submitted did not agree with the findings of the enquiry officer. He was of the opinion that both the articles of charge stood proved against respondent No.2. He, therefore, imposed the penalty of removal from service against respondent No.2. The said respondent challenged the order of his removal from service by filing an original application before the Tribunal. The same was dismissed by the Tribunal by order dated 18.12.1987. The respondent then preferred C.W.P. No.1213/99 before

this Court which was disposed of on 20.07.2000 along with C.W.P. No.1393/1999 preferred by respondent No.1 herein. The operative part of the said judgment reads as follows:-

“For the foregoing reasons, we allow the writ petitions and issue a writ of certiorari quashing the impugned order of removal dated 18th August, 1992. The petitioners shall be reinstated. Keeping in view the judgment of the Supreme Court in U.P.(Madhya) Ganna Beejevam Vikas Nigam Ltd. and others v. Prem Chandra Gupta and others, 1999 SCC (L&S) 623, we consider it appropriate to direct that **after reinstatement of the petitioners, the respondent shall have the liberty to proceed with the enquiry, if they so consider it appropriate and in that event, they may even place the petitioners under suspension if found necessary by them and continue the enquiry from the stage of furnishing the petitioners with copies of the tentative reasons for disagreement recorded by the disciplinary authority.** We make an Order accordingly. **In sofar as the grant of consequential benefit of back-wages if concerned, that will be decided, in case an enquiry is held, at the conclusion of that enquiry.** The enquiry, if any, shall be concluded within six months from the date of direction by the respondent to hold such an enquiry after the reinstatement of the petitioners. In that event, the petitioners shall co-operate in the enquiry proceedings and not cause any hindrance in its completion. Both the writ petitions are disposed off accordingly. No costs. (emphasis supplied).”

5. Respondent no.2 gave his joining report on 14.8.2000. On 16.8.2000, respondent no.2 gave notice to seek voluntary retirement under FR 56(K)(1). The petitioners vide their communication dated

25.8.2000 took the stand that till such time as respondent no.2 is not reinstated in service through an executive order of the disciplinary authority in implementation of the High Court order, the right to seek voluntary retirement was not available to him.

6. Respondent No.2 preferred O.A. No.2105/2001 seeking a declaration that he stood voluntarily retired from service in terms of his notice dated 16.08.2000 under FR 56K(1) with the expiry of the notice period on 15.11.2000. This Original Application of respondent No.2 was allowed by the Tribunal on 10.09.2002. It was held that the notice dated 16.08.2000 took effect immediately on expiry of the notice period w.e.f. 15.11.2000.

7. We may note that the petitioners at one stage decided to continue the departmental proceedings against the respondent No.2. However, after the passing of the order dated 10.09.2002 in O.A. No.2105/2001 vide order dated 11.12.2003 the petitioners cancelled the disciplinary proceedings against the respondent No.2 and also his suspension from 18.08.1992 onwards.

8. The petitioners issued a show cause notice to respondent No.2 to show cause as to why the period between 21.08.1992 to 28.07.2000 should not be treated as not spent on duty and the period from 29.07.2000 to 13.08.2000 as absent without pay. After considering the reply of respondent No.2, vide order dated 25.02.2005 the petitioners decided to treat the intervening period between 21.08.1992 to

15.11.2000 as falling under FR 54A of Fundamental Rules Part 1 in the following manner:

“(a) **For the period from 21-8-1992 (the date of your removal from service) to 28-7-2000 (the date of Hon’ble Delhi High Court order quashing your removal order):** To pay you half pay leave salary and Dearness Allowance on such half pay apart from compensatory allowances admissible from time to time on the last pay drawn by you on 20-8-1992 that is before your removal from service **after adjusting any amount which you would have earned through alternate employment during this period** thus satisfying the provisions of Rule 54-A(2)(i) read with FR 54(7), FR 53 and FR 54-A(5).

(b) To treat the intervening period between 21-8-1992 to 28-7-2000 as **NOT ON DUTY** for any purpose in satisfaction of FR 54-A(2)(ii) read with FR 54(5).

(c) To treat the period between 29-7-2000 to 13-8-2000 as absent without pay and allowances as you gave joining report in the laboratory on 14-8-2000 and not immediately after the Hon’ble Delhi High Court had quashed your removal order on technical grounds on 28-7-2000. In this regard it may added that as per your own assertion you had declared yourself automatically reinstated into service as soon as the Hon’ble Delhi High Court had quashed your removal order on 28-7-2000 and your this assertion was upheld by the Hon’ble CAT also vide their order dated 10-9-2002 in OA No.2015/2001. Thus the public money cannot be paid to you during this period as you did not do any work for the Govt in any form during this period.

(d) To pay you full pay and allowances from 14-8-2000 (the date you reported for duty in the laboratory) to 15-11-2000 (the date when the three months notice period for VR under 56 (k)(1) given by you expired) as due and admissible.”

9. Respondent No.2 once again preferred an Original Application before the Tribunal to impugn, inter alia, the order dated 25.02.2005 by filing O.A. No.2759/2004, which, as aforesaid, was disposed off by the Tribunal on 12.07.2006. The Tribunal set aside the order dated 25.02.2005. It, inter alia, further held *“Subject to submission of “unemployment certificate” by the applicants, the respondents shall re-examine the entire issue of treatment of intervening period strictly in accordance with the observations made above and also as per FR 54 and pass a reasoned and speaking order in this regard within a period of three months from the date of receipt of a copy of this order.”*

10. On 03.11.2006 the respondent No.2 submitted his no employment certificate wherein he stated that between the period 21.08.1992 to 31.03.1996 had *“no income (unemployed)”*. For the period beginning 01.04.1996 to 16.11.2000 respondent No.2 gave a statement on financial year-wise income showing himself to be *“self-employed”*.

11. On 14.11.2007 the petitioners passed an order with regard to the treatment of the period from 28.08.1992 to 16.11.2000 in the light of *“no employment certificate submitted by respondent No.2 and other relevant documents”*. The petitioners decided to treat the period between 21.08.1992 to 16.11.2000 as spent on duty. However, as regards the payment of arrears for the said period, the competent authority decided to keep the action pending till the finalization of the

CBI case registered against respondent No.2. The reason for this decision was that the CBI was prosecuting respondent No.2 in relation to certain alleged wrong doings in respect of Anjuman Co-operative Group Housing Society Ltd.

12. Admittedly, a document titled "Application for Membership" addressed to the Secretary of the Anjuman Co-operative Group Housing Society Limited, Delhi in the handwriting of the respondent No.2 and bearing his signature forms the subject matter of trial in the case lodged by the CBI, wherein against entry at serial No.7 "Monthly Income", respondent No.2 stated "*1 Lakh per month from allowances*". The stand of respondent No.2 is that though the said application for membership was submitted by him, the date that the same bears i.e. 09.02.1995 has been manipulated. He submits that the said application form was, in fact, submitted in the year 2001. He further submits that the age of his son Amit Saxena, whose name is mentioned as his nominee, was not 12 years as on 09.02.1995.

13. Respondent No.2 filed the contempt petition being C.P. No.285/2007 in O.A. No.2759/2004 apparently some time in June, 2007. Obviously when this contempt petition was filed the order dated 14.11.2007 had not been passed. During the pendency of the contempt petition, it appears, the Tribunal on 19.11.2007 required the petitioners to calculate the amount payable to respondent No.2 for the intervening period between 28.08.1992 to 16.11.2000. Vide communication dated 22.11.2007 the petitioners computed the said

amount at Rs.14,75,268/-, subject to pre audit by DCDA. It was also stated that:

“2. While calculating the arrears for intervening period, a copy of income voluntarily declared by you submitted to Secretary Anjuman Coop Group Housing Society forwarded to us by CBI has been taken into account. As per that disclosure, you have shown your income as Rs.1 lakh per month. Taking this into account, your income works out to more than Rs.65 lakh.

3. As per FR 54-A(5): “any payment made under this rule to a Govt servant on his reinstatement shall be subject to adjustment of the amount, if any, earned by him through an employment during the period between the date of dismissal, removal or compulsory retirement and the date of re-instatement. Where the emoluments admissible under this rule are equal or less than those earned during the employment elsewhere nothing shall be paid to the Govt servant.” As emoluments earned by you work out to be more than the emoluments admissible for the intervening period, no amount is payable to you.”

14. On 08.01.2008, the Tribunal passed the impugned order in C.P. No.285/2007 rejecting the submission of the petitioners that there had been sufficient compliance of the directions of the Tribunal issued in O.A. No.2759/2004. It was held that, prima facie, the petitioners were trying to circumvent the order of the Tribunal. Consequently, the Tribunal directed the petitioners to remain present on 15.01.2008 for framing of charges against them. At that stage, the petitioners preferred this writ petition, which came up before Court on 14.01.2008. While issuing notice in the writ petition and in the application for stay

being C.M. No.667/2008, this Court stayed the operation of the impugned order dated 08.01.2008 passed in C.P. No.285/2007. The said interim order was confirmed by the Court till the disposal of the writ petition vide order dated 22.07.2008. The said interim order was confirmed by the Court till the disposal of the writ petition vide order dated 22.07.2008.

15. The submission of Dr. Bhardwaj, learned counsel for the petitioner is two fold. He firstly submits that the decision conveyed by the petitioners on 14.11.2007 and again on 22.11.2007 to await the decision of the trial court in the case filed by the CBI was completely justified and in accordance with FAR 54-A(5). He submits that the period in question had been treated as spent on duty. However that, by itself, would not entitle respondent no.2 to payment of back wages. Respondent no.2 should not have derived any income from any employment, which would include self employment, during the said period to become entitled to payment of back wages. He submits that the Tribunal itself had directed in its order dated 12.7.2006 that respondent no.2 shall submit his non-employment certificate whereafter the petitioners were required to take their decision and pass an order in terms of FAR 54. He submits that the non-employment certificate submitted by respondent no.2 is not reliable. Respondent no.2, admittedly, had submitted the application for membership to the Anjuman Co-operative Group Housing Society Ltd wherein, admittedly, he had disclosed his monthly income of Rs. One

lakh from allowances. Since it is the respondent no.2 who is seeking to question the date inscribed on this document which is 09.02.1995 as disclosed in the document itself, and as it is respondent no.2 who claims to have submitted this application for membership in the year 2001, it is for respondent no.2 to establish the said position. Prima facie, the stand of respondent no.2 cannot be believed. He further submits that merely because the age of the son of respondent no.2 has been shown as twelve years in the said application form it does not lead to the conclusion that the form had been filled up in the year 2001 and not in 1995. Dr. Bhardwaj further submits that since it is the statement of respondent no.2 himself that he was having a monthly income of Rs. One lakh in 1995, on the application of FAR 54-A(5) he would not be entitled to any further payment for the period in question as the income derived by him through self employment far exceeds the income that he would have derived if he had worked with the petitioners for the said period. He submits that, in any event, as respondent no.2 is disputing the correctness of the date on his application for membership with Anjuman Co-operative Group Housing Society Ltd., the petitioners had not closed this chapter and have taken a reasonable stand that this issue be kept pending in the finalization of the CBI case registered against the said respondent.

16. Dr. Bhardwaj further submits that, in any event, there was no occasion for the Tribunal to have initiated contempt proceedings or pass the order dated 8.1.2008. He submits that the order passed by

the Tribunal in O.A. No.2759/2004 on 12.7.2006 had been complied with by the petitioners by passing the orders dated 14.11.2007 and 22.11.2007. The said reasoned orders had been passed by taking into consideration all the relevant facts and circumstances. In case respondent no.2. was still aggrieved by the said orders, these orders gave the said respondent a fresh cause of action and it was upto respondent no.2 to initiate separate proceedings in respect of these orders. He submits that respondent no.2 could not have taken recourse to contempt jurisdiction of the Tribunal and that the Tribunal could not have proceeded on the contempt petition, particularly after the issuance of the two orders dated 14.11.2007 and 22.11.2007 in compliance of the order dated 12.7.2006 passed in O.A.No.2759/2004. In support of his aforesaid submission, Dr. Bhardwaj has relied on ***J.S.Parihar V. Ganpat Duggar & Ors.***, (1996) 6 SCC 291.

17. On the other hand, learned counsel for respondent no.2 submits that merely because a CBI case was pending against respondent no.2 wherein the application for membership of the said respondent is being looked into by the trial court, is no ground existed to conclude that the income of the respondent at the relevant time was Rs. One lakh per month. He submits that the income tax returns of the said respondent were also available with the petitioners. A perusal of the said returns would show that the respondent did not have the income as alleged by the petitioners. He submits that the CBI case would take a long time to conclude and the respondent cannot be denied the arrears of salary

only on account of pendency of the said case. He further submits that the employment contemplated under FAR 54-A(5) does not include “self employment” and it necessarily has to be employment with any other person or authority wherein the employee serves as a servant. He submits that since the respondent was self employed, the income derived by him, in any event, would not be liable to be adjusted or deducted by application of FAR 54-A(5).

18. Having heard learned counsel for the parties we are of the view that after the passing of the orders dated 14.11.2007 and 22.11.2007 by the petitioners there was no justification for the Tribunal to proceed with the Contempt Petition No.285/2007 and to pass the order dated 8.1.2008.

19. In our view the expression “employment” used in FAR 54-A is wide enough to cover not only employment as in service of a superior but also “self employment” as in a Consultant or as a professional. According to the shorter Oxford English Dictionary, one of the meanings of the expression “employment” is *“occupation, business; paid work; an activity in which a person is engaged; arch, a special errand or task. A person’s trait, profession or occupation.”*

20. The meaning of the expression “employment” has to be understood in the context in which the said term has been used. The purpose of FAR 54 appears to be to compensate the employee who has been wrongfully dismissed, removed or compulsorily retired from service and who is subsequently reinstated in service. The

compensation contemplated by the Rule is to the extent of the monetary deprivation suffered by the employee. If the employee had not been so dismissed, removed or compulsorily retired from service he would have continued with his employment and would have earned his salary from time to time while rendering his services to the employer. On account of his dismissal, removal or compulsory retirement, the employee stops earning his salary. During this period he is also not obliged to make himself available for service and there is no requirement that he should report for duty. He is, therefore, free to undertake any other gainfull employment so as to earn a living. If during this period he does take up any other employment by investing his time, energy and efforts --whether it be a self employment as in a business, profession or trade, or an employment as in a service with another, the employee derives income which he would not have earned if he had continued with his employment with the employer who had dismissed, removed or compulsorily retired him. Therefore to the extent that he has derived income by employing his time, energy and effort during the period of his dismissal, removal, or compulsory retirement, which otherwise would have been utilized in the service of the employer, the damages to which he would be entitled stand mitigated. We therefore reject the submission of the respondent that "employment" as used in FAR 54 would only be employment as in service under another person or in another organization, and not "self employment".

21. This is also not the manner in which the respondent has understood the meaning of the expression “employment”. This is evident from his own employment certificate dated 3.11.2006 wherein he has disclosed the income earned by him from self employment between the period 1.4.1996 to 16.11.2000. If, as per the respondent’s own understanding, the income earned under self employment is not be taken into account while applying FAR 54-A there was no need for him to give the details of his income derived through self employment.

22. So far as the application for membership made by respondent no.2 to Anjuman Co-operative Group Housing Society Ltd is concerned, we may at the outset state that the authenticity of this document is the subject matter of a criminal trial. We cannot embark on a fact finding enquiry in these proceedings. Therefore, the expression of any opinion by us in respect of the said document can only be prima facie, only for the purpose of testing the reasonableness of the petitioners stand while passing the orders dated 14.11.2007 and 22.11.2007, and our opinion regarding the said membership application form would not affect the rights of any of the parties in the said trial.

23. We may note that admittedly the said application for membership has been submitted by respondent no.2 which has been filled up in his own hand writing and also signed by him. The same apparently bears the date 09.02.1995. It is therefore for respondent no.2 to establish his defence that the form was submitted in 2001 and

not in 1995. It is also for him to establish that his income in 1995 was not Rs. One lakh as disclosed by him in the said application form. As to how and why the age of his son Amit Saxena was filled up as twelve years in the said form is also to be explained by him. It is he who has filled up the form and it is he who was privy to the said information. If respondent no.2 is not able to establish the aforesaid aspects, then on the application of FAR 54(A) he would not be entitled to receive any amount towards arrears of pay for the period in question.

24. Reliance placed by respondent no.2 on his income tax returns for the period in question, in our view, is neither here nor there. As there are more than one statements made by respondent no.2, it is entirely upto the petitioners to accept the statement which is least favourable to respondent no.2. Respondent no.2, who has made varying statements cannot insist that the statement most favourable to him should be accepted. Merely because the return of income filed by respondent no.2 for the relevant period has been accepted by the income tax authorities, it does not mean that his own declaration of his income made elsewhere is false. We cannot lose sight of the fact that the income declared in an income tax return may be suppressed so as to avoid payment of income tax.

25. We are also not impressed by the submission of learned counsel for the respondent that merely because the trial before the trial court in the CBI case would take time, the petitioners should be directed to release the salary to the respondent for the period in question. The

petitioners cannot be compelled at this stage to risk making payment to the respondent of the entire arrears of salary till the issue with regard to the authenticity and correctness of the information contained in the application for membership submitted by respondent no.2 himself is not resolved one way or another. As aforesaid, the ball is in the court of respondent no.2, as, on the fact of it the Application for Membership goes against respondent no.2.

26. In our view the stand taken by the petitioners in their communications dated 14.11.2007 and 22.11.2007 was completely justified. The said stand is well balanced, inasmuch as, the claim of respondent no.2 has not been completely rejected. The same has been made subject to the finding that the trial Court may return in the case filed by the CBI in respect of respondent no.2's application for membership.

27. We also find merit in the second submission of Dr. Bhardwaj that there was no justification for the Tribunal to pass the order dated 8.1.2008 after the petitioners had considered the matter in the light of the directions issued by the Tribunal in OA No.2759/2004 dated 12.7.2006. The two orders passed by the petitioners were in purported compliance of the order dated 12.7.2006. If respondent no.2 was still aggrieved by the issuance of the said orders dated 14.11.2007 and 22.11.2007, these orders gave a fresh cause of action to respondent no.2 which the said respondent could have agitated by preferring a separate Original Application. With the passing of these two orders,

the order of the Tribunal dated 12.7.2006 stood complied with. Pertinently, the limited direction issued by the Tribunal vide order dated 12.07.2006 was that the petitioners shall *“re-examine the entire issue of treatment of intervening period strictly in accordance with the observations made above ad also as per FR 54 and pass a reasoned and speaking order in this regard.....”* There was no direction that the petitioners should pass the order in favour of respondent no.2. Merely because the reasoned order has gone against respondent no.2, it would not amount to non compliance of the order of the Tribunal passed on 12.07.2006. In ***J.S. Parihar*** (supra), the Supreme Court observed as follows:-

“.....It is seen that once there is an order passed by the Government on the basis of the directions issued by the court, there arises a fresh cause of action to seek redressal in an appropriate forum. The preparation of the seniority list may be wrong or may be right or may or may not be in conformity with the directions. But that would be a fresh cause of action for the aggrieved party to avail of the opportunity of judicial review but that cannot be considered to be the willful violation of the order. After exercising the judicial review in contempt proceedings, a fresh direction by the learned Single Judge cannot be given to redraw the seniority list. In other words, the learned Judge was exercising the jurisdiction to consider the matter on merits in the contempt proceedings. It would not be permissible under Section 12 of the Act.....”

28. For the aforesaid reasons, we allow this petition and quash the order dated 12.01.2008 passed by the tribunal in C.P.No.285/2007. We also dismiss C.P.No.285/2007 preferred by respondent no.2 before the

Tribunal as the order dated 12.07.2006 stood complied with by the passing of the reasoned orders dated 14.11.2007 and 22.11.2007 by the petitioners. The parties are left to bear their respective costs.

(VIPIN SANGHI)
JUDGE

(ANIL KUMAR)
JUDGE

November 04, 2009
as/rsk