

*** HIGH COURT OF DELHI: NEW DELHI**

+ Writ Petition (Civil) No.19134-19136 of 2004

Judgment reserved on: July 16, 2009

% Judgment delivered on: July 27, 2009

1. Union of India
Through Secretary
Ministry of Human Resources Development
Department of Education
Shastri Bhawan, New Delhi

2. Government of NCT of Delhi
Through its Chief Secretary
Delhi Sachivalaya
I.P. Estate, New Delhi-110002

3. Director of Education
Government of NCT of Delhi
Old Sectt., New Delhi

...Petitioners

Through Ms. Avnish Ahlawat with
Ms. Latika Chaudhary and
Mr. Pavit Katoch, Advocates

Versus

Shri T.B. Tyagi
S/o late Shri M.B. Tyagi
R/o 1/3549, Tyagi Colony
Raj Nagar Extn., Loni Road
Shahdara, Delhi

...Respondent

Through Mr. P.P. Khurana, Sr. Advocate with
Mr. Amit Anand, Advocate

Coram:

HON'BLE MR. JUSTICE MADAN B. LOKUR
HON'BLE MR. JUSTICE A.K. PATHAK

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

MADAN B. LOKUR, J.

The Respondent (Shri T.B. Tyagi) was working as a Trained Graduate Teacher at the relevant time in the Directorate of Education with the Government of Delhi. He went on a foreign assignment to Nigeria on deputation in terms of a tripartite contract. The period of deputation was for three years with effect from 9th August, 1974.

2. Despite completion of the deputation period, Shri Tyagi did not return to India allegedly because the Government of Nigeria did not relieve him. Shri Tyagi eventually returned to India and rejoined duties on 3rd March, 1987 after spending a little over 13 years in Nigeria.

3. Upon his return, departmental proceedings were initiated

against Shri Tyagi on the allegation that he had unauthorizedly overstayed in Nigeria without the approval of the competent authority. In the departmental proceedings, Shri Tyagi was exonerated of the charges levelled against him.

4. The question of treating the period of overstay in Nigeria came to be considered by the Government of India and on 13th November, 1995 an order was passed to the effect that the period of overstay from 9th August, 1979 to 3rd March, 1987 could not be regularized. There is no dispute that Shri Tyagi was given the benefit of regularization for a period of two years beyond the initial three-year deputation period. The order dated 13th November, 1995 reads as follows:

“No. F.5-78/91-UT-I
Government of India
Ministry of Human Resource Development
Department of Education
(Curzon Road Barracks)

New Delhi, the 13th Nov., 1995.

To

The Director of Education
Govt. of NCT of Delhi
Old Secretariat, Delhi-54.

Sub: - Regularisation of overstayed deputation period in respect of Sh. T.B. Tyagi, PGT (Maths).

Sir,

I am directed to refer to your letter No. F.10/48/Vig./DDE/E/9900 dated 10.5.95 on the subject cited above and to say that the competent Authority has rejected the case of Sh. T.B. Tyagi with the Govt. of Nigeria from 9.8.79 to 3.3.87, beyond the approved period of five years.

2. This issue with the concurrence of Department of Personnel and Training vide their U.O. No. 3/5/92-FAS dated 3.11.95.

Yours faithfully,

(P.K. Mohanty)
Assistant Educational Adviser”

5. Shri Tyagi superannuated on 30th September, 2000 but since his pension and other retirement benefits were not finalized, he represented to his department. Eventually an order was passed on 18th April, 2001 (partially modified on 4th May, 2001) in which the period of overstay by Shri Tyagi in Nigeria from 9th August, 1979 to 3rd March, 1987 was condoned for the purposes of grant of pension and other retirement benefits. However, it was directed that Shri Tyagi would not be entitled to earn increments of pay during this period. The order dated

18th April, 2001 reads as follows:

“GOVERNMENT OF NCT OF DELHI
DIRECTOR OF EDUCATION: DELHI
(ESTABLISHMENT II BRANCH)
OLD SECRETARIAT: DELHI-110054

No. F.47(4) (2) / E/A/98/E.II/4290

Dated: 18.04.2001

ORDER

Sub: Condonation of the period of overstay by Shri T.B. Tyagi, PGT (Maths)

WHEREAS, Shri T.B. Tyagi, PGT (Maths) was sent on deputation to the Government of Nigeria by the Department in 1974 for a period of three years.

2. **AND WHEREAS**, Shri T.B. Tyagi overstayed with the Government of Nigeria from 8.8.1977 to 31.3.1987 without the approval of the Department.

3. **AND WHEREAS**, on his return from the Government of Nigeria, Shri T.B. Tyagi was allowed to join his duties subject to the decision of the department proceedings initiated against him for unauthorized overstay.

4. **AND WHEREAS**, Shri T.B. Tyagi was exonerated by the competent authority of the charges of breach of the terms and conditions of deputation and willful absence from duty.

5. **AND WHEREAS**, on his representation, the Government of India regularized the period of his overstay for two years i.e. from 8.8.1977 to 8.8.1979.

6. **AND WHEREAS**, Shri T.B. Tyagi has retired from service on 30.9.2000 and due to non-condition [condonation?] of the remaining period of his overstay i.e. from 9.8.1979 to 3.8.1987, his pension and other retirement benefits have not been finalized.

7. **AND WHEREAS**, Shri T.B. Tyagi has been continually representing for condonation of his period of overstay with the Government of Nigeria on the following grounds: -

- (a) His over-stay was due to his not being relieved by the Government of Nigeria.
- (b) He was exonerated of the charge of over-stay and willful absence from duty.
- (c) The Government of India have clarified in this letter No. 14/12/82. Vig. III dated 23.9.1982 that any break in service not condoned for other purposes should not and need not influence the appointing authority adversely in deciding the question of condonation of break for counting the past service of the official for the purposes of pension.

8. **NOW, THEREFORE**, having taken into account all the facts and circumstances of the case as well as the letter of the Government of India cited above the undersigned is pleased to condone the period of over-stay of Shri T.B. Tyagi, PGT (Maths) with the Government of Nigeria from 9.8.1979 to 3.8.1987 for purposes of grant of pension and other retirement benefits to him. Shri T.B. Tyagi, however, will not be entitled to earn increments of pay during this period.

(G. SRIVASTAVA)
DIRECTOR OF EDUCATION”

6. Feeling aggrieved, Shri Tyagi filed an original application before the Central Administrative Tribunal, Principal Bench, New Delhi being O.A. No.553/2002 wherein he challenged the order dated 18th April, 2001 denying his entitlement to earn increments of pay. This original application was withdrawn by Shri Tyagi on 5th February, 2003 with liberty to challenge the order dated 13th November, 1995 whereby the period of overstay in Nigeria beyond five years was not regularized by the Government of India.

7. Shri Tyagi thereafter filed another original application before the Tribunal being O.A. No. 830/2003 in which he challenged both the orders dated 13th November, 1995 as well as the order dated 18th April, 2001. This original application came to be decided by the impugned order dated 2nd June, 2004. The case set up by Shri Tyagi was that the period of absence from 9th August, 1979 to 3rd March, 1987 should be regularized and after that is done, he should be allowed to earn increments for that period for pension purposes only.

8. While deciding the original application, the Tribunal concluded that although there was a delay in challenging the order dated

13th November, 1995 on the facts of the case, it should be condoned. On merits, it was held that since Shri Tyagi was exonerated of the charges of overstay and unauthorized absence, that period should be treated as having been spent on duty and he would be entitled to earn increments for the period of his absence. In coming to this conclusion, the Tribunal referred to the case of one Zaheer Ahmed whose period of overstay on deputation in Nigeria was condoned and treated as spent on duty for the purposes of grant of increments in pay. It was also held that the order dated 13th November, 1995 was passed by the Government of India without any application of mind to the facts of the case.

9. Learned counsel for the Petitioner submitted before us that there was no good reason for condoning the delay in challenging the order dated 13th November, 1995. For this, reliance was placed upon *C. Jacob v. Director of Geology and Mining & Anr., 2008 (10) SCC 115*. We are unable to appreciate how this decision is of any relevance. In *Jacob*, the issue really was of what appeared to be an innocuous direction issued by the Administrative Tribunal to consider a representation made by the appellant therein and pass an order on that representation. In that context, the Supreme Court concluded that since

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the claim made by the appellant was stale, a supposedly innocuous direction to consider a representation, and thereafter its rejection, was interpreted to mean that a fresh cause of action had arisen in favour of the appellant. The Supreme Court observed in this context:

“If the representation on the face of it is stale, or does not contain particulars to show that it is regarding a live claim, courts should desist from directing “consideration” of such claims.”

10. What is interdicted by the Supreme Court is the giving of a fresh lease of life to a stale claim by the passing of an innocuous order to “consider” such a claim. As far as the present case is concerned, the facts are completely different. It is nobody’s case that a dead claim was sought to be revived through a collateral process, as it were. Nor is it anybody’s case that Shri Tyagi had slept over his rights. In fact, soon after the order dated 18th April, 2001 was passed, he filed O.A. No.553/2002. It appears that during the course of submissions made by him before the Tribunal, it became necessary to challenge the order dated 13th November, 1995. It was under these circumstances that Shri Tyagi withdrew O.A. No.553/2002 and liberty was granted by the Tribunal to take appropriate steps to redress his grievance in accordance

with law. Because of this liberty granted to him, Shri Tyagi renewed his challenge to the order dated 18th April, 2001 and also challenged the order dated 13th November, 1995 by filing a fresh original application out of which the present writ petition has arisen.

11. We find from a consideration of the impugned order of the Tribunal passed on 2nd June, 2004 that the question whether the claim was stale or barred by time was gone into by the Tribunal on merits. It is after considering all aspects of the case that the delay in filing the original application was condoned. We do not think it appropriate to interfere on merits with the view expressed by the Tribunal that the case was fit for condoning the delay in approaching it for relief. The Tribunal relied upon *State of Bihar v. Kameshwar Prasad Singh, (2000) 9 SCC 94* to condone the delay in challenging the order dated 13th November, 1995. In our opinion, the Tribunal correctly exercised its discretion in this regard.

12. On the second issue whether Shri Tyagi is entitled to increments of pay during the period of his absence, it may be noted at the outset that the Tribunal has directed only grant of notional

increments. There is no direction issued by the Tribunal to the effect that necessary payment should be made to Shri Tyagi of the increments earned by him for the period from 1979 to 1987. Notional increments have been granted only for the purposes of pension benefits.

13. Learned counsel for the Petitioner referred to ***Lajpat Rai Mehta v. Secretary to the Government of Punjab, (2009) 3 SCC 260*** to contend that even notional increments could not be granted to Shri Tyagi. Again, we do not find anything of relevance in the decision cited by learned counsel. In ***Lajpat Rai Mehta***, there was no dispute about the fact that the appellant was unauthorizedly absent from 30th April, 1981 to 30th September, 1994. The Supreme Court noted that remaining on unauthorized leave for such a long period is a misconduct, but despite this, for some reason the State had omitted to take any disciplinary action against the appellant. In these circumstances, the Supreme Court concluded that his pension benefits should be calculated on the basis of the last pay drawn by him in 1981.

14. The facts of the case that we are dealing with are somewhat different in as much as there is no allegation that Shri Tyagi was

unauthorizedly absent. In fact, a departmental enquiry was conducted against him for unauthorized absence in which he was exonerated. As such, ***Lajpat Rai Mehta*** is inapplicable to the fact situation that we are concerned with.

15. On a reading of the impugned order, we find that the Government of India order dated 13th November, 1995 was set aside, inter alia, because a similarly placed person, Zaheer Ahmed who had also overstayed his deputation in Nigeria was granted increments of pay. It was observed that since Zaheer Ahmed and Shri Tyagi were identically situate, they must be treated in the same manner and since Zaheer Ahmed had been granted his increments, Shri Tyagi should also be granted his increments of pay. The Tribunal noted that the Petitioner had been unable to distinguish the case of Shri Tyagi from that of Zaheer Ahmed. Even before us, learned counsel for the Petitioner made no attempt to distinguish the case of Zaheer Ahmed. If, on similar facts, Zaheer Ahmed has been given the benefit of earning increments during the period of his absence, we see no reason for denying that benefit to Shri Tyagi who is (indisputably) similarly placed.

16. The Tribunal has also noted that the order dated 13th November, 1995 was passed without taking into consideration the exoneration of Shri Tyagi from the charges levelled against him. This appears to be so because there is nothing to indicate on the face of the order that the Government of India took Shri Tyagi's exoneration into account while passing the order. Nothing has been shown to us by learned counsel for the Petitioner to indicate otherwise. Consequently, if Shri Tyagi was found not to have been unauthorizedly absent, it must follow that the period of his absence should not attract any adverse consequence and the period of his absence must be counted as service rendered for all practical purposes. To the extent that the order dated 13th November, 1995 adversely affects Shri Tyagi, it is bad in law.

17. The Tribunal referred to the decision of the Patna High Court in *Dr. Cosmos John v. State of Bihar, 2003 (3) ATJ 669* to conclude that since the absence of Shri Tyagi was not attributable to him but to the decision of the Government of Nigeria not to relieve him, he should be given the benefit of increments for the period of his absence. We are of the view that the case of *Cosmos John* was much worse than that of Shri Tyagi. In that case, the petitioner had secured a job in Zambia on

his own and the State Government had no role to play in the matter. As such, it was not a case of deputation or transfer of services. Despite this, the petitioner was granted leave so that his absence may not be unauthorized. As far as the case that we are dealing with is concerned, not only was Shri Tyagi on deputation but the period of his absence had already been held to be not unauthorized.

18. Under these circumstances, the question is how should the period of absence be treated? Clearly, the period of absence is not unauthorized (as held in the departmental inquiry). Therefore, the absence must be treated as authorized or at least tacitly authorized. If that is so, the next question would be whether this period should be counted for the purposes of grant of increments or not.

19. In our opinion, there is nothing to suggest why the period of absence should be treated as not regularized. No rule or office memorandum has been shown to us in this regard, and the order dated 13th November, 1995 does not give any reason why the period cannot be regularized. On the other hand, since the period of absence has been treated as not unauthorized, it must be deemed to be authorized, or at

least tacitly authorized for all practical purposes. Consequently, the order dated 13th November, 1995 not regularizing the period of absence must be held as having been issued without any reason and without any application of mind to the full facts of the case. Therefore, it must be struck down, as has been rightly done by the Tribunal. The subsequent order dated 18th April, 2001 is admittedly based on the order dated 13th November, 1995 and once the earlier order is set aside, the subsequent order must also be set aside. It is ordered accordingly.

20. On the question of relief to be granted to Shri Tyagi, his case all along has been that he does not want any payment in respect of the increments due to him for the period of his absence. His only desire is that the period be counted for the purposes of calculating his pension. This request is eminently reasonable, particularly since there is no adverse comment about the work and conduct of Shri Tyagi. The Tribunal has granted the limited relief prayed for by Shri Tyagi. We see no reason to take a different view on the facts of the case.

21. Accordingly, we uphold the decision of the Tribunal and

dismiss the writ petition. No costs.

MADAN B. LOKUR, J

July 27, 2009

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A.K. PATHAK, J

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