

Reserved on : January, 27, 2009
Pronounced on : March 13, 2009

through : Mr. K.K. Rai, Sr. Advocate with
Mr. Gaurang Kanth and
Mr. Rahul Kumar, Advocates

through : Mr. S. Bhardwaj with
Mr. Praveen Chaudhary,
Advocates for respondent No.1.

dated 20.7.2005 was addressed by the CAG to the Accountant General (Audit), Sikkim informing that posting of the respondent No.1 in the said office at London had been approved as the incumbent therein was completing his term on 24.11.2005. In this letter, there was a specific stipulation that this posting was for a period of three years and willingness of the respondent No.1 to serve for that term was sought. The respondent No.1 was given the aforesaid offer and in response he gave the following undertaking dated 26.7.2005 :-

“ UNDERTAKING

With reference to HQ letter no. 3658/GE-I/144/2005, dt. 20.07.2005, I hereby certify that I am willing to work in the HQ office, after return from overseas posting, for three years.”

2. Thereupon letter dated 12.8.2005 was issued by the CAG stipulating the terms of his posting to London office. In paras 3 & 4 thereof it was mentioned that he would be liable to serve in CAG for a period of three years after completion of his posting abroad and in case *“he does not return after completion of approved tenure, by reasons of resignation or otherwise, he will refund to the Government of India the expenditure incurred on payment of*” His initial posting was for a period of two years, extendable by another one year. This extension was given. The tenure of the respondent No.1 at London office began on 25.11.2005 and three years period expired on 24.11.2008.

3. Few months before this tenure was to come to an end, the respondent No.1 moved the application dated 9.8.2008 whereby he

requested for ex-India leave for 272 days, i.e. from 3.12.2008 to 31.8.2009. Ground given was that his son was admitted in a school in London and was studying in '*O-Level of GCSE*', i.e. 11th Standard in the current academic year 2008-09. This was equivalent to Class-X of CBSE standard of India. This academic year is to be completed by the end of August 2009. He submitted in this application that any movement at this stage to India would seriously hamper the studies of his son and he would be compelled to get him enrolled in India in Class-IX and, thus, in the process he would be losing two years of his career. He also pointed out that there is difference of teaching syllabus in UK and Indian system of school education and change at this crucial stage would be detrimental to his interest. He assured the CAG that during his stay at London, on the sanction of ex-India leave, he would support himself and his family out of his personal savings.

4. The competent authority, after considering the aforesaid application, agreed to sanction the leave only for a period of one month, i.e. from 3.12.2008 to 3.1.2009, and sent communication dated 6.10.2008 conveying this approval to the High Commission of India at London. Obviously, the respondent No.1 was not satisfied with sanction of only one month leave. He, therefore, challenged the communication dated 6.10.2008 by filing OA before the Central Administrative Tribunal. The Tribunal has allowed the request of the respondent No.1 vide its judgment dated 19.12.2008 directing the

CAG to grant sanction of ex-India leave to the respondent as applied by him. Assailing that order, present writ petition is filed by the CAG.

5. In this petition, Union of India is impleaded as respondent No.2 and High Commission of India at London as respondent No.3. They are proforma parties and have been impleaded because of the reason that respondent No.1, in his OA, had impleaded them as parties.
6. Perusal of the judgment of the Tribunal would reveal that the Tribunal had considered the applicability of CCS (Leave) Rules, 1972 and IFS (PLCA) Rules, 1961, on which the CAG placed reliance and argued that leave was not a matter of right and it was for the competent authority to sanction or reject the leave. As per these Rules, only one month's leave could be granted. The Tribunal, however, held that these Rules were not relevant for the purpose of addressing the controversy which had arisen in the case. The Tribunal opined that IFS (PLCA) Rules, 1961 were applicable to those who were either appointed to the Indian Foreign Service or All India Service or Central Civil Service Group-A and permanently seconded to the Indian Foreign Service and the respondent No.1 was not covered by any of these categories. The Tribunal also examined MEA Circular No. Q/GA/791/11/86 (EAI 94/1/42) dated 22.8.1994 as per which upto maximum of one month per annum ex-India leave can be granted. According to the Tribunal, this circular was not applicable in the case of the respondent No.1 as it related to those

officials serving in missions/posts abroad, whereas the respondent No.1 was proceeding on transfer to Delhi after completion of his period of tenure. The Tribunal also referred to Rule 7(2) of the CCS (Leave) Rules, on the basis of which contention was raised by the CAG that leave could not be claimed as of right. The Tribunal noted that as per that provision, leave applied could be refused “when the exigencies of public service so require” and observed that in the present case, the CAG could not show as to what are the exigencies of service because of which the leave could not be granted to the respondent No.1.

7. It would be pertinent to mention at this stage that one of the submissions of the respondent No.1 was that under similar circumstances leave had been sanctioned to one Mr. A.H. Rao. CAG had contended that in his case leave was sanctioned under different circumstances and that could not be quoted as a precedent to be followed while dealing with the case of the respondent No.1 herein. The Tribunal quoted para 8 of the preliminary objections raised by the CAG in its counter affidavit in this behalf wherein it was not explained as to how said case was different. The Tribunal noted that in the case of Mr. Rao, leave was sanctioned on the ground of education of his daughter who was in the similar situation as the elder son of the respondent No.1 herein. On this basis, the Tribunal concluded that non-grant of ex-India leave to the respondent No.1 would be discriminatory and directed the CAG to sanction ex-India

leave to the respondent No.1, as applied by him, on the same lines as was sanctioned to Mr. A.H. Rao.

8. Submission of the learned counsel for the parties remained the same before us as well. Apart from stating that leave was not a matter of right, Mr. Rai, learned senior counsel for the CAG/petitioner, placed heavy reliance upon the undertaking given by the respondent No.1, as per which he had agreed to work in the HQ office for a period of three years “after return from the overseas posting”. His submission is that the respondent No.1’s tenure was initially for a period of two years, extendable for a period of one year, which was not to be extended further. Therefore, he knew fully well that such a tenure, which commenced on 25.11.2005 would positively come to an end on 24.11.2008 and, therefore, it was the outlook of the respondent No.1 to make proper arrangements with regard to studies of his children as he was made aware well in advance that he would have to return to India on the completion of the said tenure in November/December 2008 and could seek leave, by one month at the most.

Learned counsel also submitted that the observations of the Tribunal that no exigencies for refusing the leave were shown by the CAG was not correct as the same was specifically pleaded and argued before the Tribunal. He referred to the reply filed by the CAG before the Tribunal and submitted that CAG was having limited number of Assistant Audit Officers (AAOs) and, therefore, could not

afford to give such a long leave to their AAOs as the same would adversely affect the smooth functioning of the work of the CAG. The learned counsel also reiterated that the case of Mr. A.H. Rao was different in the sense that at the time when he was given ex-India leave there was no exigency since Mr. A.H. Rao was working as a PA to the Principal Director of Audit in London and was doing only administrative jobs. On the other hand, the respondent No.1 is an AAO doing specialized audit job which is also the primary function of the CAG. Moreover, substitute for the respondent No.1 had already reached and joined the London office and the post of the respondent No.1 has been lying vacant in the office of the CAG at Delhi. The circumstances existing in the case of Mr. Rao's daughter, who was studying in Class-IX in the academic year 2004-05 are also explained in the writ petition to which emphasis was laid by Mr. Rai. The submission in this behalf is in the following manner :-

“It is submitted that the leave sanctioned to Mr. Rao is under special circumstances. Mr. Rao's daughter was studying in Class X in the academic year 2004-05. She was to appear in Class X examination of CBSE in London through the 'Patrachar Vidyalaya' under the Govt of NCT of Delhi. Suddenly, from the academic session 2004-05, the Patrachar Vidyalaya was discontinued by the Govt and was replaced by 'Open School Exam', where the students can register only for Class IX. Shri Rao represented to the Govt. of Delhi. His case was also taken up by the High Commission of India, London wherein the High Commission wrote to the Principal Secretary (Education), Govt. of NCT of Delhi that the High Commission was conducting CBSE Exams for Class X & XII through Patrachar Vidyalaya and that discontinuance would cause hardship as about 15-20 students appear in the said exam every year. However, the Patrachar Vidyalaya refused the said request. It is in these circumstances the request of Shri Rao for ex-India leave was accepted by the Competent Authority. The case of the Respondent No.1 is completely different from Mr. Rao's case. Mr. Rao was not aware of the sudden and unanticipated change of the circumstances as mentioned above.”

9. Per contra, submission of the learned counsel for the respondent No.1 was that case of Mr. Rao, who was sanctioned ex-India leave, was no different as it was done under the identical circumstances. In this behalf, he drew our attention to the leave application dated 2.6.2005 made by Mr. Rao, wherein the only reason given was: *“My second daughter is in her crucial year of education – the ‘O’ level equivalent of 10th Standard in India and a movement now would seriously hamper her prospects”*. He, thus, submitted that identical reason was given by Mr. Rao and there was nothing on record to show that the reason for grant of ex-India leave was discontinuance of CBSE exams in Class X and XII by the High Commission through Patrachar Vidyalaya.
10. We may mention at the outset that the respondent No.1 has not asked for extension of his tenure in London. Undertaking given by him before he proceeded for his posting in London was that he would be willing to work in the HQ office for three years. He has not asked for waiver of his undertaking. His request is for grant of ex-India leave, which would mean that the undertaking remains intact as, if leave is granted, after the expiry of the leave, he is to return to India and serve with the CAG at his headquarters for three years as per his undertaking.
11. The issue before us is altogether different, namely, whether refusal of the petitioner to grant ex-India leave to respondent No.1 was

justified and, thus, whether the direction of the Tribunal that respondent No.1 be granted ex-India leave is proper or not.

12. Legal position, insofar as grant of leave is concerned, cannot be disputed. No doubt, it is well-settled principle of law that leave is not a matter of right. That is the provision contained in Rule 7(1) of the CCS (Leave) Rules, 1972, which rules are admittedly applicable to the respondent No.1. In *S. Partap Singh v. State of Punjab*, AIR 1964 SC 72, the Supreme Court has observed as under on this aspect :-

“4. Rule 8.15 of the 1959 rules reads :-

“Leave cannot be claimed as of right. When the exigencies of the public services so require, discretion to refuse or revoke leave of any description is reserved to the authority empowered to grant it.”

It follows therefore that the authority granting leave has the discretion to revoke it. There is no restriction on the power of revocation with respect to the time when it is to be exercised. It can be exercised before the officer to whom leave was granted proceeds on leave. It can also be revoked after he has proceeded on leave. Revocation of leave simply means cancelling the leave granted. The exigency necessitating the revocation of leave may arise after the officer has proceeded on leave. Rule 8.3 has no bearing on the question as it provides that the rules following it govern the procedure for making application for leave and for granting leave in India. It deals with the procedure and not with the right of the officer to leave or with the power of the necessary authority to sanction or refuse leave or revoke leave. Rule 8.42 deals with matters incidental to the recall from leave and in no way affects the discretion of the authority to revoke leave. In fact, recall to duty must follow the revocation of the leave with respect to the period not availed of till then.”

13. Likewise, this Court in the case of *Shakuntla Navani v. Director/Chairman, IIT*, ILR (2003) II Delhi 580, while deciding the issue as to whether the unauthorized absence from service amounts to misconduct, observed that while granting or refusing the leave, the

employer is to consider the exigency of service. It is clear from the following passage in the said judgment :-

“Merely because a person has leave to his credit does not mean that leave can be availed of at the sole discretion of the employee and when he choses to get on leave. Ordinarily leave would not be denied as per wishes of the employee but exigencies of work may require the presence of the employee. Besides, during the leave period, working being performed by the employee has to be entrusted to someone else. This is the reason why leave requires prior sanction. The employer has to reorganize work or make alternative arrangement. Availing of leave without prior sanction or atleast prior intimation is indeed misconduct.”

Thus, leave is not a matter of right and can be refused if the exigency of service so demands.

14. In the present case, the Tribunal observed that the petitioner herein, namely, CAG, could not point out any circumstances warranting exigencies, namely, requirement of the respondent No.1 in Delhi. However, the petitioner/CAG has specifically pleaded that leave was refused keeping in view the exigency of service, namely, shortage of AAOs. Ground (c) and (d) of the writ petition may be noted in this behalf :-

“C. Because the Ld. Tribunal erred in observed that *‘the Respondent’s have not shown as to what are the exigencies of service because of which the leave should not be granted to the Applicant.’* It is most respectfully submitted that the same was specifically pleaded and argued before the Ld. Tribunal. The Petitioners is having limited number of Assistant Audit Officers (AAOs) and hence the Petitioners cannot afford to give such long leave to their AAOs as the same will adversely affect the smooth functioning of the work of the Petitioner No.1 office.

D. Because in the case of Mr. A.K. Rao there was no exigencies since Mr. A.H. Rao was working as PA to the Principal Director of Audit in London. Mr. Rao was doing only administrative jobs. However, the Respondent No.1 is Assistant Audit Officer, doing specialized audit jobs, which is

also one of the primary functions of Petitioner. Petitioners are having limited number of AAOs. The substitute for the Respondent No.1 had already reached and joined the London office. The Respondent's post is lying vacant in the Petitioner No.1 office at Delhi. Because of the exigencies of the work, it was decided by the competent authority of the Petitioners, that the ex-India leave of 272 days cannot be afforded and granted to Respondent No.1. The same will disturb the work and timeline of the Petitioner No.1's office. Hence the impugned order of the Ld. Tribunal deserves to be set aside."

15. We also find that the explanation given by the CAG sanctioning the study leave to Mr. A.H. Rao and contention of the petitioner that the said case is not at par with that of the respondent No.1, is justified. In this behalf, specific plea raised in reply to OA, which is repeated in this writ petition as well, is that the Indian High Commission in London had discontinued conducting of CBSE exams for Class X and XII through Patrachar Vidyalaya and it was felt that this discontinuance would have caused hardship to about 15-20 students who appeared in the said exams every year. Further, Patrachar Vidyalaya refused the request and under these compelling circumstances, Mr. A.H. Rao was to be given ex-India leave. Moreover, Mr. Rao was working as PA to the Principal Director of Audit in London and his absence for the period during which study leave was granted to him would not have caused much problem. On the other hand, as per the petitioners, there is a dire need of AAOs, to which category the respondent No.1 belongs.
16. It is for the employer to judge the exigencies and consider on that basis as to whether leave is to be granted to a particular employee or not. It is not the case of the respondent No.1 that decision of the

CAG was actuated with any *mala fides* or was otherwise tainted. The competent authority had taken into consideration provisions contained in IFS (PLCA) Rules, 1961 on the basis of which one month leave was granted. Whether these rules are applicable or not would not be relevant at all. However, it would be of interest to point out that the respondent No.1 in his own OA had relied upon these rules and proceeded on the basis that such rules are applicable to him.

17. Even in the application submitted by the respondent No.1 for grant of ex-India leave at London, he had very clearly pointed out that he would not cause any financial burden to the petitioner's department and that during his stay at London, he would support himself and family out of his personal savings. At the time of hearing of the writ petition also, learned counsel for the respondent No.1 stated that he would be making his own arrangement for stay and would be vacating the official accommodation within four weeks. Thus, as per his own showing, respondent No.1 is to arrange his own accommodation and also bear the expenses of stay of his family through his personal savings. He wants to remain in London only to ensure that his son completes his tenure of academic year.

On our pertinent query, learned counsel for the respondent No.1 conceded that his wife is an educated lady and is in London. It is a matter of few months and she can take care of her children in London during the absence of the respondent No.1. This case is not one of personal hardship where things cannot move in the absence of the respondent No.1. As against that, his requirement at Delhi is

stated to be paramount. That is the call of duty which he has to attend. More so, when he had given an undertaking that he would be returning to India to work in the HQ office for three years after completing the tenure of his overseas posting.

18. We, therefore, allow this writ petition and set aside the judgment of the Tribunal and as a consequence the OA filed by the respondent No.1 herein is dismissed. However, in the facts and circumstances of the case, we grant one month's time to the respondent No.1 for joining his duties in Delhi. The petitioner may extend his leave upto that period.
19. Before we part with, it would be necessary to comment that such problems would keep arising in future as well, as and when postings to foreign countries are made in mid-sessions. The petitioner as well as the Government of India should consider this aspect while making foreign postings and effect such posting, as far as possible, to coincide with the academic year so that these hardships are not faced by the persons sent on such assignments.

No costs.

(A.K. SIKRI)
JUDGE

(SURESH KAIT)
JUDGE

March 13, 2009
nsk