

* **IN THE HIGH COURT OF DELHI AT NEW DELHI**

+ **W.P. (C.) No. 12554/2004**

% **Date of Reserve: 13.09.2010**
Date of Decision: 16.09.2010

UNION OF INDIA Petitioner

Through Ms.Geeta Sharma, Adv.

Versus

DR.LAKSHMAN DAS & ANR Respondents

Through Mr.S.S.Tiwari, Adv.

+ **W.P. (C.) No. 1304/2003**

DR.LAKSHMAN DAS Petitioner

Through Mr.S.S.Tiwari, Adv.

Versus

UOI & ORS. Respondents

Through Ms.Geeta Sharma, Adv.

CORAM:
HON'BLE MR. JUSTICE PRADEEP NANDRAJOG
HON'BLE MR. JUSTICE MOOL CHAND GARG

1. Whether reporters of Local papers may be allowed to see the judgment?
2. To be referred to the reporter or not?
3. Whether the judgment should be reported in the Digest?

MOOL CHAND GARG, J.

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1. It may be observed here that Dr.Lakshman initially filed OA No.405/2000 contending that his date of promotion to Special Grade I should be antedated and reckoned from 04.02.1990. The said OA

was disposed of with directions given to Union of India to consider the claim of Dr.Lakshman. The claim was rejected by Union of India vide OM dated 11.06.2002. Being aggrieved by the said OM Dr.Lakshman filed OA No.3337/2002 which was allowed by the Tribunal vide order dated 03.10.2003. It is against this order Union of India has filed W.P.(C) No.12554/2004.

2. On the other hand Dr. Lakshman despite an order passed by the Tribunal dated 28.01.2002 in OA No.405/2000 has filed W.P.(C) No.1304/2003 with the following prayers:-

“(i) Set aside and quash para 9 & 10 of the impugned order dated 28.01.2002 passed in OA No.405/2000 as well as para 2 of the order dated 11.07.91 so far as it relates to the petitioner.

(ii) Direct the respondents to give placement to the petitioner as Spl. Gr. II (NFSG) from due date and Spl.Gr.I (NFSG) w.e.f. 01.12.1991 i.e. the date on which NFSG & FSG were merged by the respondents

(iii) Direct the respondents to give all consequential benefits accruing to the petitioner consequent to his placement as Spl.Gr.II (NFSG) from due date i.e. 04.02.1990 on notional basis and subsequent promotions including difference in pay/arrears etc w.e.f. 01.03.1994 onwards.

(iv) Pass any other order/s as may be deemed just and proper in the facts of the case so as to protect the petitioner's batch seniority in the Non-teaching Specialists sub-cadre of Central Health Service w.e.f. 04.02.1982.”

3. The common facts relevant for the purpose of deciding both these matters are, that Dr.Lakshman joined as Specialist Grade II in Non-Teaching Specialist Sub Cadre in Neurosurgery w.e.f. 04.02.1982. In 1989 Dr.Lakshman got a foreign assignment. On his request President of India conveyed sanction vide letter dated 07.06.1989 for his transfer on deputation to Saudi Arabia for a period of one year. Some of the terms and conditions of the said letter dated 07.06.1989 are reproduced hereunder:

“No.A.35014/2/89-CHS.IV
Government of India
Ministry of Health & Family Welfare
(Department of Health)

New Delhi, dated 7th June 1989

To
The Medical Superintendent,
Safdarjang Hospital,
New Delhi,

Subject: Terms and conditions of foreign assignment
abroad relating to Dr.Lakshman Das, Neuro-
surgeon, Safdarjang Hospital, New Delhi.

Sir,

I am directed to convey the sanction of the President to the transfer on deputation of Dr.Lakshman Das, Neurosurgeon, Safdarjang Hospital, New Delhi on foreign service in Saudi Arabia for a period of one year on the following terms:-

(i) During the period of his foreign service Dr. Lakshman Das will receive, from the Razayat Company Limited monthly salary at the rate of 12,000/- Saudi Riyals (S.R.).

(ii) The Razayat Company Ltd. of Saudi Arabia will intimate to the Ministry of health & Family Welfare, Govt. of India whether during the period of his foreign service Dr.Lakshman Das will or will not be liable to income tax. National income tax, if levied will be paid by Dr. Das. He will also pay income tax if levied by the Govt. of India on his earnings in Saudi Arabia.

(iii) He will be paid by the Razayat Company Limited in Saudi Arabia travelling allowances for his journey to take up the assignment and to return therefrom, as well as the journey if any, in connection with his work in Saudi Arabia. Travelling allowances (both ways for the family of the officer will also be paid by the Razayat Company Limited of Saudi Arabia.

(iv) The joining time pay of Dr.Lakshman Das when proceeding on foreign service and on reversion therefrom shall be payable by the Razayat Company Ltd. of Saudi Arabia.

(v) The leave of Dr.Lakshman Das during the period of foreign service shall be regulated under the rules of the foreign employer. The leave salary in respect of leave granted by the foreign employer will also be paid by him and the leave will not be debited against the Government servant's leave account. The period of foreign service will not count towards leave under the Government of India.

(vi) The Govt. of India will not be liable to pay leave emoluments in respect of any special disability leave granted to Dr Lakshman Das on account of any disability incurred in any through foreign service under Razayat Company Limited in Saudi Arabia even if such disability manifests itself after the termination of service under Razayat Company Limited in Saudi Arabia.

(vii) The service of Dr.Lakshman Das in Razayat Company Limited in Saudi Arabia will be pensionable subject to payment of pension contribution by him at the prescribed rates. After completion of his resident service contract satisfactorily, Dr.Lakhsman Das will be eligible to receive gratuity as admissible according to the rules in Saudi Arabia. The gratuity will be paid in rupees in India on rejoining Govt. of India service after expiry of foreign service in Saudi Arabia and it will be credited to the G.P. Fund account of the officer and will form part of the accumulation to his G.P.Fund.

(viii) Dr.Lakshman Das shall pay to the Govt. of India pension contribution in respect of service rendered by him in Saudi Arabia and pension contribution shall be @ ₹ 792/- per month. These rates are provisional and the final rates of pension contribution will be determined by the Pay & Accounts Officer (Sectt.), Ministry of Health and Family Welfare, New Delhi according to the length of service of this doctor.

(ix) Dr.Lakshman Das shall pay to the Govt. of India in the currency in which the salary is paid to him, the pension contribution in respect of the service rendered by him in Saudi Arabia, as determined by the Pay Accounts Office concerned according to the orders in force from time to time on the basis of the length of service of the officer.

(x) The amount of pension contributions are to be remitted to the Pay & Accounts officer (Sectt.), Ministry of

Health and Family Welfare, Nirman Bhavan, New Delhi within 15 days of the end of the month of drawing pay and credited under the following Head of Account "XLIV – Central Receipts in aid of Superannuation Contributions for pension and gratuities". The pension contributions should be paid promptly subject to adjustments and alterations in accordance with final rates as may be necessary after intimation of final rates by the Accounts Officer. Penal interest would be levied if payments are delayed.

(xi) The Razayat Company Limited in Saudi Arabia shall afford to Dr.Lakshman Das medical facilities as may be provided by the foreign employer. He will not be entitled to claim reimbursement of any medical expenses that might be incurred by him on his own treatment or the member of his family during the period of foreign service, from the Govt. of India.

(xii) The period of deputation of Dr.Lakshman Das will commence from the date of relinquishing charge of his post in India and end on the date of resuming charge of the post under the Govt. of India.

(xiii) Residential accommodation will be provided by the foreign employer on terms and conditions prescribed by them

(xiv) During the period of foreign service Dr.Lakshman Das will continue to subscribed to the Provident Fund and Central Govt. Employees Insurance Scheme to which he is subscribing at the time of proceeding on foreign service, in accordance with the Rules and repay the outstanding loans, advances, if any, in the foreign currency in which the salary is paid to him.

(xv) In order to facilitate timely remittance of pension contributions, G.P.F. contributions and contributions towards compulsory Group Insurance scheme, and repayment of outstanding loans, advances, etc., Dr.Lakshman Das before proceeding abroad shall made standing arrangements with his local bankers in India whereby the bankers would arrange to remit to the Pay & Accounts Officer (Sectt.), Minsitry of Health & FW, Nirman Bhavan, New Delhi payment out of 'Non-resident" Bank Account operated for this purpose in rupees during the period of foreign service within Saudi Arabia. It would be the responsibility of Dr.Lakshman Das to ensure that

remittance in foreign currency to cover these payments are arranged by him at least once a year and that he would produce the requisite certificate about the remittance in foreign exchange to cover these payments from the 'Non-Resident' account to the Pay & Accounts Office (Sectt.). The exchange rates applicable will be official accounting rate at the time of actual remittances in foreign exchange are arranged by Dr.Das.

(xvi) Dr.Lakshman Das will not be allowed to enter into any contract for extension of his assignment in Saudi Arabia without prior permission of the Govt. of India. In case the Razayat Company Limited in Saudi Arabia require his services beyond the period of present contract of one year, he should intimate this fact to the Govt. of India (Ministry of External Affairs, Economic Division and Ministry of Health & Family Welfare, New Delhi) as soon as it comes to his notice and also request the foreign Govt. to take up the matter with the India's representative in that country. In no case Dr. Das should stay in beyond the period of contract without prior permission of the Govt. of India. He will also not be allowed to resign during his stay abroad.

(xvii) The Govt. of India will not be liable for any extraordinary pension under the 'Extra-ordinary pension scheme'.

(xviii) If his deputation term is not extended it will be his responsibility to ensure that he returns to India immediately on expiry of his term. It should also be his personal responsibility to initiate correspondence with his parent department for his return at least six months prior to the expiry of deputation term. He should also ensure that any request from the Razayat Company Ltd. in Saudi Arabia for extension of his period of deputation beyond one year, should be forwarded by the concerned Indian Mission in Saudi Arabia at least six months before the expiry of the deputation period.

(xix) Dr.Lakshman Das should note that if he fails to fulfil the above obligations on his part, his continued stay outside India after the expiry of sanctioned term, shall be regarded as a deliberate act for which he shall be personally held responsible and which may entail institution of disciplinary action against him.

(xx) The date on which Dr.Lakshman Das is released may be intimated to the Ministry of External Affairs (Economic Division) Shastri Bhawan, New Delhi and the Indian Mission in the Country of Saudi Arabia and this Ministry.

(xxi) Dr.Lakshman Das should register immediately with the Mission on arrival in the country of Saudi Arabia and intimate his residential as well as official address in Saudi Arabia for future correspondence, if any.

(xxii) It is, however, made clear that Dr.Lakshman Das should be relieved of his duty only after his passage is booked by the foreign company and necessary pre-departure formalities are completed.

Yours faithfully,

(P.K.Kapur)
Under Secretary to GOI."

4. The period of deputation of Dr.Lakshman was extended from time to time by various letters placed on record by Dr. Lakshman dated 21.08.1990, 28.08.1991, 26.12.1991, 08.02.1993 and 25.02.1994.

5. According to Dr.Lakshman instructions dated 29.01.1988 and 20.06.1991 were issued by the second respondent to the effect, that the person who goes on foreign assignment would retain his lien in public interest and his seniority in the cadre shall be maintained. These instructions are reproduced for the sake of reference:-

RELEVANT EXTRACT OF DOPT MEMO DATED 29.01.1988

External Affairs bears the salary and other expenses of such persons.

6.7 No person who-

- (i) is on assignment under the Indian Technical and Economic Cooperation (ITE) Programme of the Ministry of External Affairs and other Aid Programmes;

(ii) is posted abroad in a foreign based office of a Ministry/Department;

(iii) goes on a specific contract assignment to a foreign Government

Should be allowed to retire voluntarily unless, after having been transferred to India, he has resumed the charge of the post in India and served for a period of not less than one year;

(a) This restriction will, however, not be applicable in case of officers who are on deputation to UN/International organizations.

6.8 Since deputation of Indian officials abroad contributes to mutual goodwill and understanding between Indian and the foreign country concerned, it would be largely in public interest if, as a rule, the lien of a Government or semi Government employee selected for a foreign assignment on the basis of sponsorship of the Govt. of India is retained.

6.9. The State Governments are advised that their employees may be released for service abroad on foreign service terms in the public interest, after retaining the applicant's lien and protecting his seniority. However, the State Governments may allow their employees to go abroad in accordance with the rules which are in force and applicable to the employees concerned.

6.10 An expert who backs out after being selected for an ITEC assignment will stand debarred from being considered for any foreign assignment for a period of 3 years thereafter.

7. This order will take effect from the date of issue. All those who are on foreign assignment at present shall be governed by the provisions of this order in respect of proposals for extension of their tenure of deputation etc.

8. Hindi version of this letter will follow;

Yours faithfully,

(Smt. R.P.K.Kohli
Under Secretary to GOI

6. It was therefore pleaded that Dr.Lakshman was entitled to protection of seniority in the Non-Teaching Specialist Cadre of Central Health Services during the period of his remaining on deputation in Saudi Arabia. In the letter dated 11.07.1991 the Union of India considered Dr.Lakshman in the cadre and granted him promotion also which it is stated by Dr.Lakshman reflects upon the stand of the Union of India that he was on deputation in Saudi Arabia. The said letter is reproduced hereunder:

No.A.32012/21/90-CHS IV
Government of India
Ministry of Health & Family Welfare
(Department of Health)

New Delhi, dated 11th July, 1991

ORDER

The President is pleased to place the following Specialist Grade II (Senior Scale) Officers of the Non-Teaching Specialist Sub-Cadre of the Central Health Service in the Specialist Grade II (NFSG) in the pay scale of ₹ 4500-5700 in their respective specialities w.e.f. the date mentioned against their names.

<u>S.No.</u>	<u>Name of officer & design</u>	<u>Instt. Where working</u>	<u>Date from Which Placement Effective</u>
14.	Dr.Lakshman Das, Neurosurgeon	on foreign assignment In Saudi Arabia w.e.f 10.06.1989."	--

2. In the event of an officer, who is placed in the above mentioned selection Grade, being on study leave/other kind of leave etc., deputation on foreign assignment, the placement orders will take effect from the date he/she resumes the charge of the post on completion of his/her leave/deputation on foreign assignment.

3. In case any officer is or has been on unauthorized absence during the past eight years, he/she may not be placed in the scale of ₹4500-5700 till a decision on his/her

unauthorized absence is taken the details of such cases may please be reported to this Ministry. (from 20.7.1987 to 28.7.1987) cannot be counted as unauthorized absence since this period has been treated as dies-non.

4. Further in case of officers who were/are on training/fellowship etc., certified to be in public interest and are treated as on duty during the said period of training/fellowship their placement will take effect from the date indicated against their names.

5. The date on which these officers assume charge of the post in non-functional Selection Grade (₹4500-5700) may please be intimated to this Ministry.”

7. Dr.Lakshman pleaded before the Tribunal that despite the terms and conditions of his deputation dated 07.06.1989 and instructions dated 29.01.1988 & 20.06.1991 the Union of India deprived him of his placement as a Specialist Grade II NFSG w.e.f. 04.02.1990 and as Specialist Grade I NFSG w.e.f. 01.12.1991. Even though his deputation to Saudi Arabia was under the aegis of respondents in public interest and as such he could not have been made to suffer on account of his being on deputation especially when he was recommended for promotion it was pleaded that all other colleagues of the petitioner were given as Specialist NSG Grade II after completion of 8 years of service as Specialist Grade II and then as Specialist Grade I NFSG w.e.f. 01.12.1991 but he was discriminated against.

8. As stated above Union of India vide order dated 11.06.2002 rejected the claim of the petitioner for grant of NFSG w.e.f. 01.12.1991 on the ground that foreign assignment of the petitioner was on his own volition and cannot be treated in public interest. It was also pleaded that in case Dr.Lakshman would be granted any benefit then in many other cases similar benefits would have to be granted by reviewing similar cases like that of Dr.A.K. Rai where the OA was dismissed. It was also pleaded that the case of Dr.Lakshman

was covered by OM dated 22.11.1990 as per instructions of foreign assignment dated 29.06.1991. The OM dated 22.11.1990 (Annexure I) reads as under:

“D.P.T., OM No.22038/1/86-Estt.(D)
Dated 22.11.1990

**Selection Grade in Group ‘A’ Services – Grant of
NBR for NFSG appointments**

The undersigned is directed to refer to this Department’s O.M. of even number, dated 9th October, 1989 (SI No.45 of Swamy’s Annual, 1989), laying down the procedure and criteria to be followed for appointment to Non-functional Selection Grade (NFSG) in organized Group ‘A’ Central Services. In this connection, it has now been decided to follow the procedure indicated below in respect of extending the benefit of Next Below Rule (NBR) for NFSG appointments and also the sealed cover cases-

(a) In the case of promotion to NFSG, there is no need to extend the select list beyond the actual number of selection Grade vacancies even when any of the officers included in the select list remains on deputation. Since there is no functional need to fill the vacancy created by some one being away on deputation. Though the junior is not thus promoted to fill the NFSG vacancy, there should, however, be no objection to allow pro forma promotion, as a special case, to an official included in the select list while he is on deputation in public interest, without insisting on the normal condition of NBR.

(b) As regards sealed cover cases, if the recommendations in respect of a person for appointment to NFSG are kept in the sealed cover, the NFSG vacancy should be kept unfilled till the disciplinary proceedings are completed. In such cases, it is not permissible for a junior person to officiate in the vacancy. In the meantime, the post will only be operated at JAG level. If on finalization of the disciplinary proceedings, the officer is fully exonerated, he will be entitled for promotion to the NFSG from the date from which it was due and also for arrears of pay on that account.

2. These instructions may please be brought to the notice of all concerned for guidance and compliance.”

9. The order passed by Union of India dated 11.06.2002 has been assailed by Dr.Lakshman in OA No.3337/2002 which was allowed vide order dated 03.10.2003 whereby the Tribunal gave directions to grant notional benefit to Dr.Lakshman inter alia by holding that:

“The question that arises for consideration is that whether the foreign assignment of the respondent was in public interest since the claim of the respondent was rejected on the pretext that he had proceeded on the assignment on his own volition and it was not a case of government sponsorship in public interest.

The deputation of Indian officials abroad contributes to mutual goodwill and understanding between India and the Foreign Country concerned and it recognizes that it would be largely in public interest. Tribunal relied upon Paragraph 4, 8 and 14.5 of the Instructions dated 29.06.1991 and Fundamental Rule 111.

The public interest vis-à-vis a Government servant would normally be the interest of the Government. The respondent in the instant case went to the assignment in public interest keeping in view that the interest of the Government is directly involved and keeping in view that international relations with other countries is the subject of public interest.

Dr.A.K.Rai Vs. UOI, OA No.993 of 2001, is not relevant since in the said case Dr.AK Rai’s junior had been promoted before him but in the instant case no person junior to the respondent was promoted.”

10. The relief granted by the Tribunal to Dr.Lakshman in the aforesaid OA is reproduced hereunder:

“11. Resultantly, we allow the application and quash the impugned order and direct:-

(a) that the applicant would be entitled to placement in the higher scale on completion of the required number of years of service; and

(b) that if he was not serving in India and was on foreign assignment, the notional benefit would be given to him but not the arrears."

11. This order passed by the Tribunal is the subject matter of W.P.(C) No.12554/2004 filed by Union of India. According to Union of India the order passed by the Tribunal cannot be sustained inasmuch as according to OM dated 22.01.1990 the case of Dr.Lakshman who went on foreign deputation of his own volition is not covered and as such he could not be kept at par with the case of those officers whose assignments are covered by a Government sponsored programme in public interest. It was also pleaded that provisions of Next Below Rule as referred to in the OM as aforesaid was not applicable in the instant case as no officer junior to Dr.Lakshman had been promoted to Specialist Grade I before the date of his promotion. Thirdly, it was stated that as per the promotion order dated 11.07.1991 the promotion in respect of Office Memorandum will be effected on the date on which such officers resumes duties after the return from foreign assignment. The said order was not challenged and therefore it has become final. It is therefore submitted that the order of the Tribunal is liable to be set aside because even finding returned by the Tribunal that Dr.Rai's case was not applicable in the instant case was also not correct.

12. According to Dr.Lakshman, the contentions of UOI are not sustainable inasmuch as, a bare reading of the sanction dated 07.06.1989 clarifies that the opportunity to work in Saudi Arabia had a tacit approval of Union of India. In fact UOI vide letter dated 07.06.1989 has considered the joining of the service in Saudi Arabia by Dr.Lakshman who was working as Neurosurgeon Safdarjung Hospital, New Delhi as a **deputation on foreign service** in Saudi Arabia for a period of 1 year which period was extended from time to time.

13. Learned counsel appearing for Union of India states that Dr.Lakshman joined the foreign service earlier and thereafter applied for sanction and therefore it is not a case where it was a deputation in public interest sanctioned by the Government of India. However, reading the sanction letter dated 07.06.1989 does not support the contentions of the learned counsel for the respondent.

14. Perusal of the aforesaid letter clearly establishes that even if there was any lacunae on the part of Dr.Lakshman in having first accepted the assignment and then applying for deputation the deviations if any stands waived by the President of India. Moreover a reading of the instructions of the Govt. of India as are available at page 46 of W.P.(C) No.1304/2003, goes to show that in terms of the bilateral arrangements between the developing countries international assignments can be accepted by a Government employee even on the basis of direct offer from an international organization/foreign Government due to past work. Reference can be made to paragraph 8 of the instructions which reads as under:

“8.METHODS OF SELECTION AND RELATED MATTERS:

The primary criteria for permitting a government employee to undertake an assignment would be the convenience of the Government in sparing him from the point of view of the management of the service cadre to which he belongs and exigency of public service.

8.1 subject to this overall condition, the Government and public sector employees may secure international and bilateral assignments through any of the following methods:-

- (i) nomination by the Government;
- (ii) direct offer from an international organization/foreign Government due to past work;
- (iii) application made in response to open advertisement following the prescribed procedure; and

- (iv) by being picked up from the roster of an international organization.

8.2 The Department of Personnel & Training, the cadre controlling authority of various service cadres and the nodal Ministries for the international organizations will deal with various aspects relating to the nomination, selection and appointment of the government employees to posts under the international agencies and foreign Governments. Each international agency is dealt with by a nodal Ministry, for instance the Ministry of Labour looks after the International Labour Organization (ILO), the Ministry of Health liaises with the World Health Organization (WHO) and the like.”

15. The aforesaid document further goes to show that even if a Government employee receives a direct offer from a foreign country which have bilateral arrangements between the said Government and the Govt. of India can certainly seek sanction of the Government for his deputation.

16. As observed earlier, in the present case the sanction dated 07.06.1989 issued by the President of India clearly shows that the services of Dr.Lakshman were transferred to Saudi Arabia on deputation. In fact this is also clear from the letter dated 11.07.1991 as quoted above.

17. Insofar as the second requirement that is promotion of a junior of Dr.Lakshman is concerned, the Union of India has not been able to show us any seniority list prepared by them which may go to show that there are any separate list for Specialist Grade I or Grade II which may be relevant for the purpose of considering the issue of Next Below Rule for the purpose of denying promotion to Dr.Lakshman.

18. Accordingly we are of the considered view that the order passed by the Tribunal in this case does not suffer from any infirmity. Consequently we dismiss writ petition filed by Union of India being W.P.(C) No.12554/2004.

19. At the hearing of the two writ petitions, counsel for Dr.Lakshman stated that if W.P.(C) No.12554/2004 filed by U.O.I. is dismissed, W.P.(C) No.1304/2003 filed by Dr.Lakshman be treated as withdrawn. Accordingly W.P.(C) No.1304/2003 is dismissed as withdrawn.

20. No costs.

MOOL CHAND GARG, J.

SEPTEMBER 16, 2010
'ag'

PRADEEP NANDRAJOG, J.