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Reserved on: 29th March, 2011

Date of decision: 8th April, 2011

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Sh. Vijai Kumar

Through Mr.Vinay Sabharwal with
Mr.Sidharth Joshi and Ms. Neha
Sabharwal, Advocates.

Versus

Union of India

Through Mr. S.M. Arif, Advocate.

CORAM:

HON'BLE THE CHIEF JUSTICE

HON'BLE MR. JUSTICE SANJIV KHANNA

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DIPAK MISRA, CJ

In this writ petition preferred under Articles 226 and 227 of the Constitution of India, the legal substantiality and acceptability of the order

dated 14.3.2011 passed by the Central Administrative Tribunal, Principal Bench, New Delhi (for short 'the tribunal') in O.A. No.4237/2010 is called in question.

2. Bereft of unnecessary details, the facts which are required to be stated are that the petitioner was appointed as Second Secretary in the Embassy of India, Caracas vide order dated 30.3.2009 and was deployed as Head of Chancery in the Embassy vide office order dated 10.8.2009. On 28.7.2010, he was divested of the charge of Head of the Chancery and Second Secretary (Consular) and redeployed as Second Secretary (Information and Culture). Vide order dated 17.8.2010, the Ministry of External Affairs, New Delhi conveyed to the Embassy the sanction of the President to the recall of the petitioner to the Headquarters in terms of Para 8(2)(ii) & (iii) of IFS (PLCA) Rules. This letter was received by the petitioner on 18.8.2010.

3. Being grieved by the said communication/order, the petitioner knocked at the doors of the tribunal for quashment of the same. Before the tribunal, it was contended by the petitioner that noticing certain irregularities in the Embassy of India, Caracas relating to financial and administrative improprieties committed by the former Ambassador, Counsellors, etc., he

submitted written complaints to the concerned officials in the Ministry vide letter dated 30.3.2010 and because of these complaints regarding irregularities committed by his superiors, he had been prematurely recalled from Caracas to the Headquarters at Delhi and, therefore, the said order deserves to be set aside. Apart from the quashment of the order, the petitioner also prayed for declaring Rule 8(2)(ii) & (iii) of the IFS (PLCA) Rules (for brevity 'the Rules') as ultra vires Article 14 of the Constitution of India. It was averred in the application before the tribunal that the order dated 17.8.2010 prematurely recalling him is violative of the principles of natural justice as he should have been afforded an opportunity of personal hearing to rebut the allegations made against him; that though the order of recall has been passed in terms of the Rules, yet nothing has been specified therein and the order being a laconic one deserves to be axed; that the order smacks of malafides and has been issued to victimize him because of his attempt to expose the corruption of the senior officers; that the premature recall against the normal tenure of 36 months would cast a stigma on his reputation and career which has been unblemished and, hence, he should have been afforded an opportunity to explain his conduct and that the Rule confers unbridled powers on the Ministry to conclude on the conduct of an

officer without giving him an opportunity to explain his conduct and, therefore, the said power is totally unguided and invites the frown of Article 14 of the Constitution of India. The respondent, in oppugnation, contended that the financial irregularities raised by the petitioner have nothing to do with his recall to the Headquarters; that such recall was a result of the petitioner having been found unsuitable to continue in the mission abroad inasmuch as soon after his posting in the mission, he began finding fault with the functioning of all officers and staff (including locally recruited personnel) in the mission and the Attache (Administration); that his functioning as Head of the Chancery and Second Secretary (Consular) was also found to be indisciplined and unprofessional; that his behavior antagonized some local government authorities, service providers and friends of India and that he whimsically sacked some local staff which created a highly vitiated atmosphere in the mission affecting its working; that his continuance in the Embassy would have caused embarrassment to the Government of India; that the premature transfer / recall cannot be considered to be punitive as the Rules provide for curtailment of the period of Government servant in the exigencies of public service; that the recall order was issued on the recommendation of a fact finding team led by the

Joint Secretary (CNV) which was deputed to the mission from the Ministry; that there was no malafide in the recall of the petitioner; that the posting of any employee in any country or his recall therefrom does not infringe his legal rights and that the Government has unfettered right to curtail the period of posting of an employee in the exigencies of public service.

4. The tribunal referred to the relevant Rule and the decision of the tribunal in OA No.3364/2010 which has been decided on 14.2.2011 and held that the Ministry has the power to recall under the Rules and that the order of transfer was not malafide or vindictive; that the Rule does not invite the wrath of Article 14 of the Constitution as this Rule is necessary for the Government to deal with certain instances in which the image of the country or its interest needs to be protected. Being of this view, the tribunal dismissed the original application.

5. We have heard Mr.Vinay Sabharwal, learned counsel for the petitioner, and Mr.S.M. Arif, learned counsel for the respondent.

6. Assailing the justifiability of the order passed by the tribunal, the learned counsel for the petitioner has raised the following contentions:

- (a) The tribunal has fallen into error while dealing with the order as a routine transfer though it is not a case of transfer but a recall under the statutory rules and unless the conditions precedent as prescribed in the Rules are satisfied, the order of recall has to be declared invalid in law.
- (b) The order of premature recall is punitive in nature and casts a stigma as the preliminary enquiry would reflect apart from the stand in the counter affidavit and, hence, it was imperative to follow the doctrine of audi alteram partem and that having not been followed, the order of recall is unsustainable and the affirmation thereof by the tribunal is absolutely untenable.
- (c) The tribunal should have taken note of the fact that the petitioner as a responsible officer has pointed out certain irregularities and, therefore, the same should not have been taken exception to and on that foundation, he should not have been visited with the order of recall.
- (d) The order of transfer being absolutely cryptic and unreasoned deserves to be lanced and the stand put forth in the counter affidavit should have been totally ignored by the tribunal but the same having not been done, the order of recall is pregnable.

- (e) Rule 8(2)(ii) & (iii) is violative of Article 14 of the Constitution of India as it gives unbridled, unfettered and unguided power to the authorities to recall an officer and, hence, the same being totally arbitrary and unreasonable deserves to be declared ultra vires Article 14 of the Constitution of India.

To bolster the aforesaid submissions, the learned counsel for the petitioner has placed reliance on the decisions rendered in ***Mohinder Singh Gill v. Chief Election Commissioner*, (1978) 1 SCC 405** and ***Delhi Transport Corporation v. D.T.C. Mazdoor Congress and others*, AIR 1991 SC 101**.

7. Mr. S.M. Arif, learned counsel for the respondent, combating the aforesaid contentions, advanced the following submissions:

- (a) The order of recall passed by the authority is in accordance with the Rules and the petitioner had no vested right to continue in the post till the expiration of the tenure.
- (b) The petitioner was holding a sensitive posting in an Embassy on mission and when his certain actions were found not to be in the interest of the mission and also against the sustenance of friendly

relationship with the country in which he was posted, a preliminary enquiry was held and on that basis he was recalled and, therefore, the conditions precedent in the Rule had been satisfied.

- (c) The order of recall need not reflect the reason regard being had to the nature of the order and the principles of natural justice do not get attracted inasmuch as no punishment is imposed and the order is not stigmatic or punitive but on the contrary was essential to be passed regard being had to the inter-country relationship.
- (d) The Rule by no stretch of imagination offends Article 14 of the Constitution of India as the same is neither arbitrary nor unreasonable but confers a power to be exercised in a limited manner in the recall of an officer / employee who is sent to another country and the said exercise of power cannot be said to be curtailing the condition of service or punishing the petitioner.
- (e) The decision rendered in *Mohinder Singh Gill* (supra) is not applicable to the case at hand as it was open to the employer not to ascribe reasons in the order as it is not imperative to give reasons.

- (f) The decision rendered in *Delhi Transport Corporation* (supra) was delivered in a different set of facts altogether and, hence, the same is not applicable to the case at hand to declare the Rule as ultra vires.

8. First, we shall advert to the aspect whether the order of pre-mature recall is in contravention of the Rules, punitive in nature and mala fide. Para 8(2) of Annexure-XII of the IFS (PLCA) Rules reads as follows: -

“8(2) If the Ministry is satisfied that the conduct of an officer posted abroad or of any member of his family or any person living with him and under his general control: -

- (i) has prejudiced or is likely to prejudice the maintenance of friendly relations between India and a foreign country; or
- (ii) **has brought or is likely to bring India into disrepute; or**
- (iii) **has caused or is likely to cause embarrassment to the Government of India; or**
- (iv) has occasioned or is likely to occasion a breach of the security regulations of the Government of India or a danger to security; or
- (v) has occasioned or is likely to occasion the commission of an act which may constitute an offence under the Indian Penal Code; or
- (vi) Involves moral turpitude; or
- (vii) Involves a serious breach of the Conduct Rules of his service.

the Ministry may compulsorily recall the officer to India.

- (3) If the Ministry is satisfied that an officer serving abroad of a member of his family is suffering from a serious or chronic illness of disease as a result of which: -
 - (a) the officer has been or may become unable to perform his duties efficiently or fully; or
 - (b) the expenditure that has been or may be incurred on his or his family's medical or hospital treatment is unduly large;

the Ministry may compulsorily recall him to India and may, for that purpose, authorize his travel to India and of the entitled members of his family and Indian servants.”

9. The order of pre-mature recall dated 17th August, 2010 stipulates that the petitioner has been recalled in terms of para 8(2)(ii) and (iii) of Annexure-XII of the Rules.

10. In the counter affidavit, it has been stated that the petitioner was found to be unsuitable for serving in the mission/posts abroad as he started finding faults with the higher officers and his discourteous behavior antagonized some local government authorities, service providers and friends of India. That apart, it has been stated that he sacked a number of local staff and treated certain officers in a different manner. It is also the stand that

preliminary enquiry was held before the order of recall came to be passed.

The part of the preliminary report reads as follows: -

“the official conduct of the officer replete with negativism, skepticism, suspicion and insensitivity. His management of human resources was found to be unprofessional. His behavior towards local employees of the Mission was rude leading most of them to resign. In one case, he removed a local employee of the Embassy without HOM’s knowledge. He indulged into acts of insubordination and disrespect towards the Ambassador. His decision making as Head of Chancery was generally found to be arbitrary and whimsical.”

11. During the preliminary hearing, the petitioner was given opportunity for hearing by the visiting team and the order of recall was issued on the recommendations of the fact finding team. Rule 8(2)(ii) stipulates that an officer can be pre-maturely recalled if he has brought or is likely to bring India any disrepute or has caused or is likely to cause embarrassment to the Government of India. The submission of the learned counsel for the petitioner is that the recall is not in consonance with the postulates engrafted in the Rule as the petitioner had done nothing which would bring disrepute to India or cause embarrassment. On the contrary, he has found irregularities in the functioning of the higher authorities and, therefore, in a mala fide manner, he has been recalled. We have already reproduced the

report of the fact finding team. In our considered opinion, the said opinion clearly reflects that his conduct is likely to cause embarrassment to the Government of India. The order itself need not reflect the same in a case of this nature. In a sensitive posting abroad in a mission, we are disposed to think, the competent authority has taken all care to send the team to find about his conduct and eventually passed the order. Thus, we perceive that there is no violation of the Rule. It has also been categorically stated in the counter affidavit that it is neither punitive nor stigmatic. The order has been passed to save the Government of India from embarrassment and to avoid any kind of disrepute. We are persuaded to agree with the said stand as we really do not perceive the same to be stigmatic or punitive. It is not suggested in the counter affidavit that any disciplinary proceeding is going to be initiated on the basis of the same or it is going to be reflected in his character role. The tribunal might have dealt with the matter by referring to certain decisions in the field of transfer but it is also noticeable that the tribunal has referred to the Rule, the preliminary report and other aspects. Solely because the tribunal has placed reliance on certain authorities pertaining to transfer or treated the matter as a routine transfer, the order cannot be found fault with when the order passed by the tribunal approves

the justification given for the order of recall of the petitioner from the services abroad. As far as mala fide is concerned, we really perceive no mala fide in the same. The learned counsel for the petitioner would vehemently contend that because he found out irregularities and wrote against the higher officers, he has been recalled and, therefore, this mala fide per se is not acceptable. We do not intend to comment on the propriety of the petitioner making such communication or writing some letters but the opinion arrived at by the respondent that the conduct of the petitioner is likely to cause embarrassment to the Government of India or bring disrepute cannot be found fault with. The submission that the petitioner should have been afforded an opportunity of hearing and an enquiry should have been held before his recall as it makes a bad reflection on his conduct, is sans substance inasmuch as the petitioner was heard by the visiting team and that apart, in a case of recall, if holding of enquiry is treated to be condition precedent or pre-requisite, that would bring a dent in the administration. Under certain circumstances, an urgent action is required and in any case, the petitioner is not visited with any punishment. As has been fairly stated by the learned counsel for the respondent, on the ground of recall, the order of recall by itself cannot be regarded as a punishment. Regard being had to

the totality of circumstances, we are of the considered opinion that the principles of natural justice and causing of a full-fledged enquiry cannot be engrafted into the Rules for the purpose of recall and hence the submission raised by the learned counsel for the petitioner does not deserve acceptance.

12. The next facet relates to the validity of the rule in question. It is submitted by Mr.Sabharwal that when the rule provides for an order of recall on the subjective satisfaction of the employer as regards the conduct of the officer posted abroad and on that basis he can be recalled, the same violates the principles of natural justice and hence the rule is absolutely arbitrary and unreasonable. He has commended us to the decision in ***Delhi Transport Corporation*** (supra). In the said case, the Constitution Bench was dealing with Regulation 9(b) of the Delhi Road Transport Authority (Conditions of Appointment and Service) Regulation, 1952, which provided that where the termination is made due to reduction of establishment or in circumstances other than those mentioned at Regulation 9(a), one month notice or pay in lieu thereof will be given to all categories of employees. Thus, the regular employee could be terminated with one month notice or pay in lieu thereof. The said provision was declared by the High Court as unconstitutional as it confers an absolute, unbridled and arbitrary power on the management to

terminate the services of any permanent or temporary employee. The majority view has been expressed in the following terms: -

“198. The Court has, therefore, the jurisdiction and power to strike or set aside the unfavourable terms in a contract of employment which purports to give effect to unconscionable bargain violating Art. 14 of the Constitution.

199. Thus on a conspectus of the catena of cases decided by this Court the only conclusion follows is that Regulation 9(b) which confers powers on the authority to terminate the services of a permanent and confirmed employee by issuing a notice terminating the services or by making payment in lieu of notice without assigning any reasons in the order and without giving any opportunity of hearing to the employee before passing the impugned order is wholly arbitrary, uncanalised and unrestricted violating principles of natural justice as well as Art. 14 of the Constitution. It has also been held consistently by this Court that the Government carries on various trades and business activity through the instrumentality of the State such as Government Company or Public Corporations. Such Government Company or Public Corporation being State instrumentalities are State within the meaning of Art. 12 of the Constitution and as such they are subject to the observance of fundamental rights embodied in Part III as well as to conform to the directive principles in Part IV of the Constitution. In other words the Service Regulations or Rules framed by them are to be tested by the touchstone of Art. 14 of Constitution. Furthermore, the procedure prescribed by their Rules or Regulations must be reasonable, fair and just and not arbitrary, fanciful and unjust. Regulation 9(b), therefore, confers unbridled, uncanalised and arbitrary power on the authority to terminate the services of a permanent employee without recording any reasons and without conforming to the principles of natural justice. There is no guideline in the Regulations or in the Act, as to when or in which cases and circumstances this

power of termination by giving notice or pay in lieu of notice can be exercised. It is now well settled that the 'audi alteram partem' rule which in essence, enforces the equality clause in Article 14 of the Constitution is applicable not only to quasi-judicial orders but to administrative orders affecting prejudicially the party-in-question unless the application of the rule has been expressly excluded by the Act or Regulation or Rule which is not the case here. Rules of natural justice do not supplant but supplement the Rules and Regulations. Moreover, the Rule of Law which permeates our Constitution demands that it has to be observed both substantially and procedurally. Considering from all aspects Regulation 9(b) is illegal and void as it is arbitrary, discriminatory and without any guidelines for exercise of the power. Rule of law posits that the power to be exercised in a manner which is just, fair and reasonable and not in an unreasonable, capricious or arbitrary manner leaving room for discrimination."

13. As is demonstrable, the said decision was rendered in the context of termination of service of a permanent employee without holding an enquiry and, therefore, their Lordships treated the said power to be unbridled, unfettered and uncanalized and thereby inviting the wrath and frown of the equality clause enshrined in Article 14 of the Constitution of India. The present Rule deals with the recall of an officer who is posted abroad. The Rule does not deal with any kind of imposition of punishment without affording an opportunity. The Rule postulates certain guidelines regarding the conditions under which recall has to be made. The guidelines, as

engrafted in the Rule, are discernible being absolutely clear. The submission of the learned counsel for the petitioner is that as the term 'conduct' is mentioned in the beginning of Rule 8(2), there has to be an enquiry in that regard. The term 'conduct' used in the Rule has an inseparable nexus with the other conditions that follow thereafter. It is also worth noting that the conduct also relates to any member of his family or any person living with him or under his general control. This does not pertain to any kind of misconduct. It is, above all, a behavioural pattern. It pertains to the disposition or attitude of an officer and the way his family members and persons living with him or under his general control behave. This case relates to his posting in a foreign country, friendly relationship between India and a foreign country, reputation of the country, causing embarrassment to the country, breach of security regulation or commission of an offence, involvement of moral turpitude and serious breach of Conduct Rules which are extremely significant. In certain cases, a disciplinary proceeding may be instituted after the officer is recalled, if necessary. The same may be warranted in certain cases. Recall may take place and disciplinary proceeding may not be instituted, but the recall has to take place regard being had to the sensitive nature of the post and the sensibility

required from an officer holding the post as the same is in the interest of the nation. The submission of the learned counsel for the petitioner is that this is a mere subjective satisfaction but the enquiry really cannot be given any kind of acceptance because the authority is satisfied for the purpose of recall. To elaborate, before a disciplinary proceeding is initiated against a person, a preliminary enquiry is held on the basis of some complaints, the enquiry is contemplated and eventually it may be held. Unless any adverse order is passed touching the service conditions of the petitioner, it is difficult to hold that there cannot be subjective satisfaction for recall. The Ministry may have certain material at its hand from which it may arrive at a conclusion that his continuance in the foreign country has brought or is likely to bring disrepute or has caused or is likely to cause embarrassment to the Government of India. It should be borne in mind that it is basically a posting and, therefore, there can be a recall and as is perceptible, it is governed by a set of Rules. The Rules provide the guidance itself. Thus, we are not convinced that the Rule is totally arbitrary, unguided and unreasonable to be hit by Article 14 of the Constitution of India. The decision rendered in *Delhi Transport Corporation* (supra) is distinguishable and not applicable to the case at hand.

14. In view of our aforesaid analysis, we do not find any merit in the contentions raised by the learned counsel for the petitioner and, accordingly, the same are repelled and as a sequitur, the writ petition stands dismissed without any order as to costs.

CHIEF JUSTICE

SANJIV KHANNA, J

APRIL 8, 2011
dk/kapil