

* IN THE HIGH COURT OF DELHI AT NEW DELHI

Reserved on: 22nd September, 2016

Decided on: 8th December, 2016

+ W.P.(C) 9278/2015 & C.M. Nos.26324/2015, 21305/2015 & 14568/2016

UNION OF INDIA & ORS.

... Petitioners

Through: Mr. R.V.Sinha & Mr.R.N. Singh, Advs.

versus

T.M.SAMPATH

... Respondent

Through: Respondent in person.

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CORAM:

HON'BLE MR.JUSTICE SANJIV KHANNA

HON'BLE MS. JUSTICE SUNITA GUPTA

J U D G M E N T

: SUNITA GUPTA, J.

1. This writ petition under Article 226 of the Constitution of India is directed against the order / judgment dated 15.07.2015 passed by Central Administration Tribunal, Principal Bench, New Delhi in OA No.1070/2015 titled '*T.M. Sampath v. Union of India & Ors.*'.

2. The respondent – T.M. Sampath who was working as an Administrative Officer under National Water Development Agency (NWDA) filed the original application challenging the office memorandum No.2/72/2011-Admn./Vol.IX/20021-23 dated 30.12.2014

vide which the 97 days of duty period was treated as '*dies non*' and recovery of Rs.1,81,461/- in monthly installment from his salary from the month of December, 2014 to May, 2015 was directed.

3. It was the case of the respondent that vide office memorandum dated 20.01.2014, the respondent was asked to explain the reasons for appearing in various courts without any application for leave and without seeking permission. The details of dates for the year 2012 – 2014 on which he appeared in the courts were also furnished to him and it was stated in the memorandum that he used to remain absent from office unauthorizedly. The reply dated 23.01.2014 was filed by him stating therein that he had attended the courts with the blanket permission by his superior officer Mr R.K. Jain, the Chief Engineer (HQ). Moreover, Mr Jain himself advised him that attending court in respect of service matter with NWDA was a part of official duty. However, later on Mr Jain harassed him for calling him a corrupt officer in the appointment of nine LDCs during the year 2011 and for making RTI questions against his functioning. By memorandum dated 05.02.2014, he was informed that he was never advised that he could attend the court for his personal cases without submission of leave application and he had developed the habit of making false allegations against his superiors. He was also called upon to explain within 3 days as to why the period of his absence from office may not be declared as 'unauthorized absence' and the principle of 'no work no pay' be implemented. However, no reply was submitted. Again by the subsequent office memorandum dated 27.02.2014, he was informed

that remaining absent from office for the purpose of going to Courts amounts to unauthorized absence but he again remained absent from office on 27.07.2013, 30.09.2013 and 11.02.2014 and he was given last opportunity to explain as to why the days' of his absence from office be not declared as unauthorized absence besides taking disciplinary action against him. By reply dated 28.02.2014 the respondent had submitted that attending court proceedings cannot be treated as unauthorized absence when the same has been done with permission. Thereafter, by a memorandum dated 11.04.2014 it was proposed to treat the days of his unauthorized absence of 97 days as 'dies non' in terms of FR-18 and he was denied pay and allowances on the principle of 'no work no pay' in terms of FR-17(1). Further, in terms of FR-17-A, it was decided to treat the 97 days on which he remained absent unauthorizedly as interruption or break in service. He was given an opportunity to submit his representation, if any, against the proposed action within a period of five working days and an opportunity of being heard in person, if he so desired. He submitted a reply dated 15.04.2014 stating that Mr S.M. Husain, Director General, NWDA, Mr R.K. Jain, CE (HQ) & CVO, Mr JSS Satry, Consultant (Admn.) and Mr Y.D. Vats, Deputy Director (Admn.) were prejudiced against him for having been a whistleblower and for exposing the illegality committed by some of the officers of NWDA. As regards the proposal to treat 97 days as 'dies non', he stated that it should have been initiated within a reasonable time immediately after 19.01.2012 and initiating it after a period of two years is an afterthought action in order to take revenge against him for the complaints made by him

against Mr R.K. Jain, CE (HQ) & CVO, Mr JSS Satry, Consultant (Admn.) and Mr Y.D. Vats , Deputy Director (Admn.). He further stated that it was a false proposal without considering the vital documents of biometric attendance system and monthly absentee statement of immediate superior. As regards granting him opportunity of being heard by Mr S.K. Husain, DG, NWDA, he submitted that since Mr Hussain was prejudiced against him as such he does not hope to get any justice from him. Thereafter, the impugned order dated 30.12.2014 was passed. The relevant portion of the said order reads as under:

“4. The fact is that Shri Sampath left the office and attended the CAT/Court to pursue his personal cases against NWDA. Since he remained absent for the part of day without any authorization for such absence by way of grant of leave, the days on which such absence occurred have to be treated as ‘dies non’. In cases of such absence from work, the leave sanctioning authority may order that the days on which work was not performed, be treated as ‘dies non’.

5. Shri Sampath admitted that his cases which were listed between the time 10.30 A.M. to 1.00 P.M. he was present in the CAT/Court during that time. However, he attended CAT/Courts without taking at least half day CL, if not leave for full day. Apart from the above period of time in CAT, Shri Sampath would have required at least 30 minutes each way to reach from Palika Bhawan, R.K. Puram to CAT/Delhi High Court, which is at a distance of nearly 10 Kilometers. Therefore, Shri Sampath s contention that he was away from office for half an hour is absolutely untrue and physically impossible.

6. Further, Shri Sampath declined to meet the Director General, NWDA for personal hearing. The

points raised by him were found irrelevant, factually incorrect and without merit as observed in the previous paras. Therefore, the Competent Authority has decided to enforce the principle of 'no work no pay' in terms of FR-17(1) for his absence of 97 days (details given in attached statement marked as Annexure) and to treat his absence as 'dies non' in terms of FR 18. This unauthorized absence will cause interruption in his service in terms of FR 17A.

7. Accordingly, the pay and allowances for those 97 days already paid to Shri Sampath through salary for the above period is treated as excess payment. Therefore, the excess payment of Rs.1,81,461/- will be recovered from the salary of Shri Sampath, Administrative Officer as under:-

1.	December, 2014	Rs.30,000/-
2.	January, 2015	Rs.30,000/-
3.	February, 2015	Rs.30,000/-
4.	March, 2015	Rs.30,000/-
5.	April, 2015	Rs.30,000/-
6.	May, 2015	Rs.31,461/-."

4. Feeling aggrieved, the respondent filed OA No.1070/2015 before the Central Administrative Tribunal. Principal Bench, New Delhi. The Tribunal allowed the OA observing that although by an order dated 11.04.2014, the petitioners held that for the alleged unauthorized absence of the respondent he was liable for initiation of disciplinary proceedings but without initiating disciplinary proceedings against him, the petitioners enforced the principle of 'no work no pay' in terms of FR-17(1) for his absence of 97 days and treated his absence as 'dies non' in terms of FR 18 which would cause

interruption in his service in terms of FR 17A. If according to the petitioners, it was a misconduct on the part of the respondent, he should have been subjected to disciplinary proceedings before resorting to this action. Moreover, the petitioners have calculated the overpayment made to the respondent as Rs.1,81,461/-. However, as per the petitioners own records, the respondent was present on all the 97 days which were treated as 'unauthorized absence'. There was no record to show the alleged duration of his absence on each of those days he attended the Tribunal/Court. Moreover, the order of recovery was issued on 30.12.2014 and the respondent was due for his retirement on 31.07.2015. The respondent was not entitled for any pension. Reliance was placed on *State of Punjab and others v Rafiq Masih's (White Washer) etc.*, AIR 2015 SC 1267, wherein the question for consideration before the Supreme Court in bunch of cases was the private respondents who were the beneficiaries of a mistake committed by the employer on account of unintentional mistake and the employees were in receipt of monetary benefit beyond their dues, whether the private respondents against whom an order of recovery of the excess amount has been made, should be exempted in law, from the reimbursement of the same to the employer. After a detailed discussion, it was observed that it was not possible to postulate all situations of hardship, which would govern employees on the issue of recovery, where payments have mistakenly been made by the employer, in excess of their entitlement. The following situations were, however, summarized wherein recoveries by the employers, would be impermissible in law:

“(i) Recovery from employees belonging to Class-III and Class-IV service (or Group 'C' and Group 'D' service).

(ii) Recovery from retired employees, or employees who are due to retire within one year, of the order of recovery.

(iii) Recovery from employees, when the excess payment has been made for a period in excess of five years, before the order of recovery is issued.

(iv) Recovery in cases where an employee has wrongfully been required to discharge duties of a higher post, and has been paid accordingly, even though he should have rightfully been required to work against an inferior post.

(v) In any other case, where the Court arrives at the conclusion, that recovery if made from the employee, would be iniquitous or harsh or arbitrary to such an extent, as would far outweigh the equitable balance of the employer's right to recover.”

5. Relying upon this judgment it was held that recovery of such a huge amount from the applicant's pay at the fag end of his service will cause undue hardship and it amounts to nothing but injustice, the impugned order dated 30.12.2014 was set aside and the petitioners were directed to refund the amount so recovered from the respondent's pay before his retirement on 31.07.2015.

6. Aggrieved by this order / judgment, the present writ petition has been filed by the petitioners, inter alia, on the ground that the respondent was a chronic litigant and has filed more than 60 court cases before this court as well as the Central Administrative Tribunal. Besides that, he was also facing 4 criminal cases out of which in two criminal cases he has been admitted on bail. He had also taken loans from various financial institutions and had not given his correct

residential address due to which the banks, courts, and other financial institutions were dragging NWDA also in resolving defaults for the personal indebtedness of the respondent. The respondent had been appearing in person without taking any leave from the competent authority. He had been appearing in the courts at least 97 days during the years 2012, 2013 and 2014. Much emphasis was laid upon the observations made in W.P.(C) No. 5124/2012 filed by the respondent herein wherein the Court commented upon the conduct of the respondent by observing as under:

“The petitioner appears to be spending his time in the corridors of the Central Administrative Tribunal as also the Delhi High Courts evidenced by the fact that he was embroiled his department, “National Water Development Agency” in as many as 16 writ petitions and 9 litigations before the Central Administrative Tribunal..... Instant writ petition is the 17th in number.

“15. We are noting as aforesaid to highlight the fact that the petitioner who has been litigating with his department since the year 2002 seems to be spending his time in the corridors of Court rather than on his desk. It is but obvious that petitioner’s performance would be ‘Average’.”

7. It is further urged that the Superintending Engineer under whose administrative control the respondent was placed earlier, informed that during the above said period, the respondent did not apply for leave except taking casual leave on seven occasions. It is further submitted that there was no need for initiating disciplinary proceedings against the respondent as there was no such provision in the conduct rules. **Rafiq Masih’s** case (supra) was sought to be distinguished on the ground that the observations in that case were confined to recovery

from the employees belonging to Class 3 and 4 or Group C and D servants whereas the respondent is holding Group A post.

8. We have considered the submissions of learned counsel for the petitioners, but do not find any reason to interfere with the impugned order passed by the Tribunal.

9. The respondent is a party – litigant in sixty or more cases before the Central Administrative Tribunal and the High Court. The respondent appears in person in the said litigations. The respondent asserts that he is a whistle blower, the petitioners assert that he is a chronic litigant.

10. An employee is entitled to raise his grievance and file litigation for redressal against the Government employer. The said right should not be negated by preventing or obstructing an employee from approaching the court or appearing in person. Yet, the respondent like other employees must abide by the rules even if he has to attend court cases as an initiator or respondent. The respondent cannot ignore the rules for the rules ensure uniformity and it is a matter concerning basic discipline. Compliance with the rules as well as the right of Government servant to approach and appear in person have to be balanced in a manner that the important individual right is not made nugatory or void, albeit there is compliance with the rules.

11. The petitioners did not, at the relevant time ascertain and verify whether the respondent was taking leave etc. to attend the Court cases.

The petitioners also did not ascertain whether or not the respondent was attending to his duties on dates, when he would appear in the cases. The Tribunal has recorded that in the present case the petitioners had not initiated disciplinary proceedings and had invoked the principle of “no work no pay” under Fundamental Rule 17(1) and have held that the respondent was deemed to be absent of 97 days when he had attended the Court proceedings and the Court dates should be treated as *dies non*. A retrospective exercise was undertaken, a few months before the respondent’s retirement and on all 97 days when Court or Tribunal proceedings were fixed and in which the respondent had possibly appeared, have been treated as “*dies non*”. This is predicated on the assumption that when the respondent had attended the case, he did not attend to the duties and work. The respondent, on the other hand, relies upon his biometric attendance as recorded and also that he was not recorded as absent by his superiors. His attendance was marked in the attendance register. He also relies upon his annual reports wherein he has not been noted as a employee, who had remained absent unauthorizedly. The Tribunal has, in these circumstances, taking into consideration the ratio in **Rafiq Masih** (supra) has noticed that the recovery notice was issued to the respondent when he had less than a year to retire. The respondent was to retire on 31st May, 2014 and as per the order dated 30.12.2014, recovery of Rs.1,81,461/- had to be made between December, 2014 and May, 2015.

12. In our opinion, Tribunal has taken a reasonable view in the factual matrix and reaching their conclusion that the petitioners were not justified in asking for recovery of Rs.1,81,461/-. The order dated 30.12.2014 was to some extent based on assumption and surmise that the respondent would not have attended the office on all dates when Court proceedings were fixed. Attendance for a part of a day etc. were not factored and considered. Contemporaneous official records were conflicting. Evidence and material to show that the contemporaneous official records were tampered or were wrong was not there. The case of the respondent indisputably falls within the second category of ***Rafiq Masih*** (supra) alienated hereinabove as the order of recovery was issued on 30.12.2014 and the respondent was due for his retirement on 31.07.2015. This category does not make any distinction between the class of employees who were exempted from recovery. As per the admission of the petitioners, employees were not entitled for any pension. Under the circumstances, it was quite iniquitous to recover such a huge amount from the pay of the respondent at the fag end of his service resulting in undue hardship to him. The finding of the Tribunal, we would record, are in consonance with law and we do not think this Court in exercise of writ jurisdiction under Articles 226 and 227 of the Constitution of India should interfere with the said finding.

13. We, therefore, are not inclined to interfere with the directions of the Tribunal quashing and setting aside the impugned order dated 30th

December, 2014 and also directing refund of Rs.90,000/- or any other amount, which has been recovered.

14. The writ petition is accordingly dismissed leaving the parties to bear their own costs.

15. While issuing notice of the writ petition to the respondent, operation of the impugned order was stayed. On 20.07.2016, the Court was apprised by Mr R.V. Sinha, Advocate appearing for the petitioners that an amount of Rs.91,461/- has been recovered from the respondent. Further amount was ordered not to be recovered from the respondent.

16. In view of the fact that the writ petition stands dismissed, the recovered amount be released in favour of the respondent within two weeks of receipt of copy of this judgment.

**SUNITA GUPTA
JUDGE**

**SANJIV KHANNA
JUDGE**

DECEMBER 08, 2016/rd