

\$~
*

IN THE HIGH COURT OF DELHI AT NEW DELHI

+

W.P.(C) 10309/2015

Reserved on : 21st January, 2016

Date of decision: 22nd February, 2016

UNION OF INDIA & ORS.

..... Petitioner

Through: Mr. Gagan Mathur and Mr. Varun
Kumar, Advocates.

versus

K.K. NANGIA

..... Respondent

Through:

CORAM:

HON'BLE MR. JUSTICE SANJIV KHANNA

HON'BLE MR. JUSTICE NAJMI WAZIRI

SANJIV KHANNA, J.:

1. The order under challenge dated 26th August, 2014 passed in OA No.1799/2013 by the Central Administrative Tribunal directs that the respondent herein, namely, K.K. Nangia is entitled to computation of retirement/pensionary benefits on the basis of average of last 10 months' pay including the period when he was working on deputation as Deputy Registrar in the pay scale of Rs.10000-15200 in the Ministry of Agriculture.

2. The respondent had joined the Indian Agricultural Research Institute (IARI), a society, registered under the Societies Registration Act, as an employee on 19th July, 1967. The respondent was working as an Assistant Administrative Officer in IARI in the pay scale of Rs.6500-10500 (pre revised), when on 19th March, 2007, he was sent on deputation to Protection of Plant Varieties and Farmers' Rights Authority under the Ministry of Agriculture as Deputy Registrar in the pay scale of Rs. 10000-15200. While on deputation, he was promoted to

the post of Administrative Officer in the parent department i.e. IARI vide order dated 3rd September, 2007. On repatriation, the respondent joined IARI as Administrative Officer on 17th December, 2007. He retired from service on attaining the age of superannuation on 28th February, 2008.

3. It is an accepted and admitted case of the parties that retirement and pensionary benefits of the respondent have to be calculated on the basis of average pay i.e. emoluments for last 10 months. The case of the petitioner is that the expression “emoluments” means basic pay as defined in Rule 9 (21)(a)(i) of the Fundamental Rules i.e. the pay, which a Government servant was receiving immediately before his retirement or on the date of his death, but as per Note 6 and Note 7 to Rule 33 of CCS (Pension) Rules, 1972 it does not include the pay drawn by a Government servant while on foreign service. It is submitted by the petitioner that the pay received by the respondent while on deputation to Protection of Plant Varieties and Farmers’ Rights Authority under the Ministry of Agriculture would be a foreign service.

4. For the purpose of completeness, we would like to reproduce Note 6 and Note 7 attached to Rule 33 of the CCS (Pension) Rules, 1972, which read as under:-

“Note 6.- Pay drawn by a Government servant while on deputation to the Armed Forces of India shall be treated as emoluments.

Note 7.- Pay drawn by a Government servant while on foreign service shall not be treated as emoluments, but the pay which he would have drawn under the Government had he not been on foreign service shall alone be treated as emoluments.”

Note 6, we perceive and believe, is a positive rule, which declares that pay drawn by a Government servant while on deputation with the Armed Forces would be treated as emoluments. The said rule does not have a

negative stipulation and does not say that pay drawn by a Government servant on deputation to any other department of Government of India, other than Armed Forces, would not be treated as emoluments. Note 6 is an enabling and not a disabling provision. On the other hand, Note 7 is a disabling provision and states that pay drawn by a Government servant while on foreign service would not be treated as emoluments but the pay which the Government Servant would have drawn under the Government had he not been on foreign service shall be treated as emoluments. Note 7 does, in a way, incorporate a deeming fiction. The pay drawn while the employee is working in a foreign service is not to be accorded and taken into account for the purpose of computing pension, instead pensionary benefits have to be computed on the basis of the pay, which the employee would have drawn under the Government, if the employee had not been sent on foreign service.

5. The expression “foreign service” has been defined in Rule 3 (g) of CCS (Pension) Rules, 1972, which reads:-

“Rule 3 (g) ‘Foreign service’ means services in which a Government servant receives his pay with the sanction of the Government from any source other than the Consolidated Fund of India or the Consolidated Fund of a State or the Consolidated Fund of a Union Territory.”

The aforesaid Rule is couched in simple language defines foreign service as a service in which a Government employee receives pay with the sanction of the Government from any source, other than the Consolidated Fund of India or the Consolidated Fund of a State or the Consolidated Fund of a Union Territory. Referring to the said provision in *Sohanlal Vs. Union of India*, ILR (1977) 2 P&H 582, it was observed as under:-

“The plain and brief language quoted above can hardly leave any manner of doubt that two conditions are paramount and have to be satisfied before an employee may be deemed on foreign service. Firstly, its very nature seems to be dependent on the volition of the employer and it is only when the Government sanctions such an employment that an employee is deemed to be on foreign service. Here the emphasis primarily is on the approval or sanction of the employer. One can hardly imagine an employee on foreign service without the sanction or the volition of an employer who may not either wish to part with the employee or be willing to sanction his service elsewhere. It is plain that only when this pre-condition of sanction or approval by the Government is satisfied that the next issue would arise as to the source from which such an employee receives his pay, namely, that this must stem from sources other than the State revenues. Even the learned counsel for both the parties did not seem to be at any variance on the point that both the aforesaid conditions laid out by rule 2.21 have to be satisfied.”

6. The aforesaid passage clearly elucidates that when a Government servant has gone with approval or sanction of the employer, the first condition of the Rule would be satisfied. The second condition relates to the source of fund from which the payment is made. In case of a Government servant, the source should be the Consolidated Fund of India or the Consolidated Fund of a State/Union Territory. If the two conditions are satisfied, the employee is not to be treated as working in foreign service. Logically, as a sequitur, it would follow that when a Government servant is sent on deputation with approval and sanction and his emoluments are paid from the Consolidated Fund of India or the Consolidated Fund of the State/Union Territory, he would not be treated as working in foreign service. Hence, the emoluments received would be taken into account for computing pensionary and retirement benefits. Pertinently, the concept of deputation is predicated on consensus and

involves voluntary decision of the employer to lend services of his employee and corresponding acceptance of such service by the borrowing employer.

7. Difference between “foreign service” and “deputation” was elucidated in *Gangadhar Sahu Vs. State of Orissa*, 1975 SLJ 378, in the following words:-

“It follows from the above rule that in case of deputation to bodies, incorporated or not, which are wholly or substantially owned or controlled by the State Government no consent of the Government servant is necessary; deputation to foreign service is not permissible unless for public reason the duties to be performed after the transfer are such as should be rendered by a Government servant; and to a private employer or to a society the services of a Government servant are not to be loaned out on foreign service conditions unless circumstances wholly exceptional exist or a public advantage which could not be obtained otherwise is thereby secure.”

8. In the facts of the present case, the expression “foreign service” as defined in Rule 3(g) of the CCS (Pension) Rules, 1972 has to be read and understood in the context of IARI, a society registered under the Societies Registration Act. Read in this manner, it will mean that the fund for payment of salary/pay while respondent was on deputation, should emanate and come from IARI and not from any other source. However, we would not like to read down and give such a restricted and narrow meaning to Rule 3(g), for this would mean that an employee of IARI on deputation to the Ministry of Agriculture would be on foreign service. It is an accepted and admitted position that IARI, though a society, was/ is working under the administrative control of the Ministry of Agriculture, who were the first respondent before the Tribunal.

Source of funds of IARI was the Ministry of Agriculture itself. IARI did

not have any other source of funds. In the writ petition before us, IARI has accepted that they function under the Department of Agricultural Research and Education, Ministry of Agriculture. Prior to its re-organisation in the year 1966, it was an attached department of the Government of India. The respondent was sent on deputation i.e. outside IARI but only to a department of the Ministry of Agriculture, Protection of Plant Varieties and Farmers' Rights Authority. It would be, therefore, incongruous to treat this appointment on deputation as a foreign service. In fact and in reality the said deputation was with the consent of the IARI and the lending was to the Ministry which finances, supervises and controls IARI. Thus the respondent was working under the Ministry of Agriculture. In case, the petitioner wanted to give a restrictive and narrower meaning, they could and should have come out with a circular or instructions.

9. In case, Rule 3 (g) is read literally, it would mean that the respondent would not be treated as working in foreign service, if the payment when the respondent was on deputation was from the Consolidated Fund of India or the Consolidated Fund of a State or the Consolidated Fund of a Union Territory. It is obvious that this condition is satisfied in the present case as the respondent while working on deputation in the Protection of Plant Varieties and Farmers' Rights Authority was drawing his salary and emoluments from the Consolidated Fund of the State and not from any other source.

10. It is obvious to us that CCS (Pension) Rules, 1972 including Rule 3(g) cannot be given a literal meaning and the doctrine of *mutatis mutandis* will apply. According to this Rule, the CCS (Pension) Rules, 1972 would apply with modification/changes necessary as to the name, offices and like. *Mutatis Mutandis* Rule brings in an idea of adoption, insofar as it is necessary for the purpose, making a change without

altering the essential nature of the thing changed (see *Ashok Service Centre versus State of Orissa*, (1983) 2 SCC 82). In other words, we have to read the CCS (Pension) Rules, 1972, including Rule 3(g) in the context that IARI is an autonomous organization registered under the Societies Registration Act. Nevertheless, for examining the application of Rule 3(g) we would enquire into and examine the source of funds of IARI and the Ministry of Agriculture. IARI is entirely dependent on and wholly funded by the Ministry of Agriculture. IARI does not carry out any commercial or business activities as such. IARI though a Central autonomous body, for its funds, has to rely upon and is dependent on the Ministry of Agriculture. Source of funds is thus same and identical.

11. Read in this manner, we do not think that it would be correct to state that the respondent was on foreign service while working on deputation in the Ministry of Agriculture from 19th March, 2007 till he was repatriated to his parent department on 17th December, 2007. We may record that the respondent vide order dated 3rd September, 2007, was promoted to the post of Administrative Officer in IARI, which carried the pay scale of Rs.10,000-15,200. This order was partly modified and he was granted proforma promotion with effect from 9th October, 2007 i.e. the date his junior had joined the post of Administrative Officer, since at that time the respondent was on deputation. The aforesaid dates are relevant and would show that if the parent department i.e. IARI had not agreed to lend the respondent to the Ministry of Agriculture, he would have been promoted to the post of Administrative Officer on 3rd September, 2007. The said post carries the pay scale of Rs.10,000-15,200.

12. In view of the aforesaid discussion, we do not find merit in the present writ petition and for the reasons set out above, we affirm the order of the Tribunal. We are of the opinion that the respondent was not

in foreign service and the emoluments received by him while on deputation in the Ministry of Agriculture should be taken into consideration for computing pensionary and retirement benefits. The Tribunal while granting relief to the respondent in terms of the ratio in *Union of India vs. Tarsem Singh*, (2008) 8 SCC 648 had clarified that arrears would be payable for the period of three years prior to the filing of the OA and not for the earlier period. The said direction is not impugned before us and is categorical. We would also clarify that the deputation allowance would not form part of the emoluments.

13. With the aforesaid observations and directions, we dismiss the writ petition. There will be no order as to costs.

-sd-
(SANJIV KHANNA)
JUDGE

-sd-
(NAJMI WAZIRI)
JUDGE

FEBRUARY 22, 2016
NA/ssn