

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

+ **W.P.(C) 2973/2016 & CM No.12504/2016**

% **Reserved on:** 16th January, 2017
Date of Decision: 31st May, 2017

SWAPAN ROY CHOWDHURY

.....Petitioner

Through: Mr. Vivek Singh,
Advocate

Versus

UNION OF INDIA & ANR.

.....Respondents

Through: Ms. Monika Arora,
CGSC

CORAM:

HON'BLE MR. JUSTICE SANJIV KHANNA

HON'BLE MR. JUSTICE CHANDER SHEKHAR

CHANDER SHEKHAR, J.

The petitioner- Swapan Roy Chowdhury has filed the present writ petition impugning the order dated 12.08.2015 of the Principal Bench of the Central Administrative Tribunal, whereby OA No. 696/2012 filed by the petitioner has been partly disallowed. The petitioner is aggrieved that his prayer for setting aside the order dated 31.10.2011 re-fixing and reducing is pay has been rejected.

2. The petitioner submits that the order dated 31.10.2011 violates the principles of natural justice and is contrary to the mandate of Articles 14 and 20(2) of the Constitution.

3. In order to appreciate the present controversy, we would briefly refer to the facts relevant to the dispute. On 24.08.1973, the petitioner was recruited as a temporary labour by the Indian High Commission at London (High Commission, for short), and his services were regularised with effect from January, 1974. He was thereafter appointed as a messenger with effect from 21.08.1979 and promoted as a clerk-cum-typist with the High Commission on 24.12.1981. The petitioner, it is submitted, was suffering from prolapsed disc in 1989 and advised bed rest. The petitioner remained on prolonged leave from 12.10.1989 to 10.09.1990. This leave was regularised by the High Commission upon the petitioner rejoining service. Thereafter, the petitioner, on request made in writing, was sanctioned 6 months leave with effect from 01.03.1991. On 05.09.1991, the petitioner applied for extension of the leave, which was not granted. The petitioner claims that no response was received despite repeated requests. It is apparent that the leave was not sanctioned. Despite, the petitioner did not report for duty. On 27.07.1992, the petitioner was specifically asked to report for work within a week by the High Commission, failing which action would be taken to terminate his services. The petitioner failed to report for work. By letter dated 05.08.1992, one month's notice was given. By another letter dated 08.09.1992, the High Commission informed the petitioner that his services stand terminated with effect from 04.09.1992. This Office Memorandum dated 08.09.1992 reads:-

“In continuation of this office memorandum of even number dated 5th August, 1992, the services of Mr Swapan Roychoudhury, a locally recruited regular clerk-typist in the High Commission of India, London stand terminated with effect from the afternoon of 4th September, 1992. Consequent upon

termination of his services, Mr Swapan Roychoudhury also stands relieved from this Mission w.e.f. 4.9.1992 (AN). ”

4. The petitioner was re-appointed as a locally recruited contingency clerk on 23.11.1993. Subsequently, on 23.07.1997, the petitioner was appointed as a locally recruited clerk on temporary and *ad hoc* basis. With effect from 10.10.2001, the petitioner was appointed as a receptionist with the High Commission.

5. The petitioner submits that he made several representations to the respondents for regularisation of his services between the period spanning 04.09.1992 and 10.10.2001, as his termination was unfair and unjust. On 29.06.2005, the respondents, upon due consideration, had decided to treat the services of the petitioner as continuous and without any break on re-appointment as a clerk-cum-typist. The petitioner was assured and informed that there would be no change in seniority and he would be allowed notional increments and benefit of past service in pay fixation on his appointment as a receptionist with effect from 10.10.2001. These benefits were to accrue to the petitioner prospectively. However, the period from 4.9.1992 to 23.11.1993 would be excluded and treated as a break. The petitioner was not entitled to count the same for terminal benefits. The petitioner was asked to furnish an undertaking stating that the action of the respondents was to his satisfaction and he would not further pursue the matter. The office order dated 29.06.2005 relied on by the petitioner is reproduced below in entirety:-

“With reference to the representation of Shri Swapan Roy Chowdhury regarding restoration of past services, the competent authority has decided as follows:

- i) *Services of Shri Roy Chowdhury shall be counted as continuous from 6.9.73 till date excluding the period from 4.9.92 to 23.11.93. The excluded period will not qualify for terminal benefits.*
- ii) *There shall not be any change in his seniority as he has since been appointed as Receptionist w.e.f. 10.10.2001.*
- iii) *Shri Swapan Roy Chowdhury's pay shall be protected by allowing notional increments in the scale existed as on 4.9.92 till the date of his promotion to the post of Receptionist. This grant of increments shall be purely notional so as to arrive at his pay as on 10.10.2001 for fixation of his pay in the scale of Receptionist. Due to the aforementioned position, Shri Roy Chowdhury shall not be paid any arrears of pay for any period (s) prior to 1.7.2005. In other words, Shri Roy Chowdhury will not receive any financial benefits retrospectively.*
- iv) *Implementation of the above decision is subject to Shri Roy Chowdhury's undertaking, in writing, that the proposed action meets his full satisfaction and that he will not resort to any representation or legal action hereafter."*

6. Subsequently, vide the Office Order issued by the first respondent on 29.2.2008, the pay of the local staff was revised with effect from 1.10.2007 and the pay of the petitioner was fixed, taking into account his 34 years and 1 month's service, out of which 1 year 2 months are to be treated as 'extraordinary leave'. The order 16.4.2008 issued by the administrative wing of the High Commission, fixed the pay of the petitioner as £1200.

7. The genesis of the dispute, however, lies in the order dated 31.10.2011 whereby the pay of the petitioner was reduced and re-fixed as £1080. For the sake of clarity, the order dated 31.10.2011 is reproduced below:-

"Subject : Re-fixation of pay

Consequent upon the revision of pay-scale of locally recruited regular staffs of the High Commission of India, London w.e.f. 1st October, 2007 vide Ministry's order No.Q/LC/681/23/97 dated 20 February 2008 and in continuation of the Office Order of even number dated 29 February 2008 thereto, the pay of Shri Swapan Roy Chowdhary, Receptionist (local) has been re-fixed as follows:

Date of joining the service	Pay in the existing scale (inclusive of COLA) i.e. prior to revision of pay scales (in GBP)	Length of service at HCI London as on 1.10.07	Revised pay scale w.e.f. 1.10.07 (in GBP)	Pay fixed in the revised pay scale as on 1.10.07 (in GBP) (A)	Minimum benefit for length of service up to 1.10.07 (in GBP) (B)	Total pay as on 1.10.07 (A+B)	Date of next increment	Pay after increment
23.7.97	£492/- (fixed)	10 years 2 months	£1050-10-1400	£1050/-	£20/-	£1010	01.10.2008	£1080/-
							01.10.2009	£1090/-
							01.10.2010	£1100/-
							01.10.2011	£1110/-

2. The above fixation of pay is subject to post-audit check and any excess payment detected in the light of discrepancies noticed subsequently will be refunded to the Government either by adjustment against future payments or otherwise.

3. This issue in supersession of earlier order of even number dated 29 February 2008."

8. The aforesaid order was passed, for as per the respondents, they had erroneously earlier granted benefit vide the office order dated 29.06.2005. The Ministry of External Affairs, the first respondent before us, observed that the Office Memorandum dated 29.06.2005 regularising the services of the petitioner prior to 23.07.1997 as continuous and including the period of absence from duty was not in conformity with the directions issued by them and was contrary to the terms of contingency employment. Further, the

services of the petitioner as contingency clerk from 23.11.1993 to 22.07.1997 could not have been regularised in the absence of any available post to adjust the petitioner's lien. The terms of appointment of the petitioner as contingency clerk had clearly stated that the appointment was temporary and liable to be terminated at any time. There being no post to which the petitioner could have been regularly appointed, regularisation of services from 23.11.1993 up to the date of appointment as a regular clerk was contrary to the Rules, i.e., instructions. This would amount to creation of an additional post where there was none. The power to do so vests with the Ministry. The High Commission in regularising his services from 23.11.1993 to 22.07.1997, when the petitioner was serving only as a temporary contingency clerk, had acted in a manner contrary to law. Accordingly, the petitioner's appointment was to be counted from 23.07.1997 and his pay was re-fixed on the said date at the minimum pay scale of £480-8-720.

9. The petitioner being aggrieved by the order of the respondents dated 31.10.2011, filed the OA 696/2012 before the Tribunal which has been partly allowed. The Tribunal has declined to interfere with the order dated 31.10.2011 to the extent of re-fixation of pay. However, the Tribunal, has directed that the respondents would not be entitled to recovery of the excess payment made to the petitioner in view of the decision in *State of Punjab Vs. Rafiq Massih*, (2015) 4 SCC 334.

10. The contention of the petitioner is that the competent authority having granted the benefit of the past service from 06.09.1973 till 04.09.1992 and having notionally fixed the pay on re-appointment vide order dated 25.06.2005, the benefit granted could not have been withdrawn.

The petitioner had worked as a contingency clerk for the period between 23.11.1993 to 22.07.1997 Further, the order dated 31.10.2011 had resulted in disregarding the service rendered by the petitioner from 06.09.1973-23.07.1997 and was thus, arbitrary and illegal.

11. The Tribunal, in the impugned order, has relied on the terms and conditions of Service of Locally Recruited Personnel of The High Commission of India, London (Conditions of Service, for short) to hold that the rights of the petitioner were governed by the terms of the contract. The order dated 04.09.1992 terminating the services of the petitioner did not suffer from any infirmity. Further, in view of the decision in ***Maharashtra State Board of Secondary and Higher Secondary Education & Anr. v. Paritosh Bhupeshkumar Sheth & Ors., 1984 (4) SCC 27***, the respondents had the right to correct the error in fixation of pay which was an integral part of functioning and power of the respondents. Consequently, there was no illegality or error in the order dated 31.1.2011 re-fixing/reducing the pay of the petitioner.

12. We are inclined to agree with the reasoning recorded by the Tribunal for rejecting the prayer of the petitioner. Rule I of the Conditions of Service relied upon by the Tribunal reads as under:-

“I.CONTINUANCE:

(a) All appointments to local posts will be temporary.

(b) Subject to the following conditions, the High Commission may retain the services of any locally recruited person till he/she attains the age of 60 years;

(i) If the Government of India decides that a local post should be abolished or converted to an India-based one, the services of

the incumbent thereof are liable to be terminated after giving two months notice;

(ii) The incumbent of any post may resign from service after giving the High Commission two months notice;

(iii) However, the services of any incumbent may be terminated on medical grounds or for reasons of insubordination, intemperance, misconduct and breach of discipline, without any notice.”

13. The aforestated rule would show that all appointments to local posts at the High Commission were to be treated as temporary and were liable to be terminated with a prior notice of two months. Further, services of a person appointed to a local post could also be terminated without notice on medical grounds or where such person had been charged with insubordination, intemperance, misconduct or breach of discipline. The petitioner being a locally recruited personnel, he was governed by the aforestated Conditions of Service. Furthermore, a perusal of the official documents filed on record would show that the services of the petitioner were terminated with effect from 04.09.1992 after consulting the Law Officer of the High Commission who had advised that as per the Conditions of Service, one month's prior notice be given to the petitioner before terminating his services. The termination order was never challenged by the petitioner when it was passed and implemented. Thus, the second engagement as a receptionist with effect from 10.10.2001 would not result in continuous service from 06.09.1973. It was also peculiar to add and count notional increments granted till termination on 04.09.1992 to arrive at the pay as on 10.10.2001 on appointment of the petitioner as a receptionist.

14. Examining the issue with reference to the Memorandum dated 29.06.2005, and whether or not it was issued by the competent authority, the minutes dated 16.09.2008 filed on record clearly state that that the Ministry, i.e., the respondent No.1 had not authorised or sanctioned the regularisation of the services of the petitioner for the entire period from 06.09.1973 including the period between 23.11.1993 and 22.07.1997. The Ministry had been approached for regularisation of services for the period spanning 04.09.1992 to 23.11.1993. However, vide office order dated 29.06.2005, the services of the petitioner had been regularised without any break on re-appointment as a clerk-cum-typist, including the period of contingency appointment between 23.11.1993 and 22.07.1997. Such regularisation had serious financial implications and consequences. Further, it would result in similar claims from other employees for regularising contingency employment. It was accordingly directed that the period between 23.11.1993 and 22.07.1997 could not be treated as regular and was not be counted for any benefits including seniority. The services of the petitioner for the purpose of fixing seniority and all other practical purposes was to be considered from 23.07.1997. Thus, the pay of the petitioner was found to have been wrongly fixed by the authorities, was corrected vide order dated 16.4.2008 and the pay was re-fixed. The respondents, therefore, were well within their rights to correct the error and mistake that had occurred in the pay fixation.

15. We are of the opinion that the impugned order of the Tribunal does not require interference. It is reiterated, for the sake of clarity that the High Commission had no authority to regularise the services of the petitioner and no such powers were vested with the High Commission. The order dated

29.06.2005 had not been issued by the competent authority and hence had no force of law. The petitioner, being a contractual employee, would be governed by the terms and conditions of the contract signed by him at the time of his joining and his services can be terminated under the Conditions of Service. The services of the petitioner from 6.9.1973 till 29.6.1995, excluding the period from 4.9.1992 to 23.11.1993, cannot be treated as a part and continuous service till 23.07.1997. The order dated 31.10.2011 being in accordance with law cannot be interfered and set aside. However, so far as recovery of excess payment of salary is concerned, the Tribunal has directed that the respondents would not be entitled to recovery of payments made in terms of the decision in *Rafiq Massih* (supra). This direction is not challenged by the respondent and has become final.

16. Accordingly, the writ petition is dismissed, with no order as to costs. The pending application is also dismissed.

(CHANDER SHEKHAR)
JUDGE

(SANJIV KHANNA)
JUDGE

MAY 31 , 2017

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