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

+ **W.P.(C) 7630/2016**

Date of decision: 23rd March, 2017

O.P. NAHAR

..... Petitioner

Through Mr. Rakesh Kr. Khanna, Sr. Advocate
with Mr. Virendra K. Singh, Ms. Shefail Jain, Ms.
Mahima Rath, Ms. S. Bushra Kazim and Mr. H.S.
Sachdeva, Advocates.

versus

UNION OF INDIA

..... Respondent

Through Mr. Akshay Makhija, CGSC with Ms.
Divya Kapur, Advocate.

CORAM:

HON'BLE MR. JUSTICE SANJIV KHANNA

HON'BLE MR. JUSTICE CHANDER SHEKHAR

SANJIV KHANNA, J. (ORAL)

O.P. Nahar, in this writ petition, impugns the order dated 5th February, 2016, whereby OA No.3820/2013 filed by him has been dismissed by the Central Administrative Tribunal (Tribunal, for short).

2. The petitioner, who was earlier a Legal Adviser and ex-officio Additional Secretary (Conveyancing), Department of Legal Affairs, Ministry of Law and Justice, upon selection was appointed as the Chairperson, Appellate Tribunal for Foreign Exchange (ATFE, for short), vide letter dated 16th June, 2005 in the pay-scale of Rs.26,000/- (fixed). He

retired from the said post on 13th November, 2009, on attaining the age of 65 years and after rendering service for 4 years, 4 months and 13 days.

3. The petitioner had credited earned leave for 132 days, as the Chairperson, ATFE. Relying upon O.M. No. 3/6/97-Estt. (Pay II) dated 29th January, 1998, he had claimed entitlement to encashment of 50% of this earned leave i.e. 66 days.

4. As the respondent authorities had rejected the prayer and did not make payment, the petitioner filed OA No.3820/2013 with the following prayers:-

“(i) direct the respondent to pay the amount of encashment of ½ earned leave 132 days along with interest @ 24% from the date of demand letter dated 11/2/2013;

(ii) direct the respondent to pay an amount of Rs.1,50,000/- as compensation for harassment and mental agony to the consumer due to deficiency in service on his part;

(iii) direct the respondent to pay Rs.63,000/- as costs of litigation;

(iv) pass such and other orders, as this Hon’ble Tribunal may deem fit and proper in the facts and circumstances of the case.”

5. The Tribunal by the impugned order, as noticed above, has dismissed OA No. 3820/2013 holding that the ATFE is not a Regulatory Authority and the Appellate Tribunal for Foreign Exchange (Recruitment, Salary and

Allowances and other Conditions of Service of Chairperson and Members) Rules, 2000 (Rules, for short) do not postulate payment or encashment of earned leave. The OM dated 29th January, 1998 was not applicable to the petitioner, except for Rule 11, which relates to allotment of accommodation.

6. We have heard the learned senior counsel appearing for the petitioner and the counsel for the respondent. Learned senior counsel has produced before us Order No.68 dated 29th June, 2005, which records that consequent to petitioner's selection as Chairperson of the ATFE, the Competent Authority was pleased to relieve the petitioner to enable him to take charge of the said post. The petitioner was deemed to have retired from Government service with effect from the date he joined the post of Chairperson.

7. Letter dated 16th June, 2005, offering appointment to the petitioner as Chairperson of the ATFE, which has been relied upon by the petitioner, reads as under:-

“With reference to your application dated 31-01-2005, I am directed to say that the President is pleased to offer an appointment as Chairperson, Appellate Tribunal for Foreign Exchange (ATFE) in the scale of Rs.26,000/- (fixed). The terms and conditions of service as Chairperson will be governed by the Appellate Tribunal for Foreign Exchange (Recruitment, Salary and Allowances and other Conditions of Service of Chairperson and Members) Rules, 2000 read

with DOP&T's O.M. NO.3/6/97-Estt. (Pay-II) dated 29-1-1998 (one copy each thereof is enclosed).

2. In case, you are willing to accept the offer of appointment as Chairperson, A.T.F.E on the terms and conditions aforesaid and enclosed, you are requested to send your acceptance immediately and in any case latest by 30-6-2005.
”

The aforesaid letter specifically refers to the Rules and stipulates that the Rules have to be read with OM dated 29th January, 1998.

8. The Rules prescribe that the Chairperson would be paid Rs.26,000/- (fixed) per month and would hold office for a period of five years or till he attained the age of 65 years, whichever was earlier. The Rules also stipulate that the Chairperson shall be governed by the Contributory Provident Fund Rules, 1962 and would not have the option to subscribe under the General Provident Fund Rules. Additional pension and gratuity would not be admissible for service rendered in the ATFE. Rules 11 and 13 of the Rules are reproduced below as they are relied upon and have to be interpreted:-

“11. Accommodation.

The guidelines as laid down in OM No.3/6/97-Estt. (Pay II) dated 29.1.1998 of the Department of Personnel and Training shall apply. However, if a sitting Judge of High Court is appointed as Chairperson, he shall be eligible for allotment of general pool accommodation in accordance with High Court Judges Rules, subject to availability.

12. x x x x x

13. The conditions of service of the Chairperson or Members in respect of matters for which no provision is made in these rules shall be the same as may for the time being be applicable to other such persons of a corresponding status.”

Rule 11, which as per the heading relates to accommodation, states that the guidelines in the OM dated 29th January, 1998 issued by the Department of Personnel and Training shall apply. If a sitting Judge of High Court is appointed as Chairperson, he would be eligible for allotment of general pool accommodation in accordance with the High Court Judges Rules, subject to availability. Guidelines in the OM dated 29th January, 1998, by the specific stipulation in Rule 11 have been made applicable to the Chairperson/Members of the Appellate Tribunal in respect of grant of accommodation. Rule 13, which is a residuary Rule, states that conditions of service of the Chairperson or Members in respect of which no provision is made in the Rules shall be the same as may for the time being be applicable to any other person of corresponding status.

9. At this stage, it would be relevant to refer to the heading and paragraphs 1 and 2 of the OM dated 29th January, 1998, which read:-

Subject - Perquisites and some important terms and conditions for the Chairperson and Members

of the Regulatory Authorities and allied matters-policy regarding-

As the Ministries/Departments are aware, during the last few years a number of Regulatory Authorities have been set up and some more are proposed to be set up as a part of Government's efforts to restructure the administrative machinery consistent with the ongoing economic reforms and emphasis on a more effective and result- oriented administrative structure. In this context, the question of laying down uniform terms and conditions of appointment and perquisites in respect of the Chairperson and the members of various Regulatory Authorities was under the consideration of the Government for sometime past and it has now been decided to prescribe uniform guidelines annexed to this Office Memorandum.

2. These guidelines will be applicable to Regulatory Authorities where the appointments have not been announced so far, where there are constitutional or statutory obligations to prescribed terms and conditions different from those being specified in these guidelines or where terms and conditions have already been offered to a Chairperson and/or Member (s). In cases where a retired Judge of the Supreme Court or the High Court has already been appointed as Chairperson or member, the provisions of OM No.19048/7/80-EIV dated the October 8, 1987 of the Department of Expenditure would be applicable.”

The heading/subject of the said OM shows that it deals with perquisites and other important terms and conditions for the Chairperson and Members of the Regulatory Authorities. The expression “Regulatory Authorities”, which is used in the heading/subject, is also to be found in the

first paragraph of the OM as it states that in the last few years a number of Regulatory Authorities had been set up and some more were proposed to be set up as a part of the Government's efforts to restructure the administrative machinery. The second paragraph specifically states that the guidelines laid down by OM dated 29th January, 1998 would be applicable to Regulatory Authorities where appointments had not been announced so far.

10. Paragraphs 4 and 5 of the OM are as under:-

“4. While offering appointment to any new incumbent as Chairperson or Member, the terms and conditions of appointment being prescribed hereby should clearly be indicated in the letter of offer and the written consent of the appointee obtained before the letter of appointment is issued or before assumption of charge by the incumbent.

5. The Chairperson and Member(s) shall be deemed to have retired from Govt. service upon taking up their respective appointments in the Regulatory Authority.”

It may be also relevant to quote some paragraphs from the Annexure to the said OM, which has the heading “PERQUISITES AND SOME IMPORTANT TERMS AND CONDITIONS FOR THE CHAIRPERSON AND MEMBERS OF THE REGULATORY AUTHORITIES -POLICY REGARDING”:-

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“(h) ACCOMMODATION: The Chairperson and

Members of a Regulatory Authority located in Delhi or in one of its satellite towns would be given the option of claiming House Rent Allowance of 30% of the basic pay drawn if they stay at Delhi but no house would be hired by the Authority or allotted by the Government. Outside Delhi, Members and the Chairperson would be entitled to rented unfurnished accommodation with built-up area measuring around 300 sqm. for Members and 350 sqm. for the Chairperson with suitable open land area appurtenant as permissible under the regulations of the concerned municipal bodies. The same facility would be extended to retired Judges of the Supreme Court and High Court as well, instead of the present facility (rent free accommodation or 12-1/2% HRA).

XXXXX

(m) LEAVE A Chairperson or Member would be entitled to 30 days of Earned Leave for every year of service. The payment of leave salary during leave shall be governed by Rule 40 of CCS (Leave) Rules, 1972. A person would be entitled to encashment of 50% of Earned Leave to his credit at any time.”

11. The short question, which arises for consideration, is whether the ATFE under the Foreign Exchange Management Act, 1999 (Act, for short) is a Regulatory Authority and, therefore, the OM dated 29th January, 1998 would be applicable. Learned senior counsel appearing for the petitioner relies on the letter dated 16th June, 2005, which specifically refers to the OM dated 29th January, 1998. Reliance is also placed upon paragraph 4 of the OM to contend that the letter of appointment dated 16th June, 2005 was

issued in terms thereof. The petitioner was deemed to have retired in terms of paragraph 5 of the OM dated 29th January, 1998. Our attention is drawn to Sections 13, 16, 18, 19 and 23 of the Act.

12. Having examined the contents of the OM dated 29th January, 1998 and the letter of appointment dated 16th June, 2005, we are unable to agree with the petitioner that the ATFE under the Act is a Regulatory Authority. The Act has different chapters. Chapter II of the Act deals with regulation and management of foreign exchange. This refers to the regulatory part. The petitioner was not a part and was not performing any regulatory functions specified in Chapter II or even in Chapter III, which relates to authorized persons, the Reserve Bank's powers to issue directions to authorized persons and power of Reserve Bank to inspect authorized persons.

13. Section 13 of the Act deals with penalties which can be imposed on any person who contravenes any provision of the Act or any rule, regulation, notification, direction or order issued in exercise of powers under the Act, or contravenes any condition subject to which an authorisation was issued by the Reserve Bank etc. This refers to the adjudicatory and penal powers. Under sub-section (1) to Section 13, penalty may be imposed up to thrice the

sum involved in such contravention where such amount is quantifiable, or up to two lakh rupees where the amount is not quantifiable, and where such contravention is a continuing one, further penalty which may be extended to five thousand rupees for every day after the first day during of contravention may be imposed. Sub-section (2) to Section 13 states that the authority adjudicating contravention under sub-section (1), may, if he thinks fit, in addition to the penalty which can be imposed under sub-section (1), direct confiscation of currency, security, money etc. in respect of which contraventions have taken place.

14. Section 17 deals with appeals to the Special Director (Appeals), who has the power to hear appeals against orders of the adjudicating authority. The ATFE, as per Section 18, has the power to hear appeals against the adjudicating authority and Special Director (Appeals). The adjudicating authorities are performing adjudication functions and are not performing regulatory functions. Thus, the ATFE is not a Regulatory Authority and is performing only the adjudicatory functions envisaged as per the Act. Penalties, which are imposed by the adjudicating authority, are not in exercise of the regulatory functions. The Chairperson of the ATFE acts as the Chairperson of the appellate forum over orders passed by the

adjudicating authority and does not perform regulatory functions under the Act.

15. Section 23 of the Act stipulates that the salary and allowances payable to and the other terms and conditions of service of the Chairperson and other Members and Special Director (Appeals) shall be such as may be prescribed. Clause (e) to sub-section (2) to Section 46 provides that the Central Government in exercise of the said power can make rules with regard to salary and allowances payable and other terms and conditions of service of the Chairperson and other Members of the ATFE and Special Director (Appeals). Thus, the Central Government may by a notification make rules to carry out the provisions of the Act. Rule 11 makes the guidelines in OM dated 29th January, 1998, applicable specifically to providing of accommodation. This OM has restricted applicability i.e. relating to accommodation. The OM is not made applicable as far as other guidelines are stipulated therein. Rule 13 states that service of the Chairperson or Members in respect of matters for which no provision has been made in the Rules shall be the same for the time being as applicable to other person of corresponding status. It is not stated in Rule 13 that the OM dated 29th January, 1998 would be applicable on residuary aspects or matters not

specifically covered and stipulated by the Rules. Rule 13 indicates to the contrary. It is not the case of the petitioner that Chairperson of other corresponding status Tribunals are entitled to leave encashment.

16. On being asked, learned senior counsel appearing for the petitioner accepts that on deemed retirement from the government service, the petitioner had received encashment of earned leave for a period of 300 days. In case, we accept the request of the petitioner, he would be entitled to encashment of earned leave for the second time. We do not think that the terms and conditions of service had any such stipulation. As recorded and noticed above, it is not the case of the petitioner that chairpersons of Tribunal corresponding status are entitled to and have been paid second encashment of earned leave.

17. In view of the aforesaid, we do not find any merit in the present writ petition and the same is dismissed, without any order as to costs.

SANJIV KHANNA, J

CHANDER SHEKHAR, J

MARCH 23, 2017
NA/VKR