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

+ **Date of Decision: November 29, 2018**

+ **W.P.(C) 11919/2016**

SHIV MANGAL RAI Petitioner
Through: Mr. Puneet Taneja, Advocate.

versus

UNION OF INDIA AND ORS Respondents
Through: Ms. Arti Bansal, Advocate.

+ **W.P.(C) 11936/2016**

BASISTHA NARAYAN CHAUDHARY Petitioner
Through: Mr. Punjeet Taneja, Advocate.

versus

UNION OF INDIA AND ORS Respondents
Through: Ms. Arti Bansal, Advocate.

CORAM:
HON'BLE MR. JUSTICE VIPIN SANGHI
HON'BLE MR. JUSTICE A.K.CHAWLA

A.K.CHAWLA, J. (ORAL)

1. Two senior Indian nationals, now aged about 70 years, are once again before this Court by way of writ petitions viz. W.P.(C) 11919/2016, *Shiv Mangal Rai vs. Union of India & ors* and WP(C) 11936/2016, *Basistha*

Narayan Chaudhary vs. Union of India and ors. They seek issuance of the writs of certiorari and mandamus to the respondents for being released the pensionary benefits having served in the respective Military Pension Paying Offices of Government of India at Pokhara and Dhankutta in Nepal, for almost 42 years or so.

2. Succinctly, the relevant facts are that the petitioner in WP(C) 11919/2016 Sh. Shiv Mangal Rai in short 'Shiv' and the petitioner in WP(C) 11936/2016 Sh. Basistha Narayan Chaudhary in short 'Basistha' were initially appointed as LDCs on 06.10.1963 and 14.05.1965 respectively, by the First Secretary, Indian Embassy, Nepal, in the Pension Paying Office, Pokhara, on a purely temporary basis. They came to be confirmed to the said post on permanent basis against sanctioned posts on 28.03.1972. While working in such positions they came to be promoted as UDCs, Head Clerks and then Sub-Treasury Officers. Both the petitioners on attaining the age of superannuation have been released their retiral sans pensionary benefits. Pensionary benefits have come to be denied on the premise that they were locally recruited staff and therefore, the pensionary and the other benefits, as applicable to the regular Govt. of India employees (India based), were not applicable to them. On the representation(s) made, which were declined, the petitioners approached Central Administrative Tribunal in short 'CAT' by way of OA 789/2008. On 05.03.2010, CAT directed the respondent No.2 through the Secretary, Ministry of External Affairs, to take steps to consider the possibility of recognising the long and devoted services of the applicants and others like them for grant of suitable benefit at the end of their service in consultation with Nodal Ministries/Departments as necessary, and, the

decision taken be intimated to the applicants by a speaking order. Ministry of External Affairs vide communication dated 13.07.2010 reiterated its stand that the extant rules governing the service conditions of the locally recruited employees do not permit payment of the pensionary benefits, though, the post-retirement gratuity in recognition of the service rendered at the pension paying office, Pokhara (Nepal) were paid. Shiv again approached CAT assailing the order dated 13.07.2010 issued by the Ministry of External Affairs refusing to grant the pensionary benefits. This came to be dismissed on 11.11.2011. Aggrieved thereof, Shiv and Basistha filed writs being WP(C) 5502/2013 and WP(C) 4550/2015 *inter alia* adverting to documents obtained by them later, contending that they were the employees of Pension Paying Office of the Ministry of Defence and not the Ministry of External Affairs. Said writ petitions were disposed of vide orders dated 15.05.2015 with the liberty to the petitioners to file a review application based on the said documentary evidence, which, according to them, were not available to them during the pendency of the original applications before CAT. On the liberty so given, petitioners filed RA no. 232/2015 before CAT seeking recall of the orders dated 05.03.2010 and 11.11.2011. This RA again came to be dismissed by CAT vide order dated 09.05.2016 and that has resulted into filing of the instant two writ petitions by Shiv and Basistha respectively. Counter and additional affidavits in these writ petitions have come to be filed only by the Ministry of External Affairs- the respondent no.2. No counter affidavit came to be filed on behalf of the Ministry of Defence - the respondent no.1.

3. In the submissions of the learned counsel for the petitioners, the petitioners were the employees of Military Pension Paying Offices of the Ministry of Defence, Govt. of India and their salaries and other perks were always released by the Ministry of Defence. It was also strenuously contended that though the petitioners' initial appointment was made by the First Secretary, Indian Embassy, Nepal, on behalf of Ambassador of the Embassy in a purely temporary capacity, they had actually so worked against sanctioned posts as per sanction letter no. Y.I(7)/60/541-S/D (Pension/Services) dated September 5, 1960 in short 'the sanction letter'. In his submissions, the services of the petitioners were not only regularized against permanent posts, they were even promoted against sanctioned posts of UDCs, Head Clerks and then Sub-Treasury Officers and therefore, the mere fact of their having been initially appointed locally without due process of their selection against sanctioned posts by the concerned Ministry itself, was, in any event, rendered irrelevant. It was also his submission that CAT, at any stage, never recorded a finding for the petitioners being the locally recruited employees of "Missions/posts abroad" and that the rule 1(3)(i) read with rule 10(1-B) of the Central Civil Services (Temporary Service) Rules in short 'the Temporary Service Rules' also entitled the petitioners the pensionary benefits. To buttress the submissions that the petitioners were the employees of the Ministry of Defence and not that of the Ministry of External Affairs, the learned counsel adverted to the letter dated 05.09.1960 of the Ministry of Defence pertaining to the sanction of the posts for establishment of all-the- year round pension paying offices at Pokhara and Dhankutta as also the pay bill adjustable by CDA (Army), Meerut. Here, it

may be noted that these are primarily the two documents, on the premise whereof, this Court had directed CAT to consider its decision dated 11.11.2011 on the review application made by the petitioners, which came to be dismissed vide the impugned order dated 09.05.2016. Also, according to the learned counsel for the petitioner, CAT had erred in not appreciating the facts of the case of similarly placed another employee namely, Sh. Ram Sarup Sharma, who was granted the relief of pension by CAT vide judgment dated 20.04.1988, which stood affirmed by the Supreme Court. It was thus strenuously contended that the impugned order is not sustainable and the petitioners are entitled to the reliefs prayed.

4. As observed to earlier, the Ministry of Defence has not chosen to file its counter-affidavit. The counter-affidavit and the additional affidavit have come to be filed only by the Ministry of External Affairs. The Ministry of External Affairs in the counter-affidavit as also the additional affidavit that came to be filed in pursuance of the directions of this Court has reiterated that CCS (Pension) Rules were not applicable to the locally recruited employees of Indian Missions/Posts as confirmed by DoPT vide their clarification dated 17.06.2008 and therefore, the petitioners being the locally recruited employees in the Indian Missions/Posts abroad, were not entitled to the benefits under the CCS (Pension) Rules. To say so, the Ministry of External Affairs asserts that the petitioners were appointed on contractual basis directly by the Indian Diplomatic Missions/Posts located abroad and they were so appointed under the Administrative and Financial powers delegated to the Head of the Mission/Head of the Post i.e. Ambassador/High Commission/Consulate General, approved by the Ministry of External

Affairs, as provided therefor. It is also the plea of Ministry of External Affairs that CCS (Pension) Rules are not applicable to the persons locally recruited for service in Diplomatic, Consular or other Indian Establishments in foreign countries for the purpose of pension as defined in para 2(f) of the CCS (Pension) Rules, 1972.

5. At the onset and before we get on to the voyage to ascertain the applicability of the Rules for the entitlement of the petitioners to the pension, it is necessary to look into the aspect of who is the employer of the petitioners. Though, it is true that the petitioners were initially appointed in a purely temporary capacity by the First Secretary, Indian Embassy, Nepal, on behalf of the Ambassador of the Embassy, it is clear from the record that they were so appointed in pursuance of the sanction of posts accorded by the President, for the Establishment of all-the-year round pension paying offices at Pokhara and Dhankutta, to the Chief of the Army staff vide letter dated 05.09.1960 issued by the Ministry of Defence and not the Ministry of the External Affairs. Copy of the pay bill of Shiv, copy whereof is Annexure P-13, the veracity whereof is not disputed, further endorses the fact that the pay and other allowances etc. were also being released to the petitioners by none else but the Ministry of Defence. Ministry of Defence has not chosen to dispute such material factual aspects inasmuch as it has not even filed its counter-affidavit to controvert any of the assertions of the petitioners that they were the employees of Ministry of Defence and not the Ministry of External Affairs. Even the Ministry of External Affairs in its affidavit does not dispute such a fact. We have therefore no hesitation in coming to the conclusion that the petitioners were the employees of the Ministry of

Defence against the sanctioned posts for discharging their duties at all-the-year round pension paying office at Pokhra. In view thereof, we proceed to consider the plea of the Ministry of the External Affairs in refusing the grant of pensionary benefits to the petitioners on the plea that CCS (Pension) Rules were not applicable to the locally recruited employees of Indian Missions/Posts abroad and that, it was so confirmed by DoPT vide their clarification dated 17.06.2008.

6. Undisputedly, the petitioners, initially appointed in a purely temporary capacity, were regularised against sanctioned posts on 28.03.1972. A perusal of the appendix to the letter dated 05.09.1960 issued by the Ministry of Defence to the Chief of the Army Staff which forms part of Annexure P-4 to the writ petition, would show that such appointments could be made either on local recruitment or recruited from India or found from existing staff or deputed from offices in India. In other words, it did not provide for any such appointment locally from Nepal only. This sanction letter dated 05.09.1960 and the appendix thereto, also does not even impliedly suggest that the appointments made against the sanctioned posts, were to be governed by the Temporary Service Rules. It is also not the case of the Ministry of the External Affairs that at the time the petitioners were regularised to the post of LDC and/or they were promoted from time to time against the sanctioned posts, they submitted for being treated as temporary or contractual employees and be not entitled to the pensionary benefits. We therefore, find it difficult to fathom a proposition to the contrary. The petitioners having been regularised against the sanctioned posts and thereafter, having been given promotions upto Sub-Treasurers Officers, the

initial appointment of the petitioners as LDCs on purely temporary basis, loses its significance. It appears that the establishment of all-the-year round pension paying offices at Nepal was an exceptional establishment of the offices for the purpose by the Ministry of Defence, to cater to its special requirements, in view of the topography of Nepal and the available manpower. Suffice to say, none of the respondents has come forward to point out that any such offices have come to be established in any other part of the world but for Nepal. On the face of it therefore, establishment of such offices by the Ministry of Defence, though, within the premises and possibly, under the administrative control of the Embassy there, cannot be construed to imply that the appointments and the deployment in such offices, *ipso facto*, has the effect of diluting their substantive rights, which their regular service attracts. The contention of the learned counsel for the respondents that the petitioners were governed by the guidelines for employment of local employees in Indian Missions/Posts abroad, in the given facts and circumstances, is wholly meritless. Not only that, if, one adverts to these guidelines, which are annexed to the counter affidavit of the Ministry of External Affairs as Annexure C, it would be seen that these guidelines are for the Indian Missions/Posts abroad and the employees, who are recruited locally and are required to execute a labour contract. It simply implies that such guidelines are attracted only in case of the persons signing the labour contracts or in other words, are the contractual employees and not the regular employees. The purported clarification given by DoPT copy whereof is annexed to the counter affidavit of Ministry of External Affairs as Annexure F, is therefore, unmerited. For the same reason, the contention

of the respondents for the exclusion of the petitioners from the applicability of CCS (Pension) Rules, 1972 deserves rejection inasmuch as Rule 2(f) of the CCS (Pension) Rules, 1972 excludes its applicability to the persons locally recruited for service in diplomatic, consular or other Indian establishment in foreign countries. Rule 2 of CCS (Pension) Rules reads, as follows :

"2. Application

Save as otherwise provided in these rules, [these rules shall apply to Government servants appointed on or before the 31st day of December, 2003] including civilian Government servants in the Defence Services, appointed substantively to civil services and posts in connection with the affairs of the Union which are borne on pensionable establishments, but shall not apply to -

- (a) railway servants;
- (b) persons in casual and daily-rated employment;
- (c) persons paid from contingencies;
- (d) persons entitled to the benefit of a Contributory Provident Fund;
- (e) members of the All India Services;
- (f) persons locally recruited for service in diplomatic, consular or other Indian establishments in foreign countries;
- (g) persons employed on contract except when the contract provides otherwise; and
- (h) persons whose terms and conditions of service are regulated by or under the provisions of the Constitution or any other law for the time being in force."

A plain reading of the rule foregoing, shows that it is also applicable

to civil government servants in defence services in connection with the affairs of the Union of India. In the said context, it is to recall that we have already observed that the petitioners are the employees of the Ministry of Defence and not that of the Ministry of External Affairs and therefore, by no means, the exclusion as provided for under sub-rule (f) of rule 2 is attracted. Sub-rule (f) pertains to the employees of the Embassy or in other words, the Ministry of External Affairs and not the Ministry of Defence. Any plea to the contrary is therefore, rejected. Even, rule 1(3)(i) read with rule 10(1-B) of the Temporary Service Rules provide for payment of pension to all persons, who hold a civil post including all civilians paid from the defence services estimates under the Govt. of India, which is the case in hand. Relevant rules to that effect of the Temporary Services Rules read, as under:

"1. Short, title commencement and application.

(1) These rules may be called the Central Civil Services (Temporary Services) Rules, 1965.

(2) They shall come into force with effect from 1st May, 1965.

(3) Subject to the provisions of sub-rule (4), these rules shall apply to all persons : -

(i) who hold a civil post including all civilians paid from the defence services estimates under the Government of India and who are under the rule making control of the President, but who do not hold alien or a suspended lien on any post under the Government of India or any State Government;

....."

10. Terminal gratuity payable to temporary Government servants.

(1) Subject to the provisions of sub-rule (1-B), a temporary Government servant who retires on superannuation or is discharged from

service or is declared invalid for further service shall be eligible for gratuity on the same scale as admissible to a permanent Government servant under the Central Civil Service (Pension) Rules, 1972.

(1-A) In the case of a temporary Government servant who is compulsorily retired from service as a disciplinary measure, the provisions of sub-rule (1) shall apply subject to the modification that the rate of gratuity payable in his case shall not be less than two-thirds of, but in no case exceeding, the rate specified in sub-rule (1).

(1-B) In the case of a temporary Government servant who retires from service on attaining the age of superannuation or on his being declared to be permanently incapacitated for further Government service by the appropriate medical authority, after he has rendered temporary service of not less than 10 years or who has sought voluntary retirement by giving three months notice in writing on completion of 20 years service, provisions of sub-rule (1) shall not apply and in accordance with the provisions of the Central Civil Services (Pension) Rules, 1972 -

(i) Such a Government servant shall be eligible for the grant of superannuation, invalid or retiring pension, as the case may be, and retirement gratuity; and

....."

As per these Temporary Service Rules, a Government servant, who renders even temporary service of not less than ten years is entitled to pension as per the CCS (Pension) Rules, 1972. We also take note of the fact that the respondents have equally not disputed the fact that a similar placed another employee Sh. Ram Sarup Sharma, who was granted the relief of pension by CAT vide judgment dated 20.04.1988 and that judgment was affirmed by the Supreme Court. Even, on the grounds of parity, the petitioners have been entitled to the relief prayed. In the given factual conspectus, we are dismayed by the fact that CAT repeatedly failed to advert to the genesis of the grievance of the petitioners despite having been

approached repeatedly, especially, on the Review Application, which has come to be dismissed vide the impugned order.

7. In view of the foregoing, the writ petitions are allowed and the impugned order is set aside. Consequently, the Ministry of Defence-the respondent no.1 is directed to release the pensionary benefits of the petitioners and pay the arrears with interest @ 6% p.a. within four weeks from today, failing which, the arrears shall attract interest @ 12% p.a. Writ petitions stand disposed of accordingly. No order as to costs.

NOVEMBER 29, 2018

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A.K.CHAWLA, J.

VIPIN SANGHI, J.

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