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

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Date of Decision:14.02.2019

% **W.P.(C.) No.13401/2018**

SHRI MUKUL SANWAL

..... Petitioner

Through: In person.

versus

UNION OF INDIA

.....Respondent

Through: Mr.Dev P.Bhardwaj, CGSC with
Ms.Anubha Bhardwaj,
Mr.Jatin Teotia and
Mr.Ram Laxman, Section Officer,
Ministry of DoPT.

CORAM:

HON'BLE MR. JUSTICE VIPIN SANGHI

HON'BLE MR. JUSTICE A.K.CHAWLA

VIPIN SANGHI, J.(ORAL)

1. The petitioner, who appears in person, assails the order dated 09.10.2018 passed by Central Administrative Tribunal ('the Tribunal' for short) in OA No. 1805/2017. The Tribunal has rejected the original application preferred by the petitioner wherein he had assailed the orders/communications issued by the respondent, denying his claim for the pension. He further sought direction to the respondent to pay him pension and other related entitlements along with arrears and interest thereon.

2. The petitioner was appointed to the Indian Administrative Service in 1971. In 1993, the petitioner was deputed on foreign assignment as Policy

Advisor in United Nations. Prior to completion of five years on foreign assignment (which was permissible under the consolidated instructions relating to foreign assignments of Indian experts), the petitioner was transferred within the United Nations by the Secretary General. The Government of India considered the said transfer as a fresh deputation, and his foreign assignment was not extended beyond 1995.

3. The petitioner represented for extension of his foreign assignment and same was also recommended by State of UP. However, that request was not exceeded to. Eventually, since the petitioner did not rejoin despite notices, the President was pleased to issue a Notification dated 18.05.2001, whereby the petitioner was deemed to have resigned from the Indian Administrative Service with effect from 01.07.1995 in terms of Rule 7(2) of the All India Service (Leave) Rules, 1955. The same reads as under:

“The President is pleased to direct that Shri. Mukul Sanwar, a member of the Indian Administrative Service, borne on the Cadre of Uttar Pradesh (1971 batch) is deemed to have resigned from the Indian Administrative Service w.e.f 01.07.1995 in terms of All India Service (Leave) Rules, 1955.”

4. We may reproduce Rule 7 of the All India Service (Leave) Rules, 1955 under which the petitioner was declared as deemed to have resigned. The same reads as follows :

“7. Maximum period of absence from duty-

1. No member of the service shall be granted leave of any kind for a continuous period exceeding five years.

2. A member of the service shall be deemed to have resigned from the service if he –

(a) is absent without authorization for a period exceeding one year from the date of expiry of sanctioned leave or permission, or

(b) is absent from duty for a continuous period exceeding five years even if the period of unauthorized absence is for less than a year, or

(c) continues of foreign service beyond the period approved by Central Government.

Provided that a reasonable opportunity to explain the reason for such absence or continuation of foreign service shall be given to the member of the service before the provisions of this service rules are invoked.”
(emphasis supplied)

5. The petitioner, admittedly, accepted the said notification and did not assail the same in any proceedings. Even when he filed the present original application before the Tribunal, there was no challenge raised to his deemed resignation. Thus, the status of the petitioner as “*deemed to have resigned*”, is not in question.

6. In 2016, the petitioner—for the first time, raised the claim that his deemed resignation may be treated as voluntary retirement from service from July 1995. He also claimed that he be released his pension with arrears, on the premise that his deemed resignation under Rule 7(2) of the All India Service (Leave) Rules, 1955 does not tantamount to misconduct, and his status as “*deemed to have resigned*” does not invite the penalty of forfeiture of his past service.

7. Since the petitioner’s representations were not acceded to, he approached the Tribunal.

8. The submission of the petitioner is that his deemed resignation under

Rule 7(2) of the All India Service (Leave) Rules, 1955 does not tantamount to a punishment for misconduct. In this regard, he has placed reliance on a judgment of the Kerala High Court in *M.P. Joseph vs. Union of India* in Writ Petition no. 27511/2009. The Kerala High Court in the said decision para 28 has observed as under:

“28. The rule does not impose a penalty for misconduct and the consequence of the deemed resignation is one which flows from the voluntary absence of the member of the service who have also been provided with an opportunity to put forward his explanations for such absence. There is no absolute discretion leading to arbitrariness and the procedure prescribed for granting an opportunity to consider the explanations offered evidently satisfy the rules of fair play. On facts, in each case, according to us, on a judicial review of an order passed under Rule 7(2), what, Courts sitting in review would have to do is to test the said order; on the facts, to see whether any subterfuge was employed and whether the order in fact is one camouflaged under Rule 7(2); which, on moving aside the cloak of camouflage, is actually found to be one of imposition of penalty for misconduct. We cannot on facts discern any subterfuge in the order passed. We cannot also term it as camouflaged one, visiting the petitioner with a penalty for a misconduct. Admittedly the petitioner rejoined duty and on the very next day, abandoned his post after preferring an application for Extra-ordinary Leave and remained absent for a continuous period of five years, callously indifferent to the rejection of leave and direction to rejoin.”

(emphasis supplied)

9. The petitioner submits that at the relevant point of time he was asked

to resign if he wanted to continue with his foreign assignment. However, he was never informed that his resignation may entail denial of his pension.

10. This submission of the petitioner cannot be accepted for the reason, that the petitioner was a senior IAS officer and he ought to have been aware of the relevant service rules applicable to him and in particular Rule 5 of the All India Services (Death-cum-Retirement Benefits) Rules 1958 ('the AIS (DRB) Rules' for short) which reads as under:

"5. Removal, Dismissal or Resignation from Service.-

5(1) No retirement benefits may be granted to a person who has been dismissed or removed from the Service or who has resigned from the service:

Provided that, if the circumstances of the case so warrant the State Government may grant to a person who has been dismissed or removed from the Service a compassionate allowance, not exceeding two-thirds of the retirement benefits which would have been admissible to him if he had been invalidates and not dismissed or removed from the Service.

5(2) Subject to the provisions of Rule 5A, where a member of the service is required to retire or resign from the service as a condition of his appointment under a Statutory or other body, he shall be granted the retirement benefits to which he would have been entitled if he had been invalidates from the Service and not resigned or retired."

(emphasis supplied)

11. Moreover, the conduct of the petitioner does not support his submission because, even though he was deemed to have resigned on

18.05.2001, he never raised a claim for grant of pension till as late as 2016. If the understanding of the petitioner had been that he was entitled to pension as a matter of right, despite his resignation, he would have raised the claim in 2001 itself.

12. The petitioner has also placed reliance on the judgment of a learned single Judge of this court in **Sudarshan Kumar vs. Delhi Transport Corporation**; 56(1994) DLT 538, wherein this court observed that if a person is entitled to pension on retirement after completing qualifying service, it follows that the said benefit is a benefit earned by the employee because of the service rendered by him. The learned single Judge in Para 10 observed as under:

“10. If a person is entitled to pension on retirement after completing qualifying service, it follows that, the said benefit is a benefit earned by the employee because of the services rendered by him. Can it be said that the benefit so earned ceases to be a benefit only because, at the end of the qualifying service, the employee resigns? If that is so to be the law, will it not be penalizing such a person from resigning from service, resulting in the forfeiture of the benefit earned. The letter dated 2.9.1993 (Annexure 2) written to the petitioner proceeds on the assumption that benefit of past service will be lost on resignation as per Rule 26. But it fails to consider the implications of Rule 48 and the need to treat all employees who rendered qualifying years of service on equal footing. It should be noted that the petitioner had no occasion to persuade the first respondent-corporation to retire him by applying a Rule similar to Rule 48 of the Rules. Question of exercising option did not arise in the year 1986 by which time the petitioner had

resigned from service, however, the result of the resignation was in no way different from the normal retirement. In both the cases the employee concerned will be going out of the actual service after rendering a requisite number of qualifying service. In the circumstances, I am of the view that the term “retired w.e.f. 3/08/1981” found in Clause 3 of the Office Order No. 16 should include a person who resigned also w.e.f. 3/08/1981 after rendering qualifying years of service of 30 years as stated in Rule 48 of the Rules. I am of the view that the phraseology used in Clause 3 of the Scheme should be understood in a liberal sense so as to extend the benefit to all those who rendered the qualifying service and there cannot be any artificial distinction between a person who retired and a person who resigned.”

13. On the other hand, learned counsel for the respondent has drawn our attention to the aforesaid Rule 5 of the AIS (DRB) Rules, to submit that resignation may lead to the consequence of the person being denied his retirement benefits. It is, therefore, argued that the petitioner has rightly not been granted the relief by the Tribunal.

14. Rule 7(2) of the All India Service (Leave) Rules, 1955, which is taken note of hereinabove, provides for the consequence that may follow, when a member of an All India Service continues on any foreign service beyond the period approved by the Central Government. The facts of this case taken note of above, clearly show that the petitioner's case fell within the scope of Rule 7(2)(c) of the All India Service (Leave) Rules, 1955 and, consequently, the petitioner was deemed to have resigned vide Notification dated 18.05.2001. As noticed above, the said notification has never been

questioned by the petitioner and, in any event, it is too late in the day for him to do so. Thus, whatever be the background or the circumstances in which the petitioner continued to remain in foreign service, we must proceed on the premise that he is deemed to have resigned as directed by the President vide Notification dated 18.05.2001. The legality and validity of the said notification dated 18.05.2001 has never been questioned on any ground whatsoever and, therefore, we must proceed on the basis that the same is valid. The consequence of the said deemed resignation is provided in Rule 5(1) of the AIS (DRB) Rules. By force of Rule 5(1) of the AIS (DRB) Rules, the petitioner has no vested right to claim retirement benefits on account of his deemed resignation. It is within the discretion of the Government whether, or not, to grant the same. Reliance placed on the decision of the Kerala High Court in **M.P.Joseph** (supra), in our view, is of no avail to the petitioner. In the said decision, the Kerala High Court in Para 21 has observed under:

“21. A resignation from service definitely would be a voluntary act on the part of the petitioner and none who has opted for the same voluntarily and with eyes open can turn around to challenge the necessary consequences on the ground of such acceptance of resignation amounting to termination from service. The above rule also postulates a situation where a member of the service absents himself from duty for a period exceeding five years. But for the absence being on foreign service or under special circumstances determined by the Central Government, the same has to be treated as a voluntary act with knowledge of the provision in the leave rules, of the service, in which such employee is borne. Any explicable circumstance which explains such absence could necessarily be taken

into account by the appropriate authority and it is to that end an opportunity to explain the reasons for absence have been provided to any member of the service who remained absent from duty for a continuous period of five years.” (emphasis supplied)

15. The submission of the petitioner that deemed resignation does not tantamount to penalty on account of misconduct, in our view, is of no relevance and need not be gone into, since the consequence of deemed resignation is statutorily provided for in Rule 5(1) of the said Rules. Therefore, the assumption of the petitioner that pension could be denied to him only in the eventuality of him being found guilty of misconduct; and by way of penalty, has no basis and cannot be accepted.

16. So far as the decision of the learned single Judge of this court in **Sudarshan Kumar** (supra) is concerned, the said decision has not been rendered in the context of Rule 7(2) of the All India Service (Leave) Rules, 1955 taken note of hereinabove. The said Rule 7(2) of the All India Service (Leave) Rules, 1955 is a statutory rule, which specifically deals with a factual situation with which we are concerned. As noticed above, the petitioner has not questioned his deemed resignation communicated by Notification dated 18.05.2001 ever, and it is not open to him now to contend that the same tantamounted to voluntary retirement. The rule authorizing the grant of voluntary retirement in respect of a member of All India Service has been dealt with in Rule 16(2-A) of the AIS (DRB) Rules, which reads as follows :

“A member of the service may, after giving three months’ previous notice in writing to the State

Government concerned, retire from service on the date on which he completes 20 years of qualifying service or any date thereafter to be specified in the notice :

Provided that a notice of retirement given by a member of the service shall require acceptance by the State Government concerned if the date of retirement on the expiry of the period of notice would be earlier than the date on which the member of the service could have retired from service under sub-rule (2) :

Provided further that a member of the service who, is on deputation to a corporation or company wholly or substantially owned or controlled by the Government to a body controlled or financed by the Government, shall not be eligible to retire from service under this rule for getting himself permanently absorbed in such corporation, company or body.” (emphasis supplied)

17. The petitioner did not comply with Rule 16(2-A) of the said Rules contemporaneously, and his claim for treating his resignation as voluntary retirement, cannot be accepted at this stage.

18. In our view, the matter does not end there. Rule 5(1) of the AIS (DRB) Rules, firstly does not mandatorily debar the grant of pension to the person who has been dismissed or removed from service, or who has resigned from the service. The use of the word “may” in Rule 5(1) plainly shows that the pensionary benefits “may” be denied by the Government in its discretion. This also means that the Government may, in the facts of the case under consideration, also decide not to deny the pensionary benefits to the concerned person. There is no reason to read the word “may” as “shall” in the present context. Like all other discretionary powers, even this power has to be exercised on sound and germane considerations, and it cannot be exercised unreasonably, whimsically, arbitrarily, or on extraneous or

misplaced considerations. Secondly, even if the Government were to decide not to grant the pensionary benefits on the examination of the facts and circumstance of a case, the proviso to Rule 5(1) shows that the government still has the discretion to consider whether the circumstances of the case warrant the grant to such person – who has been dismissed or removed from the service, compassionate allowance not exceeding two-thirds of the retirement benefits.

19. Pertinently, a reading of the proviso to Rule 5(1) of the AIS (DRB) Rules shows that the same only talks about the discretion of the Government to grant compassionate allowance in the case of dismissal or removal of the officer from service. The proviso does not specifically deal with the case of an officer, who has resigned, or is deemed to have resigned from service. An officer who is dismissed or removed from service, i.e. an officer who is found guilty of misconduct and is, therefore, visited with the penalty of dismissal or removal from service, can certainly not be better off than a person who resigns, or is deemed to have resigned from service after rendering qualifying service. In respect of an officer, who resigns, or is deemed to have resigned, there is no proven misconduct.

20. Thus, we are of the considered view that the petitioner – who is deemed to have resigned, cannot be denied consideration for grant of pension. Even if the government – for good and disclosed reasons denies pension to him, his case for grant of compassionate allowance – which cannot exceed two-thirds of the retirement benefits, would have to be considered. The exercise of discretion – when considering the aspect of grant of pension, and if not pension, for grant of compassionate allowance,

would have to be graded and the government would be more liberal while assessing the facts and circumstances of the case, for considering the grant of compassionate allowance, even if it does not consider it fit to exercise its discretion in favour of the officer/person for grant of pension.

21. We may, at this stage, take note of the judgment of the Supreme Court in ***Mahinder Dutt Sharma v. UOI & Ors.***, (2014) 11 SCC 684, wherein the Supreme Court laid down some of the considerations which should be kept in mind while considering the claim for grant of compassionate allowance under Rule-41 of CCS (Pension) Rules, 1972.

22. Rule 41(1) of the CCS (Pension) Rules provides that:

“A Government servant who is dismissed or removed from service shall forfeit his pension and gratuity :

Provided that the authority competent to dismiss or remove him from service may, if the case is deserving of special consideration, sanction a Compassionate Allowance not exceeding two-thirds of pension or gratuity or both which would have been admissible to him if he had retired on compensation pension.”

23. Pertinently, Rule 41(1) does not deal with the cases of resignation, or deemed resignation. But Rule 5(1) of AIS (DRB) Rules does. Another important distinction between Rule 41(1) of the CCS (Pension) Rules and Rule 5(1) of the AIS (DRB) Rules is that, whereas Rule 41(1) stipulates that the Government Servant “shall” forfeit his pension upon dismissal or removal from service, Rule 5(1) does not mandatorily so provide. The CCS (Pension) Rules do not apply to members of an All India Service as specifically provided in Rule (2)(e) of the CCS (Pension) Rules.

24. Even though the CCS (Pension) Rules, 1972 are not attracted in the case of an All India Service – to which the petitioner belongs, the principles for grant of compassionate allowance would be the same. The Supreme Court in ***Mahinder Dutt Sharma*** (supra) has observed as follows:

“14. In our considered view, the determination of a claim based under Rule 41 of the Pension Rules, 1972 will necessarily have to be sieved through an evaluation based on a series of distinct considerations, some of which are illustratively being expressed hereunder:

14.1. (i) Was the act of the delinquent, which resulted in the infliction of the punishment of dismissal or removal from service, an act of moral turpitude? An act of moral turpitude is an act which has an inherent quality of baseness, vileness or depravity with respect to a concerned person's duty towards another, or to the society in general. In criminal law, the phrase is used generally to describe a conduct which is contrary to community standards of justice, honesty and good morals. Any debauched, degenerate or evil behaviour would fall in this classification.

14.2. (ii) Was the act of the delinquent, which resulted in the infliction of the punishment of dismissal or removal from service, an act of dishonesty towards his employer? Such an action of dishonesty would emerge from a behaviour which is untrustworthy, deceitful and insincere, resulting in prejudice to the interest of the employer. This could emerge from an unscrupulous, untrustworthy and crooked behaviour, which aims at cheating the employer. Such an act may or may not be aimed at personal gains. It may be aimed at benefiting a third party to the prejudice of the employer.

14.3. (iii) Was the act of the delinquent, which resulted in the infliction of the punishment of dismissal or removal from service, an act designed for personal gains from the employer? This would involve acts of corruption, fraud or personal profiteering, through impermissible means by misusing the responsibility bestowed in an employee by an employer. And

would include acts of double-dealing or racketeering, or the like. Such an act may or may not be aimed at causing loss to the employer. The benefit of the delinquent could be at the peril and prejudice of a third party.

14.4. (iv) Was the act of the delinquent, which resulted in the infliction of the punishment of dismissal or removal from service, aimed at deliberately harming a third-party interest? Situations hereunder would emerge out of acts of disservice causing damage, loss, prejudice or even anguish to third parties, on account of misuse of the employee's authority to control, regulate or administer activities of third parties. Actions of dealing with similar issues differently, or in an iniquitous manner, by adopting double standards or by foul play, would fall in this category.

14.5. (v) Was the act of the delinquent, which resulted in the infliction of the punishment of dismissal or removal from service, otherwise unacceptable, for the conferment of the benefits flowing out of Rule 41 of the Pension Rules, 1972? Illustratively, any action which is considered as depraved, perverted, wicked, treacherous or the like, as would disentitle an employee for such compassionate consideration.”

25. Recently, in our order dated 13.02.2019 in “**Govt. of NCT of Delhi and Ors. vs. Smt. Raj Kumari and Anr.**”, we considered the aforesaid judgment in **Mahinder Dutt Sharma** (supra) and Rule-41 of CCS (Pension) Rules, 1972 and observed as follows:

“4. From the above it would be seen that though there is no vested right in a dismissed or removed government servant to demand, as a matter of right, that he be granted Compassionate Allowance, and it lies within the discretion of the Government to grant the same upon examination of the facts of each case, the exercise of that discretion has to be based on relevant, germane and reasonable considerations. Where the conduct of the government servant is not

found to be dishonest, corrupt, or involving moral turpitude, and the conduct of the Government servant does not qualify as base; suffering from the depravity, or; dishonesty, and where he is not found to have acted with a design to make personal gains by involving himself in acts of corruption, fraud or personal profiteering, his claim may be favourably considered.

*5. In the present case, since the conduct of the late husband of the respondent was not found to be of the kind which would attract rejection of the claim for Compassionate Allowance, the Tribunal has allowed the same. No doubt, the respondent's husband was habituated to remain unauthorisedly absent. He suffered the consequence thereof as he was dismissed from service. There was no other allegation of corruption, or dishonesty or conduct involving moral turpitude made against him. The whole premise on which the Rule- 41 is based, is that the Government is empowered, coupled with the duty to act fairly in the matter of grant of Compassionate Allowance, to the dismissed or removed employee. The rejection of the claim for Compassionate Allowance in the present case is solely based on the habituated unauthorized absence of the respondent's husband. That is not a reason good enough to deny Compassionate Allowance as the case is not of a kind elaborated in **Mahinder Dutt Sharma** (supra)."*

26. In the light of the aforesaid, we are inclined to direct the respondent to consider the petitioner's claim for grant of pension and even if the respondent does consider in its discretion, that the petitioner is not entitled to release of pensionary benefits, the respondent should consider whether he should be granted compassionate allowance in terms of proviso to Rule 5(1)

of the said rules. Since the petitioner raised the claim for grant of pension for the first time only in the year 2016, in case the respondent favourably considers his claim for grant of pension, or compassionate allowance, he would be paid arrears of the same, for a period of three years prior to the date when he made his claim for the first time in the year 2016. The respondent should consider the claim of the petitioner in the light of the aforesaid discussion in the next eight weeks and communicate its reasoned order to the petitioner. The reasons disclosed should show that the competent authority has bestowed his consideration to the aspect of grant of pension to him and, if that claim is not granted, to the claim for grant of compassionate allowance. In case the petitioner is still aggrieved, it shall be open to him to take appropriate steps in accordance with law.

27. The petition stands disposed of in the above terms.

VIPIN SANGHI, J.

A.K.CHAWLA, J.

FEBRUARY 14, 2019

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