

Sanjay Kher and ors Vs. Uoi and ors.

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Court : Delhi

Decided On : Apr-09-2013

Judge : Valmiki J. Mehta

Appellant : Sanjay Kher and ors

Respondent : Uoi and ors.

Advocate for Def. : Mr. Paritosh Budhiraja, Mr. Vikas B. Pakhiddey

Advocate for Pet/Ap. : Mr. Subrat Basak

Judgement :

* IN THE HIGH COURT OF DELHI AT NEW DELHI + % W.P.(C) No. 2089/1996
9th April, 2013 SANJAY KHER & ORS Through: Petitioners Mr. Subrat Basak,
petitioner no.2 in person. VERSUS UOI & ORS. Through: Respondents Mr.
Paritosh Budhiraja and Mr. Vikas B. Pakhiddey, Advocates for R-2. CORAM:
HONBLE MR. JUSTICE VALMIKI J.MEHTA To be referred to the Reporter or not?
VALMIKI J.

MEHTA, J (ORAL) 1. This writ petition is filed by the four petitioners who were the employees of the respondent no.2-employer namely Rashtriya Pariyojna Nirman Nigam Ltd. The four petitioners were deputed for different periods by the respondent no.2 in Iraq. Petitioners claim that the foreign allowances which were granted to them at the initial stage should be revised upwards not only on account of increase of the DA granted to the employees in India but also because the Non

IFS officers of the Government of India who were posted abroad from time to time received enhancements in the foreign allowances payable to them.

2. On behalf of the petitioner no.2, to dispute the stand of the petitioners reliance is placed upon Rule 5 of the rules of the respondent no.2 relating to the terms and conditions of regular employees posted in Iraq and which reads as under:5. Foreign Allowance: To compensate for the higher cost of living, an employee of the Company serving outside India shall be granted a foreign allowances at such rates and subject to such conditions as may be prescribed by the Company from time to time, provided that such allowances shall not exceed the rates of foreign allowances applicable to Non-IFS officers of the Government of India of the equivalent category, such rates being subject to 5% compulsory economy out and slab deductions prescribed by the Government of India from time to time. The present rates are, however, enclosed as Annexure A.

3. On the basis of the aforesaid Rule-5, it is argued that petitioners are not entitled to complete parity for payment of foreign allowances as applicable to Non-IFS officers of the Government of India of the equivalent category and that the allowances of the employees of respondent no.2 were not to exceed the foreign allowances to Non-IFS officers and not for equal to the Non-IFS officers. On behalf of respondent no.2, what is contended is that as per the applicable Rule5, all that is stated is that the foreign allowances will be granted as per circulars to be issued from time to time and which will not exceed the foreign allowances which are paid by the Government of India to its Non-IFS officers posted abroad. It is argued that the expression of not exceed cannot be equated with the expression equal to and petitioners cannot claim that they should be paid foreign allowances which are from time to time given to the Non-IFS officers of the Government of India who are posted abroad. It is argued that no policy guidelines were issued by the respondent no.2 from time to time for enhancing of the foreign allowances by the respondent no.2 and therefore, the petitioners cannot merely claim because of the fact that enhanced DA was granted to employees in India or enhanced foreign allowances were granted to the Non-IFS officers of the Government of India posted aboard claim enhancement in their foreign allowances.

4. In response the petitioners have placed reliance upon the letter dated 19.1.1980 written by the Director of the respondent no.2 to the Ministry of External Affairs, and which according to the petitioners shows that the respondent no.2 had agreed to be bound by the rules for Non-IFS officers posted at the project sites in Baghdad, Iraq.

5. Before I proceed further in this case, it would be necessary to refer to the dictum of the Supreme Court in the case of *Indian Drugs and Pharmaceuticals Ltd. vs. Workmen* (2007) 1 SCC 40, wherein the Supreme Court has categorically observed that Courts should not substitute itself for the executive so as to decide what should be the scales of pay which should be granted to its officers. The Supreme Court has cautioned against judicial activism inasmuch as the finances of an employer are considered by the employer so as to decide what should be the emoluments which should be granted to its employees. Paras 37 and 40 of the said judgment are relevant and the same read as under: 37. Creation and abolition of posts and regularization are purely executive functions vide *P.U.Joshi v. Accountant General* (2003) 2 SCC 632. 2003 SCC (L&S) 191. Hence, the court cannot create a post where none exists. Also, we cannot issue any direction to absorb the respondents or continue them service, or pay them salaries of regular employees, as these are purely executive functions. This Court cannot arrogate to its the powers of the executive or legislature. There is abroad separation of powers under the Constitution, and the judiciary, too, must know its limits.

40. The courts must, therefore, exercise judicial restraint, and not encroach into the executive or legislative domain. Orders for creation of posts, appointment on these posts, regularization, fixing pay scales, continuation in service, promotions, etc., are all executive or legislature functions, and it is highly improper for Judges to step into this sphere, except in a rare and exceptional case. The relevant case-law and philosophy of judicial restraint has been laid down by the Madras High Court in great detail *Rama Muthuramalingam v. Dy. Supdt. Of Police* AIR 200.Mad 1 and we fully agree with the views expressed therein.

6. Therefore, in view of the aforesaid dictum of the Supreme Court, Courts are not to on the ground of equity or such similar ground, grant a particular pay-scale or

monetary emoluments unless and until the field is covered by the rules of the employer-organization or by the circulars or policies which are issued from time to time by the employer-organization.

7. In the present case, I agree with the interpretation urged on behalf of respondent no.2/employer with respect to Rule 5, that this rule cannot be read to mean that the foreign allowances of the employees of the respondent no.2 automatically have to be enhanced or are to be all the times equal to foreign allowances which are payable to Non-IFS officers of the Government of India. If I do so, it would amount to doing violence to the language of Rule-5 inasmuch as the rule categorically provides that if there have to be changes, circulars/orders will be issued by the respondent no.2 from time to time. The very first line of Rule 5 makes this position crystal clear. Also the expression will not exceed cannot be read to mean will be equal to for granting the petitioners at all points of time the same foreign allowances which are paid to the Non-IFS officers of the Government of India.

8. So far as the letter dated 19.1.1980, relied upon by the petitioners is concerned, in order to appreciate the same, it is required to reproduce the same and therefore, it is reproduced in its entirety as under:5742221 19.1.80 Shri M.B.Tuli Under Secretary (Fin.I), Ministry of External Affairs, (Finance Division), New Delhi. Sub: Rationalisation of pay and allowances pattern in Public Sector Undertaking functioning abroad. Dear Sir, Kindly refer to your letter No. 25608(Fin.I) dated 24.12.79, received by me vide D.O.letter No.23(13)/Fin./79 dated 29.12.79 from Shri P.K.Lahiri, Dy. Secretary, Ministry of Energy, New Delhi.

2. We have undertaken the Construction of Grain Sites Project(Lo to4) in Iraq as Associate of M/s KPI. Therefore, as advised by the B.P.E. we have framed our rules for foreign offices based on the terms and conditions as are applicable to Regular Employees of KPI. These rules are, in fact, based on the Rules for Non-IFS officers of the Govt. of India. In addition, our officers and staff posted at the Project sites, outside Baghdad or the city Municipal limits, are entitled to Project Allowance at 900/- p.m. Those employees who are required by the Corporation to proceed alone, keeping their families in India, can also draw House Rent for the

stay of their families in India subject to the ceiling the rules as applicable to them had they been posted in India.

3. Copies of Rules relating to Foreign Offices of NPCC and Statement showing emoluments admissible to Regular employees (married) posted to Iraq are enclosed in extupicates as desired for information and further necessary action. Thanking you, Yours faithfully, (S.K.Relan) Director (F).

9. A reading of the aforesaid letter shows that nowhere the respondent no.2 has used any language therein that at all points of time, the respondent no.2 will grant its employees who were posted in Iraq, the same foreign allowances as are paid to the Non-IFS officers of the Government of India. This letter refers to the fact that its rules are based upon the rules for Non-IFS officers and this language cannot mean that at all points of time the foreign allowances which are payable to the Non-IFS officers, will be equal to the foreign allowances to be paid to the employees of the respondent no.2 who are posted in Iraq. Surely Central Government employees form a different class, and every PSU depending upon its financial condition can always decide whether or not to adopt the rules of the Central Government or adopt them in variation or not at all adopt them as stated in the judgment of the Supreme Court in Indian Drugs and Pharmaceuticals Ltd.(supra). Courts have no powers to impose upon an employer-organization directions for fixing of monetary emoluments to its employees.

10. I may note that the monetary emoluments which are paid to officers of the respondent no.2, who are posted in Iraq, are otherwise considerably higher than those employees of the respondent no.2 who are posted in India, as per the arguments as urged before me by the counsel for the respondent no.2. Also, there was no confined bindingness upon the petitioners to necessarily continue in Iraq, and if the petitioners were allegedly feeling the pinch of any higher costs, they at any point of time could have requested for their posting back to India. Obviously, the petitioners never did this because surely, the emoluments with respect to their posting in Iraq were far better than the emoluments which were paid to the employees in India serving the respondent no.2. Therefore, I do not find petitioners, at this stage can claim any enhancements in the foreign allowances,

much less in the absence of any circulars issued by the respondent no.2 in this regard.

11. In view of above, there is no merit in the petition, which is accordingly dismissed, leaving the parties to bear their own costs. APRIL 09 2013 ib W.P(C) 2089/1996

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