WG CDR. ASHWINI KUMAR HANDA (RETD.) A

v.

UNION OF INDIA & ORS.

(Civil Appeal No. 1491 of 2018)

FEBRUARY 01, 2018 B

[A. K. SIKRI AND ASHOK BHUSHAN, JJ.]

Service Law:

Refund of pay and allowances – Propriety of – Study leave granted to appellant in terms of Army Instructions 13/78 – Submitted Service Guarantee Certificate whereby, he was liable to serve for nine years from the date of return from study leave – Appellant, on return from study leave, after serving for 6 years and 8 months was permitted to retire prematurely – Pay and allowances paid during study leave were deducted from his post retirement dues on the ground that he committed breach of contract by not serving for nine years – Order of recovery challenged – Armed Forces Tribunal dismissed the case of appellant – On appeal to Supreme Court, appellant took the plea that since he had served for 6 years 8 months, there should have been proportionate deduction; and not making proportionate deduction was discriminatory as in case of another officer proportionate deduction was made – Held: In the facts of the case, proportionate deduction is not permissible – Plea of discrimination also not admissible as it was taken for the first time. C D E

Dismissing the appeal, the Court

HELD : 1. In the facts of the present case, question of proportionate deduction does not arise at all. The employer had paid him salary and allowances even for the period he did not work and was on study leave. This payment was made subject to the condition that after his return the appellant would serve for entire nine years. As he has not served for that period, the employer is entitled to receive back the pay and allowances given during the period of study leave, in terms of the Army Instructions coupled with the Service Guarantee Certificate. Validity of the aforesaid Instruction has not been questioned by the appellant. [Para 9 and 10] [880-E-G] F G H

A *Oil & Natural Gas Corporation Ltd. v. Saw Pipes Ltd.* **(2003) 5 SCC 705 : [2003] 3 SCR 691 ;** *Subir Ghosh v. Indian Iron and Steel Company* **1976 SCC OnLine Cal 222 – distinguished.**

State of Punjab & Ors. v. Dr. Rajeev Sarwal **(1999) 9**
B **SCC 240 – referred to.**

2. So far as the plea of discrimination is concerned, there are no foundational facts in support of this argument. No such plea was taken either before the Tribunal or in the instant appeal. Only with the additional documents, communication dated
C **February 6, 2014 is enclosed which the appellant has received under the Right to Information Act, 2005 in respect of another officer. It is not known as to under what circumstances recovery of proportionate cost was made in his case. Moreover, in the absence of pleadings, the respondents did not have any opportunity to explain the same. Therefore, such a plea cannot**
D **be allowed in the facts of the present case. [Para 11] [881-B-D]**

Case Law Reference

(1999) 9 SCC 240	**referred to**	**Para 7**
[2003] 3 SCR 691	**distinguished**	**Para 8**
1976 SCC OnLine Cal 222	**distinguished**	**Para 8**

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CIVIL APPELLATE JURISDICTION : Civil Appeal No. 1491 of 2018.

F From the Judgment and Order dated 26.07.2017 in O. A. No. 188 of 2013 / Order dated 09.09.2017 in M. A. No. 1493 of 2017 with M.A. No. 1494 of 2017 in O. A. No. 188 of 2013 of the Armed Forces Tribunal, Regional Bench, Lucknow.

G Sudhanshu S. Pandey, Gaichangpou Gangmei, Abhishek R. Shukla, Arjun Singh, Advs for the Appellant.

Vikramjit Banerjee, Sr. Adv, Santosh Kumar, Sayooj Mohandas M., M. K. Maroria, Advs for the Respondents.

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The Judgment of the Court was delivered by

A. K. SIKRI, J. 1. Delay condoned. Leave to appeal granted.

2. The appellant herein while working with the Indian Airforce in the rank of Wing Commander has applied for and was granted study leave for a period of two years i.e. from December 27, 2003 to December 26, 2005. At that time, he had submitted an undertaking in the form of a Service Guarantee Certificate to the effect that he would serve for nine years from the date of his return from study leave. On this undertaking, the appellant was also given pay and allowance for the period of study leave. After his return, he started serving but before the completion of nine years period, applied for premature retirement on health grounds. His request for premature retirement was accepted. At the same time, the pay and allowances drawn by the appellant during the period of study leave was deducted from his post retirement dues on the ground that he had committed breach of contract by not serving for nine years.

3. The appellant challenged the order of recovery of pay and allowances by filing the Original Application (OA) before the Armed Forces Tribunal (AFT) which has been dismissed by the AFT vide order dated July 26, 2017. The plea of the appellant before the AFT was that once he was allowed to retire prematurely on medical grounds, his undertaking contained in service guarantee certificate furnished on November 15, 2001 could not have been enforced. The AFT has, however, dismissed the OA preferred by the appellant assigning the reason that the medical ground was taken by the appellant as an additional ground and it was not the sole or main ground for premature retirement. According to the AFT, the main ground for release was entirely different and his premature release was not ordered on the ground of illness. Relevant portion of the order of the AFT is reproduced below:

> "13. Thus, from the above facts, it is abundantly clear that the study leave rules mandate that after completing the study leave period, the Applicant will have to serve for a specific period of service. The Applicant was aware of this fact from the very beginning and as per the Service Guarantee, he had given an undertaking to this effect. Admittedly, the aforesaid amount was deducted from his post retiral dues. The grounds raised by the Applicant in the instant O.A. is that because he has taken premature retirement on the ground of his ill health, so the said ground entitles him for the refund of the deducted amount. After

A perusal of the application of premature release, we are of the considered view that this ground is not tenable in view of the grounds taken by him in his own application. A plain reading of the aforesaid premature release application clearly shows that the main ground for his release was his dis-satisfaction due to delay in promotion and refusal to his posting to Pune, which were mentioned as the first five grounds. The sixth ground was taken as his ill health, wherein he has stated that I am unable to concentrate on my work due to my illness. I want to give off my best to the esteemed organisation which has given me so much and to conclude this application, he has written in paragraph 6, as under:

> "6. I was diagnosed with disabilities – primary hypertension & PIVD about ten months after coming to my present unit, which is in Counter Insurgency Operation – CI Ops. Recently I developed target organ involvement – hypertensive retinopathy – necessitating addition of another drug. Multiple factors as enumerated are having a deleterious effect on my health. I am unable to concentrate on my work due to my illness. I want to give off my best to this esteemed organization which has given me so much."

Contents of paragraph 7 of his own application show that the main ground for premature retirement were the other grounds.

> 14. It makes it abundantly clear that the main ground for his premature retirement from the service was his supersession and his family issue. It is not the case where the applicant has prayed for his premature retirement mainly on the ground of his ill health."

4. When this appeal came up for preliminary hearing challenging the aforesaid judgment of the AFT, the Court found that the aforesaid approach of the AFT was without blemish and in consonance with law. The AFT has taken note of the fact that the Service Guarantee Certificate was submitted in terms of Army Instructions 13/78 as per which the appellant was liable to serve for nine years from the date of his return from study leave subject to certain exemptions like ill-health etc. However, in the present case, it is found, as a fact, that the main ground for seeking premature retirement was not the illness of the appellant. To this end, the order of the AFT does not call for any interference.

5. However, at that stage, the learned counsel for the appellant took an altogether different plea viz. even if the Service Guarantee Certificate was enforceable, the respondents were not entitled to deduct full pay and allowances drawn by the appellant during the period of his study leave inasmuch as the appellant had served for 6 years, 8 months and 19 days after return from study leave and only proportionate deduction was permissible in law. Accordingly, notice in this appeal was issued limited to the aforesaid question, namely, whether deduction should be proportionate to the service already rendered under the bond executed by the appellant. On this question of law, both the counsel have made their submissions.

6. Learned counsel for the appellant submitted that the appellant has availed study leave for two years from December 27, 2003 to December 26, 2005 and thereafter he was in service posted initially to Command Hospital (SC) Pune till 2010 and thereafter to Command Hospital (NC) Udhampur, Jammu and Kashmir located in Counter Insurgency Operational Area. The appellant applied for premature retirement from service on completion of 22 years 9 months of total service on September 28, 2011 and he was released from service on September 15, 2012. The appellant after his study leave had served for 6 years 8 months and 19 days. He, thus, argued that as against commitment to serve for nine years on joining the duties after study leave, the appellant had served for substantial period of 6 years 8 months and 19 days and, therefore, there could not have been recovery of the entire amount of pay and allowances disbursed to him during study leave period. He argued that this action of the respondents in compelling the appellant to refund total amount thereby obliterating his long service after study leave is actually a case of unjust enrichment by the State and is contrary to the public policy. He also submitted that the respondents ought to have given due consideration to this aspect as model employer. Another submission of the learned counsel for the appellant was that, even otherwise, the aforesaid action on the part of the respondents is discriminatory and violative of Article 14 of the Constitution of India inasmuch as in other cases, the respondents have been making only proportionate recovery. In support, the appellant cited the case of one Surg Cdr Haresh Maini in whose case recovery of proportionate cost of training/study leave etc. was made under similar circumstances. For this purpose, the learned counsel relied upon information obtained from

A the respondents vide their communication dated February 6, 2014 under Right to Information Act, 2005.

7. Learned counsel for the respondents stoutly refuted the aforesaid submissions. His contention was that the recovery was made in terms of bond/undertaking which was executed by the appellant in terms of B Army Instructions 13/78 which instructions were admittedly applicable to all the three services, namely, Army, Navy and Air Force. He argued that the appellant herein had not challenged the aforesaid Army Rule either before the AFT or before this Court and, therefore, he could not argue to the contrary. In this behalf, he relied upon the judgment of this C Court in the case of ***State of Punjab & Ors.*** v. ***Dr. Rajeev Sarwal***[1] wherein it is held that:

> "6. The contention put forth on behalf of the respondent that the period of study leave could be granted at a time not exceeding 24 months does not stand to reason at all because the rule is very clear that 24 months is relatable to the entire service and not to D any part of service. The validity of the rule was not challenged before the High Court. Therefore, that aspect could not be gone into by the High Court. Nor could it be said that the exercise of power by the appellant was arbitrary, in any manner, merely because that power of relaxation was used in certain cases. In E our opinion relaxation also cannot be read into a provision of this nature where the rule itself mandates the maximum period to be 24 months for the entire service. The order made by the High Court is, therefore, not sustainable."

8. He also relied upon two more judgments in support of his F submission that clause of liquidated damages can be contractually incorporated, which would be enforceable in law. These are:

(i) Oil & Natural Gas Corporation Ltd. v. ***Saw Pipes Ltd.***[2]

> "(1) Terms of the contract are required to be taken into consideration before arriving at the conclusion whether the party G claiming damages is entitled to the same.
>
> (2) If the terms are clear and unambiguous stipulating the liquidated damages in case of the breach of the contract unless it is held that such estimate of damages/compensation is unreasonable or is by

[1](1999) 9 SCC 240

H [2](2003) 5 SCC 705

way of penalty, party who has committed the breach is required to pay such compensation and that is what is provided in Section 73 of the Contract Act.

(3) Section 74 is to be read along with Section 73 and, therefore, in every case of breach of contract, the person aggrieved by the breach is not required to prove actual loss or damage suffered by him before he can claim a decree. The court is competent to award reasonable compensation in case of breach even if no actual damage is proved to have been suffered in consequence of the breach of a contract.

(4) In some contracts, it would be impossible for the court to assess the compensation arising from breach and if the compensation contemplated is not by way of penalty or unreasonable, the court can award the same if it is genuine pre-estimate by the parties as the measure of reasonable compensation."

(ii) Subir Ghosh v. ***Indian Iron and Steel Company***[3] wherein the Calcutta High Court laid down the following proposition of law:

"It was contended for the appellant that the agreement was one-sided, against public policy and constituted restraint on trade and that the claim by the company came specifically within S. 74 of the Contract Act, 1872, and notwithstanding the amount on the breach of the covenant. Normally, when the amount payable is either disproportionately more than the actual damage suffered on the breach or remain the same irrespective of the varying damages which may be suffered due to breach of different covenants, the amount so payable partakes the nature of penalty. In the instant case what was payable under the bond reasonably represents the damage which the company is likely to suffer in case the appellant leaves the company in the midst of the training, and as such, the amount so payable is nothing but a genuine pre-estimate of the damage which the company is liable to sustain in the event of breach on the part of the appellant."

9. We may observe at the outset that the judgments in ***Oil & Natural Gas Corporation Ltd.*** and ***Subir Ghosh*** would not be applicable in the instant case as in those judgments provisions of the Indian Contract

[3]1976 SCC OnLine Cal 222

A Act pertaining to damages/liquidated damages were dealt with. On the other hand, in the instant case we are concerned with the statutory provision under which leave was granted to the appellant herein. Moreover, those cases dealt with the issue of pre-estimated liquidated damages. In the instant case, the recovery made by the respondent is not of any damages but of pay and allowances which were given to the B appellant during the period the appellant was on study leave. This matter, therefore, has to be looked into keeping in mind the following aspects:

(i) the appellant, while serving with the respondent, had availed two years study leave;

C (ii) this study leave was granted to him in terms of Army Instructions 13/78 pursuant to which the appellant submitted Service Guarantee Certificate;

(iii) as per the said Service Guarantee Certificate, the appellant was liable to serve for nine years from the date of return D from study leave;

(iv) only on the ground of ill health the appellant could be relieved earlier; and

(v) in the event of leaving the job without completing nine years of service after return from study leave, the appellant was E liable to refund the pay and allowances given to him during study leave.

In the aforesaid facts, question of proportionate deduction does not arise at all.

F 10. It is stated at the cost of repetition that undertaking in the form of Service Guarantee Certificate did not specify any compensation or damages to be paid by the appellant to the respondent in the event the appellant did not serve for nine years on joining after the study leave. In that eventuality, his request for proportionate deduction might have been relevant on the ground that he had served for 6 years 8 months out of G the nine years and, therefore, is not liable to pay the entire compensation as per the stipulation in the bond. On the contrary, here is a case where the employer had paid him salary and allowances even for the period he did not work and was on study leave. This payment was made subject to the condition that after his return the appellant would serve for entire nine years. As he has not served for that period, the employer is entitled H

to receive back the pay and allowances given during the period of study leave, in terms of the Army Instructions coupled with the service guarantee certificate.

Learned counsel for the respondent is right in his submission that validity of the aforesaid Instruction has not been questioned by the appellant.

11. As far as argument of discrimination is concerned, there are no foundational facts in support of this argument. No such plea was taken either before the AFT or in the instant appeal. Only with the additional documents, communication dated February 6, 2014 is enclosed which the appellant has received under the Right to Information Act, 2005 in respect of Surg Cdr Haresh Maini. On the basis of this document, oral submission was made at the time of arguments. It is not known as to under what circumstances recovery of proportionate cost was made in his case. Moreover, in the absence of pleadings, the respondents did not have any opportunity to explain the same. Therefore, such a plea cannot be allowed in the facts of this case.

12. Thus, we do not find any merit in this appeal, which is accordingly dismissed.

Kalpana K. Tripathy Appeal dismissed.