

(1997) 08 GAU CK 0036

In the Gauhati High Court

Case No : Civil Rule No. 15 (SH) of 1996

Amttangshu Dhar

APPELLANT

Vs

The President Shilong Cantonment Board and Others

RESPONDENT

Date of Decision : 14-08-1997

Acts Referred:

Constitution of India, 1950 — Article 226

Citation : (1998) 1 GLT 95

Hon'ble Judges : V.D. Gyani, J

Bench : Single Bench

Advocate : M.Z. Ahmed and B.K. Deb Roy, for the Appellant; S.R. Sen, T. Yangi and S. Chakravarty, for the Respondent

Judgement

V.D. Gyani, J.—By this petition under Article 226 of the Constitution, the Petitioner who started his career as an Assistant Clerk in the Cantonment Board and eventually rose to the position of Office Superintendent, seeks to challenge the order dated 7.11.83 and 19.12.94 as passed by the Respondent No. 3 and prays for a direction to the Respondents to pay him his salary for the period commencing from 2.5.78 to 20.11.93, which includes the period of suspension and remaining out of employment till passing of the order of reinstatement in service and resumption or duties.

2. The case seems to have a procrastinated history. It was way back in July, 1980 that the Petitioner was dismissed from service. This order of dismissal from service was challenged by him in an appeal which also met with dismissal at the hands of the G-O-C, Eastern Command. Aggrieved by the same he filed a revision petition on 12th June, 1981 and the Central Govt. by its order dated 7th November, 1983, Annexure-A directed him to be reinstated in his service right from the date of his dismissal. But even while making the above direction, as for the period intervening the date of dismissal and the date of rejoining the duty, the Central Govt., Respondent No. 3 directed that the period shall be treated as dies non. Not satisfying with the above order the second round of petitioning

started. The Petitioner submitted representation on 27th August, 1984 and also approached this Court, which resulted in direction to the Respondent to dispose of the aforesaid representation. Accordingly by order dated 19th December, 1994 the representation was disposed. The order is reproduced hereunder not only as a ready reference but incidentally it would also give a brief resume of the necessary facts:

No. 21 (1)/D(D&C)/94 Government of India Ministry of Defense. New Delhi, the 19th Dec. 1994.

ORDER

Where as the Cantonment Board , Shillong dismissed Shri Amitangshu Dhar,. Office Superintendent from service on 26.7. 1980 vide order No. 30-1/1/191/C dated 26.7.1980.

And where as the GUC- in C, Eastern Command rejected the appeal dated 12.8.1981 submitted under Rule 14 of the CFSR, 1937 by Shri Amitangshu Dhar vide letter No. 363018/LC-3 dated 28.5.1981.

And whereas the. Central Govt. after taking into consideration the revision petition dated 12.6.1981 submitted by Shri Amitangshu Dhar under Rule 15(1) of the CFSR, 1937, the extent of charges proved against him and other circumstances of the case reinstated Shri Amitangshu Dhar in service vide order No. 25-A/2/C/L&C/81/2006/D (W&C) dated 7.11.83 and also directed that the period intervening the date on which Shri Amitangshu Dhar was dismissed from service and the date on which he rejoined duty be treated as dies-non".

And whereas Shri Amitangshu Dhar submitted a representation dated 27. 8. 84 requesting that the intervening period of his suspension followed by dismissal and rejecting on reinstatement may be treated as period spent on duty. He had also stated that the order dated 7.11.83 reinstating him in service was defective as no specific order about regulating his pay and allowances as required under FR 54 (1) had been issued. Shri Amitangshu Dhar also filed a writ petition No. C. Rule No. 77(SH) 93 in the Gauhati High Court which directed the Central Government to dispose off the above mentioned representation dated 27.8.84 submitted by Shri Amitangshu Dhar within a period of 3 months from the date of receipt of the same by the Government by speaking order and to send a copy of such order to the Petitioner.

And whereas the Central Government after considering the representation of Shri Amitangshu Dhar dated 27.8.84 and the circumstances of the case found that Charge No. (2) relating to non-recovery of PF instalment regularly as well as to withdrawal of advances by Shri Amitangshu Dhar on the basis of incorrect reports and Charge No. (5) regarding non-handing over of 233 voucher to the new accountant have been found proved against him. As regards Charge No. (2) Shri Amitangshu Dhar drew advances from the Cantonment Funds which were more than what he was authorised to draw and the transactions were irregular

and in contravention of the existing rules. As regards Charge No. (3) Shri Amitangshu Dhar did not hand over 233 vouchers to the new Accountant relating to the period from 1.4.1977 to 10.7.1977. In view of the charges proved against Shri Amitangshu Dhar, the Central Government now therefore, confirm the Government order No. 25-A/2/C/L&C/81/7006/D(W&C) dated 7.11.83 and therefore , confirm the Government order No. 25-A2/C/L&C/81/7006/D(W&C) dated 7.11.83 and consequently Shri Dhar will not be eligible for any pay and allowances during the said period i.e. from 1.5.78 till the date he rejoins his duty.

It is further clarified that Shri Amitangshu Dhar is a Cantonment Board employee and is governed by CFSRs, 1937. Government orders have been accordingly issued under the provisions of CFSR, 1937-in particular under Rule 15(1) of the said rules and not under FRSR's. The provisions of CFSR, 1937 have been fully satisfied.

Sd/-Pradeep Sinon Director (Works)

Copy to:

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3. learned Counsel appearing for the Petitioner contended that there was absolutely no enquiry held preceding the dismissal order which was wholly unjustified and uncalled for and the Petitioner is entitled to his full wages for the period that he was under suspension and till the date his dismissal was revoked and he was allowed to resume duties.

4. learned Counsel for the Respondent No. 1 and ,2, the Cantonment Board, on the other hand, maintained that it is essentially a discretion of the authority passing the restatement order, to make a direction as regards payment of salary and according to him in the instant case, the discretion has been properly exercised which does not call for any interference in the writ jurisdiction or this Court.

5. Learned Standing Counsel appearing for the Union of India submitted that the order under challenge are fully justified in the circumstances of the case although no return has been filed by the Respondent Union of India. It was urged by the learned Standing Counsel that the exercise of discretionary power is essentially a subjective exercise and in such masters the scope of judicial review is extremely narrow and restricted. The Petitioner has not been able to show that the discretionary power has been wrongfully exercised.

6. It is a common ground that Fundamental Rule 54 is attracted to the facts of the present case and learned Counsel appearing for the Respondent No. 1 and 2 placing reliance on a judgment as reported in State of Assam and Anr. v. Raghav Raj Gopalachari Supreme Court Service Rulings (6) Page 7\$, being Civil Appeal No. 1561 and 1562 of 1966 decided on 6.10.67 highlighted and stressed Clause (b) of the Fundamental Rules 54, which reads as follows:

F-R. 54-B. (1) When a Government servant who has been suspended is reinstated or would have been so re-instated but for his retirement on superannuation while under suspension, the authority competent to order reinstatement shall consider and make a specific order:

(a) regarding the pay and allowances to be paid to the Government servant for the period of suspension ending with reinstatement or the date of his retirement on superannuation, as the case may be; and

(b) whether or not the said period shall be treated as a period spent on duty.

(2) Notwithstanding anything contained in Rule 53 where a Government servant under suspension dies before the disciplinary or Court proceedings instituted against him are concluded, the period between the date of suspension and the date of death shall be treated as duty for all purposes and his family shall be paid the full pay and allowances for that period to which he would have been entitled had he not been suspended, subject to adjustment in respect of subsistence allowance already paid.

(3) Where the authority competent to order re-instatement is of the opinion that the suspension was wholly unjustified, the Government servant shall be subject to the provisions of sub-R. (8) be paid the full pay and allowances which he would have been entitled, had he not been suspended: Provided that where such authority is of the opinion that the termination of the proceedings instituted against the Government servant had been delayed due to reasons directly attributable to the Government servant, it may, after hearing the representation, if any submitted by him, direct for reasons to be recorded in writing, that the Government servant shall be paid for the period of such delay only such proportion of such pay and allowances as it may determine.

(4) In a case falling under sub-R. (3) the period of suspension shall be treated as a period spent on duty for all purposes.

(5) In cases other than those falling under Sub-Rules (2) and (3) the Government servant shall be subject to the provisions of Sub-Rules (8) and (9) be paid such proportion of the full pay and allowances to which he would have been entitled had he not been suspended, as the competent authority may determine, after giving notice to the Government servant of the quantum proposed and after considering the representation, if any, submitted by him in that connection within such period which in no case shall exceed sixty days from the date of the notice which has been served as may be specified in the notice.

(6) Where suspension is revoked pending finalisation of the disciplinary or Court proceedings any order passed under sub-R. (1) before the conclusion of the proceedings against the Government servant shall be reviewed on its own motion after the conclusion of the proceedings by the authority mentioned in sub-R (2) who shall make an order according to the provisions of sub-R. (3) or (5) as the case may be.

(7) In a case falling under sub-R (5), the period of suspension shall not be treated as period spent on duty, unless the competent authority specifically directs that it shall be treated for any specified purpose,

Provided that if the Government servant so desires, such authority may order that the period of suspension shall be converted into leave of any kind due and admissible to the Government servant.

Note 1. The order of the competent authority under the preceding proviso shall be absolute and no higher sanction shall be necessary for the grant of:

(a) extraordinary leave in excess of three months in the case of temporary Government servant, and

(b) leave of any kind in excess of five years in the case of permanent or quasi-permanent Government servant.

Note 2. In a case falling under Sub-Rule (5) and (7) of fundamental Rule 54-B, the competent authority may pay such proportion of such pay and allowances as admissible under F.R. 53 read with Sub-Rule (9) of F. Rule 54-B with prior concurrence of Finance Department.

(8) The payment of allowances under Sub-Rule (3) or Sub-Rule (5) shall be subject to all other conditions under which such allowances are admissible.

(9) The proportion of the full-pay and allowances determined under the proviso to Sub-rule (3) or under sub- Rule (5) shall not be less than the subsistence allowance and other allowances admissible under Rule 53.

7. It was urged that the revising authority having not exercised its discretion, the Petitioner is not entitled to any further relief.

8. learned Counsel for the Petitioner on the other hand, submitted that the doctrine "dies non" is not at all attracted to the present case and depriving the Petitioner of his legitimate right to salary/wages on that account is wholly untenable and unjustified in law. The doctrine "dies non" comes into play when an employee or public servant is unauthorisedly absent from duty, which is not the case at hand. The Petitioner was initially suspended and subsequently dismissed from service and the dismissal order had to be revoked. It is not as if he was unauthorisedly absent from duty, and heart of the matter is, he was prevented from discharging his duty because of his wrongful suspension and ultimate dismissal.

9. The service jurisprudence has been ever growing and in such matters relating to the exercise of discretionary power, some light can be derived from the decided cases. What are those circumstances or reasons which disentitle a public servant ordered to be reinstated in service from claiming full backwages for the period* that he remained out of duty and what factors or consideration should guide the authority, conferred with the discretionary power ? The plain language of Rule 54 read with Rule 54 (a) and (b) in juxtaposition would indicate that the

power vesting in the authority is not an absolute one. Sub-rule (2) of Rule 54 provides that where the authority competent to order restatement is of opinion that the Government servant who had been dismissed has been fully exonerated, he shall be paid full pay and allowances to which he would have been entitled to had he not been dismissed. Of course, it is subject to Sub-rule (6) of Rule 54 which merely governs the payment of allowances. Thus it is abundantly clear that in case of exoneration from charges the Government servant whose dismissal has been quashed and ordered to be reinstated shall ordinarily entitle to his full backwages.

10. It remains to be seen whether the Petitioner in the instant case has been fully exonerated of the charges levelled against him. Going by the affidavit in opposition filed by the Respondent Nos. 1 and 2, particularly paragraph 21 it would be seen that the Petitioner was charged with financial irregularities although this fact has been controverted by the Petitioner in his reply to the affidavit in opposition filed on 20th September, 1996. Added to it is the submission made by the learned Counsel for the Petitioner that no enquiry was held against him (see paragraphs 13, 14 and 15 of the petition). It is also significant to note that the decision to dismiss the Petitioner was taken after the submission of his written statement by way of defence to the chargesheet. In the meantime there was no enquiry held. Levelling of charges or making imputation is one thing and to substantiate and to prove the same is altogether a different matter. While the Respondent Nos. 1 and 2 in their affidavit in opposition have blamed the Petitioner for his non-cooperative attitude and challenged the proceedings before the Court of law seeking injunction against the holding of an enquiry. Despite notices, the Petitioner wilfully absent from the enquiry thus compelled the enquiry committee to proceed *ex parte* and the decision was taken on being fully satisfied about the proof of the charges made against the Petitioner. So far as the non- supply or enquiry report is concerned, as averred by the Petitioner , the Respondents in their affidavit have sought shelter behind the view that it does not provide for supplying any such enquiry report.

11. Notices were either served or accepted on 1.3.96. Thereafter on 7.5.96 counsel for the Respondent Union of India prayed for four week's time to file counter affidavit which was allowed and continued to be allowed from date after date 4.7.96, 22.7.96, 12.8.96, 16.8.96, 2.9.96, 16.9.96, 18.9.96 when it was heard in part but released from part heard on 20.9.96, again listed for hearing on 4.10.96, and continued on further dates of hearing 3.3.97, 10.3.97, 21.3.97.

12. It was on 27.3.97 a specific direction was given to the Union of India to file an affidavit, for which again four weeks time was sought which was granted, although it was unusual that after so many opportunities the Union of India had failed to file an affidavit. What is still more exasperating is that despite the above direction and opportunity, seeking further four week's time learned Standing counsel when asked even after 18 weeks of the above order was not in a position to make any statement as to why no affidavit was filed. Now in such

circumstances, the Court is left with no option but to go by the order dated 7.11.83 Annexure- VIII as it is. It could only be on exoneration of the charges that the Petitioner was ordered to be reinstated right from the date of his dismissal from service. When Respondent despite repeated opportunities granted and specific direction made, indicating the necessity and desirability of filing an affidavit yet does not choose to file an affidavit as pointed out by the Supreme Court in Naseem Banoo's case, the uncontroverted averments made by the Petitioner should be deemed to have been admitted. (See. Smt. Naseem Banoo v. State of U.P. and Ors. AIR 1993 SC 2492. In any case the order Annexure- VIII does not indicate if the Petitioner was not fully exonerated of the charges, this is apart from Petitioner's vehement objection that no inquiry as such was held.

13. The Supreme Court in Manorma Verma (SMT) vs. The State of Bihar and Ors., 1994 Supp. (3) SCC 671 has categorically held that once termination is found to be illegal consequential order of grant of backwages must follow unless there -are reasons justifying departure from this normal rule. In another case Om Prakash Goel Vs. The Himachal Pradesh Tourism Development Corporation Ltd., Shimla and another, the Supreme Court while dealing with backwages observed.

We have heard both the sides on this aspect elaborately. Shri P.P. Rao, learned Counsel for the Petitioner submitted that even if the relevant period is to be treated as one of suspension pending enquiry the Petitioner would have been entitled to the subsistence allowance till his reinstatement. That at least should be the criteria in granting the backwages in a situation like this. We think this is a reasonable and fair suggestion.

14. In view of the foregoing discussion, this petition deserves to be allowed, it is accordingly allowed. The Respondents are directed to pay full salary alongwith all other allowances for the period 2.5.78 to 20.11.93 within three months from today, any lapse or delay would entail imposition of interest which is not being imposed for the present in the hope that amount would be paid ungrudgingly and without delay.