
(2014) 09 RAJ CK 0118
In the Rajasthan High Court
Case No : Civil Writ Petition No. 3449/97

Arun Kumar Kashyap

APPELLANT

Vs

State of Rajasthan

RESPONDENT

Date of Decision : 30-09-2014

Acts Referred:

Constitution of India, 1950 — Article 226

Citation : (2014) 09 RAJ CK 0118

Hon'ble Judges : Vineet Kothari, J

Bench : Single Bench

Advocate : M.C. Bhoot, Sr. Advocate and Arpit Bhoot, Advocate for the Appellant; Mukesh Dave, Advocate for the Respondent

Final Decision : Dismissed

Judgement

Vineet Kothari, J.—The petitioner-Arun Kumar Kashyap had filed this writ petition in this Court on 23/8/1997 for the following reliefs claimed by him in the writ petition.

"(a) by an appropriate writ, order or direction Annexure No. 16 dt. 11.10.96 be set aside/quashed.

(b) That petitioner be given pension and other past retiral benefits as per his qualifying service till the date of retirement.

(c) any other appropriate writ, order or direction which in the facts and circumstances of the case, may be deemed just and proper be issued in favour of the petitioner."

2. While admitting the petition of the petitioner on 15/9/1997, a coordinate bench of this Court, however, did not grant any interim relief against the chargesheet served upon the petitioner vide Annex. 16 dated 11/10/1996 under Rule 16 of the CCA Rules 1958 for the misconduct for the long absence of more than 7 years of the petitioner from service from 29/5/1988 till 31/10/1995, when

upon reaching the age of superannuation, he was deemed to have retired from service on 31/10/1995. The petitioner was working as Assistant Engineer in the respondent P.W.D. Department of the Government of Rajasthan, when retired.

3. The writ petitioner has stated in the writ petition that he was initially appointed as Overseer (Mechanical) on 23/4/1962 and was later on promoted to the post of Assistant Engineer (Mechanical) in the year 1973 and after completion of 15 years of service as Assistant Engineer in the year 1988 he was bound to be promoted to the next higher post of Executive Engineer but he was not so promoted and on the contrary his junior Mr. A.C. Mathur was so promoted to the next higher post and, therefore, under these circumstances he became sick & frustrated and did not attend his duties and remained on medical leave for sometime and, thereafter, though the respondent Department gave several notices to the petitioner to resume his duties between 1988-91, as stated in para. 6 of the writ petition, the petitioner did not report back for duty till attaining the age of superannuation, he retired from service on 31/10/1995.

4. Thereafter, the petitioner filed his representation in the year 1996, as stated in para. 8 of the writ petition, for the release of his pension but the pension was not paid to him and on the contrary an inquiry was initiated against him under Rule 16 of the CCA Rules, 1958 by serving the impugned charge sheet Annex. 16 dated 11/10/1996 but the petitioner did not file any reply to the said charge sheet except one letter dated 28/10/1997 which has not been placed on record by the petitioner with the petition or later on, for the reasons best known to him, nor he participated in the enquiry initiated by this charge sheet, but on the contrary filed this writ petition as aforesaid on 23/8/1997.

5. During the pendency of the this writ petition, the petitioner expired on 24th July 2013 and on an application filed by his legal representatives, his wife Smt. Poornima Kashyap and his son Rachit Kashyap, were taken on record vide order passed by a coordinate bench of this Court on 20/9/2013. An amendment application seeking amendment of the writ petition was filed by a different counsel in this Court on 11/11/2003 seeking to add a prayer in the writ petition to the following effect:-

"On the basis of last pay which the petitioner was entitled had he been promoted as Executive engineer against the vacancy of the year 1988-89 and necessary order for his notional promotion as Executive Engineer against the vacancy of 1988-89 may kindly be granted."

6. The said amendment application is also pending in this Court to which the respondent Department has not filed any reply but the said amendment application was never pressed in last 11 years, when this petition was pending. However, reply to be main writ petition has been filed by the respondent PWD Department in this Court on 6/11/1998.

7. During the pendency of this writ petition, it appears that an ex parte enquiry under Rule 16 in pursuance of the charge sheet Annex. 16 dated 11/10/1996

was held against the petitioner for long and willful absence for 7 years between the period 29/5/1988 till 31/10/1995 and on the basis of the said report of the enquiry officer of which a notice was also served on the petitioner but to the said show cause notice also the petitioner did not file any reply and, therefore, with the consent of the RPSC dated 19/2/1999, the Governor passed the impugned order for stoppage of 100% pension of the petitioner and the said order was placed on record as Annex. 20 along with the aforesaid amendment application. In the amendment application also no challenge has been laid to the said order Annexure 20 dated 17/4/1999 and the only amendment, as quoted above in the prayer clause of the writ petition seeking a promotion to the post of Executive Engineer against the vacancy of the year 1988-89 that too notional promotion, is sought. The order Annex. 20 dated 17/4/1999 is quoted below in extenso for ready reference:

8. In the reply filed on behalf of the respondent State, the respondent PWD Department has raised certain preliminary objections as to the maintainability of the writ petition itself, while contesting the petition on merits also and it is relevant to quote the relevant portion of the reply filed on behalf of the respondent Department including the aforesaid preliminary objections:

"Preliminary objections:

A. That the present writ petition suffers from the vice of delay and laches inasmuch as the petitioner is seeking quashing of the order Annex. 16 dated 11.10.1996. Whereas the writ petition appears to have been filed somewhere in October, 1997 i.e. After a lapse of about one year and that too without any plausible reasons explaining the delay. The second prayer is with regard to grant of pension. Admittedly the petitioner retired on 31.10.1995 and after more that 2 years he is approaching this Hon''ble Court. The unexplained delay is certainly fatal and the writ petition deserves to be dismissed on this count alone.

B. That the writ petition also suffers from the vice of mis-joinder of causes of action inasmuch as for two entirely different causes he has chosen to file one writ petition which is not maintainable and deserves to be dismissed on this count alone.

C. That the writ petition raises serious/complicated questions of facts which cannot be resolved without recording the evidence and this Hon''ble Court while exercising the extraordinary jurisdiction under Article 226 of the Constitution will not go into such questions of facts. Therefore, the writ petition also deserves to be dismissed on this count alone.

D. That the petitioner is also guilty of suppression of material and important facts from the knowledge of this Hon''ble Court inasmuch as he has very conveniently omitted to mention that he has not performed his part of duty in getting the disciplinary enquiry finalized and completed and despite the numberless communication sent to him, he never respondent in a manner in which an officer like the petitioner was expected to act and did not cooperate at all in the enquiry

and the Department was left with no option but to proceed ex-parte. Besides this even for getting the provisional pension he never performed his part of duty. The petitioner has not mentioned all these facts and has tried to mislead this Hon''ble Court by twisting the real facts. Thus, on this count alone writ petition deserves to be dismissed.

Parawise reply

5. That the contents of para No. 5 of the writ petition are not admitted in the manner they have been alleged. Since the petitioner was facing a departmental enquiry and punished as well, therefore, not found fit for promotion. However, it is denied that Executive Engineer had ever asked or pressed the petitioner not to make any type of representation regarding his promotion nor there was any occasion for him to do so. However, since the petitioner was absent from duty for a long period, in that case the Treasury Officer was requested not to pass the salary bill till his leave case is not regularized as per Rules. Although staff salary bill was passed regularly. It is denied that on account of facts mentioned in this para he could not continue his duties and became sick. Whereas he on his own accord remained absent from duty.

6. That contents of para No. 6 of the writ petition are admitted. The petitioner in the first instance went on 4 days sanctioned C.L. On account of the illness of his wife i.e. From 3.2.1988 to 6.2.1988. But thereafter he went on submitting application for extending medical leave on account of his own illness. However, after 29.5.1988 neither any application for extension of leave was received nor any intimation of any kind was received from the petitioner. Vide letters dated 12.5.88, 3.4.89, 12.5.89, 18.9.89, 29.5.90, 14.11.90 etc he was requested to join his duties but the petitioner never turned-up and joined his duties nor submitted any application for extension of leave.

(iii) It is denied that enquiry itself is not maintainable. The petitioner has very cunningly and conveniently not mentioned a single word about his long absence from duty. The appointing authority is well within its jurisdiction to proceed in the matter in accordance with law and accordingly an enquiry U/R 16 of the Rules of 1958 was instituted and petitioner was given full opportunity to put his defence. But despite several opportunities by way of sending letters, he did not cooperate in the enquiry. The petitioner could have raised all these pleas in the enquiry. This Hon''ble Court should be reluctant to grant any relief to a person who wants to take advantage of his own lapse/omission inasmuch as he does not cooperate in the enquiry and on the other hand challenges the enquiry itself without even putting his defence in the enquiry."

9. Mr. M.C. Bhoot, Sr. Advocate along with Mr. Arpit Bhoot appearing on behalf of the petitioner has urged that for no good reason the petitioner was denied the promotion to the post of Executive Engineer in the year 1988-89 and his junior Mr. A.C. Mathur was so promoted to the said higher post and being unable to suffer subordination, the petitioner took medical leave and remained absent for

the aforesaid period and since the present writ petition has been filed after retirement of the petitioner on 31/10/1995, the said Shri A.C. Mathur has not been impleaded as a respondent in the present writ petition and the petitioner only claims his due promotion against the vacancy of the year 1988-89. He also submitted that for the same medical reasons and feeling of frustration and disgust, the petitioner did not participate in the enquiry initiated against him in pursuance of the charge sheet Annexure 16 dated 11/10/1996 and the ex parte enquiry proceedings against him deserve to be set aside and the consequential orders passed on that basis also deserve to be quashed.

The written submissions filed by the counsel were also considered by the Court & the case laws cited therein were also perused.

10. On the other hand, Mr. Mukesh Dave, learned counsel appearing for the respondent Department urged that the petitioner did not even file reply to the charge sheet and never participated in the enquiry proceedings despite several notices nor did he resume his duties for long 7 years & despite several communications given to him and, therefore, the enquiry was held ex-parte against him and even after inquiry officer finding him guilty of willful absence for 7 years, in response to the show cause notices sent to him, no reply thereto was also filed by him and consequently with the consent of the RPSC, His Excellency the Governor of the State has passed the impugned order Annexure 20 dated 17/4/99 directing the stoppage of 100% pension of the petitioner and the said order has not been even challenged by the petitioner and otherwise also the said order being perfectly just and legal order no interference deserves to be made in the same.

11. He also urged that since an enquiry was pending against the petitioner, the petitioner was not considered for the promotion to the next higher post of Executive Engineer and the same cannot be claimed at this belated stage even on notional basis, particularly after the death of the petitioner and in the absence of Mr. A.C. Mathur having been impleaded as a respondent in the writ petition. At the relevant point of time, he never raised any grievance or filed any representation for his non-promotion, therefore, such stale claim cannot be now raised and for this reason the amendment application filed for this purpose also deserves to be rejected.

12. He, therefore, submitted that the writ petition has become infructuous as such and on merits also there is no force in the writ petition and the same deserves to be dismissed. He also urged that for the long period of absence under Rule 86 of the RSR provides that the Govt. Servant shall be deemed to resigned from the service and in the case of Mohd. Hanif vs. State & Ors-SBCWP No. 5283/91 decided on 20/5/2014, this Court has already held that in such cases of long absence without the due sanction of leave Rule 86 is attracted and even without holding any enquiry under Rule 16 of the CCA Rules, 1958, a Govt. Servant can be removed from the service of the Government as having resigned resulting in forfeiture of pension. He also submitted that compliance of Rule 170

of RSR & now incorporated as Rule 7 of the Pension Rules, 1996 w.e.f. 21.1.1997 have been complied with by the State in the case of the petitioner. These relevant rules are quoted below for ready reference:-

Rule 170. Recoveries of loss from the pension.-

The Governor further reserves to him self the right of withholding or withdrawing a pension or any part of it, whether permanently or for a specified period and the right of ordering the recovery from a pension of the whole or part of any pecuniary loss caused to the Government, if in a departmental or judicial proceeding, the pensioner is found guilty of grave mis-conduct or negligence during the period of his service including service rendered upon re-employment after retirement.

(a) provided that such departmental proceeding, if instituted while the officer was in service, whether before his retirement or during his re-employment, shall after the final retirement of the officer, be deemed to be a proceeding under this rule and shall be continued and concluded by the authority by which it was commenced in the same manner as if the officer had continued in service;

(b) such departmental proceeding, if not instituted while the officer was in service, whether before his retirement or during his re-employment:

(i) Shall not be instituted save with the sanction of the Governor;

(ii) shall not be in respect of any event which took place more than 4 years before such institution; and

(iii) shall be conducted by such authority and in such place as the Governor may direct and in accordance with the procedure applicable to departmental proceedings in which an order of dismissal from service could be made in relation to officer during his service;

(c) no such judicial proceeding, if not instituted while the officer was in service, whether before his retirement or during his re-employment, shall be instituted in respect of a cause of action which arose or an event which took place more than 4 years before such institution; and

(d) The Rajasthan Public Service Commission shall be consulted before final orders are passed.

"Rule 7. Right of Governor to withhold or withdraw pension

(1) The Governor reserves to himself the right of withholding or withdrawing a pension or part thereof, whether permanently or for a specified period, and of ordering recovery from a pension of the whole or part of any pecuniary loss caused to the Government, if in any departmental or judicial proceedings, the pensioner is found guilty of grave misconduct or negligence during the period of his service including service rendered upon re-employment after retirement:

Provided that the Rajasthan Public Service Commission shall be consulted before

any final orders are passed:

Provided further that where a part of pension is withheld or withdrawn, the amount of such pension shall not be reduced below the amount of rupees one thousand two hundred seventy five per mensem."

(2) (a) The departmental proceedings referred to in sub-rule (1), if instituted while the Government servant was in service whether before his retirement or during his re-employment shall, after the final retirement of the Government servant, be deemed to be proceedings under this rule and shall be continued and concluded by the authority by which they were commenced in the same manner as if the Government servant had continued in service:

Provided that where the departmental proceedings are instituted by an authority subordinate to the Governor, that authority shall submit a report recording its finding to the Governor.

(b) The departmental proceedings, if not instituted while the Government servant was in service, whether before his retirement, or during his re-employment-

(i) shall not be instituted save with the sanction of the Governor,

(ii) shall not be in respect of any event which took place more than four years before such institution, and

(iii) shall be conducted by such authority and in such place as the Governor may direct and in accordance with the procedure applicable to departmental proceedings in which an order of dismissal from service could be made in relation to the Government servant during his service.

(3) No judicial proceedings, if not instituted while the Government servant was in service, whether before his retirement or during his re-employment, shall be instituted in respect of a cause of action which arose, or in respect of an event which took place, more than four years before such institution.

(4) In the case of a Government servant who has retired on attaining the age of superannuation or otherwise and against whom any departmental or judicial proceedings are instituted or where departmental proceedings are continued under sub rule (2), a provisional pension as provided in Rule 90 shall be sanctioned.

(5) Where the Governor decides not to withhold or withdraw pension but orders recovery of pecuniary loss from pension, the recovery shall not ordinarily be made at a rate exceeding one third of the pension admissible on the date of retirement of a Government servant.

(6) For the purpose of this rule,-

(a) departmental proceedings shall be deemed to be instituted on the date on which the charges together with a statement of allegations on which they are based, or the proposal of Government to take disciplinary action together with

the allegations on which it is proposed to be taken, are issued to the Government servant or pensioner, or if the Government servant has been placed under suspension from an earlier date, on such date; and

(b) judicial proceedings shall be deemed to be instituted-

(i) in the case of criminal proceeding, on the date on which the complaint or report of a police officer, of which the Magistrate takes cognizance, is made, and

(ii) in the case of civil proceedings, on the date the plaint is presented in the court."

13. I have heard the learned counsels and perused the record and also the relevant provisions of Rajasthan Service Rules and the judgments cited at the bar.

14. This Court is of the considered opinion that the present writ petition has no force and is liable to be dismissed. The reasons are as follows.

15. Firstly, the challenge to the charge sheet served upon the petitioner vide Annex. 16 dated 11/10/1996, which was a follow up charge sheet of one served upon him prior to his retirement on 31/5/1995 by filing this writ petition after his retirement on 31/10/1995, has been laid much belatedly by filing the present petition in this Court on 23/8/1997. Instead of filing reply to the charge sheet or giving his explanation for long absence of more than 7 years from duty, the petitioner has chosen to directly challenge the said charge sheet in this Court in the present writ petition. The petitioner has now stated in his written submissions only for the first time that a letter dated 28/10/1997 was given by him referring to its reference in the order Annex. 20 dated 17/4/1999 but that document has never been produced on record by the petitioner. The reason given for doing so is the frustration and feeling of subordination on account of wrongful promotion of the person junior to the petitioner, is not at all sufficient ground for the petitioner to lay a challenge to the charge sheet straightaway in writ jurisdiction before this Court. His deliberately remained absent and did not participate in the enquiry proceedings, which was bound to result in an ex-parte enquiry in which the charges levelled against the petitioner were proved by examining the witness P.W. 1 and production of documents Ex. P/1 to P/3 and for the long absence of more than 7 years without any valid reason or without any sanctioned leave granted in favour of the petitioner, the finding of guilt against the petitioner was recorded. Thereafter, as required under Rule 170 of the RSR even before initiation of enquiry vide charge sheet dated 11/10/1996 the approval of His Excellency the Governor was obtained and after inquiry report was submitted, the petitioner was again given a show cause notice to which also the petitioner did not file any reply or explanation and consequently the matter was referred to the Governor again and after obtaining the consent of RPSC vide letter dated 19/2/1999 and, thereafter, the order for stoppage of 100% pension was passed by the Governor on 17/4/1999, which order has been only placed on record as Annex. 20 along with the amendment application filed in the Court in the year 2003 but no challenge to the same has been laid by the petitioner nor

the said application was ever argued & pressed for last 11 years. On the contrary, to overcome the said order dated 17/4/1999 in a surreptitious manner, the amendment in the writ petition has been sought by seeking to add a prayer in the writ petition for grant of notional promotion to the petitioner against the vacancy for the year 1988-89 as Executive Engineer only after so many years by filing the amendment application in the year 2003.

For the reason viz. not challenging the order dated 17/4/1999 (Annex. 20), the case laws referred by the petitioner about pension being a right of Govt. servant etc. are not applicable here and do not require a detailed further reference here.

16. This will not only result in a misjoinder of issues but such amendment in writ petition cannot be allowed by the Court as it would also result in changing the very tenor and purpose for which the original writ petition was filed by the petitioner, namely to challenge the charge sheet vide Annex. 16 dated 11/10/1996 itself. Mixing of the issues of disciplinary action and non-promotion or wrongful promotion to the junior persons is a misjoinder of issues which can not be permitted, particularly after so many years & death of the petitioner himself. The amendment application, therefore, deserves to be rejected and the same is accordingly rejected.

17. As far as the challenge to the issuance of the charge sheet itself is concerned, no sufficient reasons have been given nor the arguments advanced by the learned counsel for the petitioner on the basis of which the issuance of charge sheet after retirement of the petitioner from service can be held to be per se illegal or without jurisdiction. On the contrary, the petitioner is clearly held guilty of remaining absent from duty for a long period of more than 7 years without any sanction of leave & for no apparently good reason despite several letters and communications sent to him by the respondent Department. Remaining absent and then not cooperating in the enquiry even after retirement is itself a serious indiscipline and misconduct on the part of the petitioner. He himself chose to remain absent and did not voluntarily participate in the enquiry proceedings and, therefore, he cannot raise any grievance now against inquiry having been held ex-parte against him. Even after the enquiry was completed, he did not choose to give any reply or representation to the respondents and there is no material placed on record by the petitioner which could establish the reasonableness of any excuse for such willful absence even before his retirement or after retirement in the enquiry proceedings and subsequent thereto.

18. The claim of the petitioner that wrongful promotion was given to Mr. A.C. Mathur and his non-consideration for promotion to the post of Executive Engineer for the vacancies of the year 1988-89 sought to be raised at this stage belatedly by the legal representatives of the petitioner after his death is not only a stale claim but no foundation has been laid for claiming such promotion as a matter of right. The said claim is also, therefore, liable to be rejected.

19. Therefore, viewed from any angle, this Court finds no substance in the

present writ petition and the same is found to be bereft of merit and the same is liable to be dismissed. It is accordingly dismissed. No order as to costs. Copy of this order be sent to the concerned parties forthwith.