
(2009) 05 J&K CK 0048

In the Jammu And Kashmir High Court

Case No : Service Writ Petition (SWP) No. 2785/2001

Ashok Kumar

APPELLANT

Vs

State of J&K & Ors.

RESPONDENT

Date of Decision : 12-05-2009

Acts Referred:

Citation : (2009) JKJ 549 Supp

Hon'ble Judges : Sunil Hali, J

Bench : Single Bench

Advocate : S.C.Gupta,AAG, D.S.Chouhan, Advocates appearing for the Parties

Judgement

1. The petitioner stood removed from the service on account of his absence from duty. The order of dismissal/removal from service was

challenged by him in SWP No. 289/1987. On 26.5.1997, while deciding the said writ petition, the Court directed the respondents to hold a fresh

enquiry, if they so desires. An appeal against the said order also stood dismissed on 3.5.2000 by the Division Bench.

2. Pursuant to the directions issued by the Court, an inquiry was stated to have been conducted by the respondents. The resultant effect of the

inquiry was that the petitioner was reinstated in the service. However, the period of his unauthorized absence from duty with effect from

03.04.1985 to 03.05.2000 was treated as 'dies non' and the period with effect from 10.06.2000 was treated as period spent on duty. Being

aggrieved of the same, the petitioner has challenged the said order dated 11.9.2000 before this court.

3. I have heard learned counsel for the parties and perused the record.

4. After order of dismissal, removal or compulsory retirement from service is

set aside and no fresh inquiry is ordered, the State is left with no option, but to determine the absence period of the delinquent official as on date. It is to be noted that under Article 108B, if a person who is fully exonerated, the period of absence from duty is to be treated as period spent on duty. However, if a person has not been fully exonerated and the order of dismissal, removal or compulsory retirement from service is set aside on the ground of noncompliance with the requirement of provisions of subsection (2) of Section 126 of the Constitution of Jammu and Kashmir, in that eventuality the period of absence shall not be treated as period spent on duty, unless it is specifically directed by the respondents.

5. Perusal of the aforementioned provision reveals that in case of exoneration the State is left with no option, but to treat the period of absence as on duty and in other case the State cannot treat the absence period as on leave, unless it so directs in such order.

6. In the present case, there is no dispute that the petitioner was not fully exonerated. On account of breach in following the procedures as contended in Article 126 Clause (2) his order of discharge was set aside. This being the position, the respondents have powers to treat his absence from duty as 'diesnon'. The effect of 'diesnon' has been interpreted vide SRO 514 dated 22.11.1999. The word 'diesnon' means a day on which no legal business is transacted or which is not reckoned for some particular purpose. The period which, is directed to be treated as 'diesnon' cannot therefore be counted for service benefits otherwise available for that period. Accordingly, the import of the term 'diesnon' is that:

I) "It does not qualify for any remuneration (pay and allowances); II) It does not count for pension;

III) It does not count for increments;

IV) It does not cause any interruption for leave carried up to the date preceding that on which the period of 'Diesnon' has commenced'

V) It does not cause any interruption for the past service qualifying for pension; it shall not count for experience;

VI) During 'Diesnon' the concerned Govt. servant shall not be entitled for promotion.

VII) The concerned shall lose seniority in his cadre/category by the period which is treated as 'Diesnon'.

It is important to mention here that amendment of aforementioned SRO has been made and the period of absence was not counted for pensionary and other benefits.

7. There is no dispute that the respondents had the powers to treat the period of absence as 'diesnon' but the question which arises in this writ

petition is that can it be imposed without hearing the petitioner.

8. Undoubtedly, treating the period of absence as 'diesnon' is not a punishment under Civil Service Regulation, but it has the effect of taking away

the vested rights of a person. That is to say the period will not be counted towards his service, both for pensionary and monetary benefits. Before

taking away any right which vests in a person, the principles of natural justice are required to be followed. I say so because right to pay has been

held to be a property under Article 19 of the Constitution and the same cannot be denied to the petitioner unless he is heard.

9. Even Article 108D clearly indicates that before taking any decision in respect of any amount which is to be paid to the petitioner for the period

he remained absent, a notice is required to be given to the beneficiary.

10. Be that as it may, treating the period of absence from duty as 'diesnon' has direct bearing on the rights of the petitioner which cannot be taken

away unless he is heard in the matter.

11. In view of the above, I allow this petition and set aside the order dated 11.9.2000 treating the period of absence of the petitioner from duty as

'diesnon'. The respondents are, however, directed to take a fresh decision after affording an opportunity of hearing the petitioner and following the

principles of natural justice.

12. Disposed of along with connected CMP.