

(2004) 05 AHC CK 0036
In the Allahabad High Court
Case No : C.M.W.P. No. 17023 of 2002

Ashok Kumar Tiwari

APPELLANT

Vs

Chairman, U.P. Power Corporation Ltd. and Others

RESPONDENT

Date of Decision : 20-05-2004

Acts Referred:

Citation : (2004) 3 AWC 2765(2)

Hon'ble Judges : Janardan Sahai, J

Bench : Single Bench

Advocate : K.C. Sinha, for the Appellant; Nripendra Mishra and C.P. Mishra, S.C., for the Respondent

Judgement

Janardan Sahai, J.—The petitioner was a clerk in the U. P. Power Corporation, He was involved in a criminal case u/s 302, Indian Penal Code and was arrested and he was in jail from 27.11.1998. While still in Jail and order of suspension of the petitioner dated 1.12.1998 was passed by the Superintending Engineer who "it is not disputed" is the appointing authority of the petitioner. The petitioner was ultimately acquitted in the criminal case on 16.8.1999 by the judgment of the VIIIth Additional District and Sessions Judge. On 30.8.1999, the petitioner submitted an application along with the copy of the judgment of acquittal seeking reinstatement. The Superintending Engineer passed the order of reinstatement on 7.9.1999. It appears that even before the petitioner was sent to jail he was absenting from 19.11.1998 to 26.11.1998. When he joined on 8.9.1999 the petitioner made an application to the Executive Engineer, Electricity Distribution Division under whom he was working that the period of his absence between 19.11.1998 to 26.11.1998, be treated as earned leave. On 9.9.1999, the petitioner gave another application for treating the period of absence from 27.11.1998 to 7.9.1999 also as earned leave. By the order dated 23.8.2001 of the Executive Engineer the period of absence between 19.11.1998 to 26.11.1998 was treated as leave without pay. By another order dated 23.8.2001 of the Up Maha Prabandhak the period of absence between 27.11.1998 to 7.9.1999 was

treated as leave without pay. By the impugned order dated 4.9.2001 of the Executive Engineer the petitioner was informed of the earlier orders dated 23.8.2001 of the Up Maha Prabandhak and Executive Engineer that the period of absence from 27.11.1998 to 7.9.1999 and 19.11.1998 to 26.11.1998 was treated as leave without pay. All these orders are under challenge in the present writ petition.

2. The U. P. State Electricity Board has made regulations known as the Regulation u/s 79C of the Electricity (Supply) Act, 1947, governing the payment of Subsistence Allowance. By this regulation the provisions of Rules 53, 54 and 55 of the Fundamental Rules contained in the U. P. Financial Handbook have been made mutatis mutandis applicable to the employees of the Board. Rule 54B relates to a situation where a Government servant who has been suspended is reinstated. This Rule 54B is being quoted below :

"54B. (1) When a Government servant who has been suspended is reinstated or would have been so reinstated 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 or 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 reinstatement is of the opinion that the suspension was wholly unjustified, the Government servant shall, subject to the provisions of Sub-rule (8), to be paid the full pay and allowances to 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 giving him an opportunity to make his representation within sixty days from the date on which the communication in this regard is served on him and after considering 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 amount (not being the whole) of such pay and allowances as it may determine.

(4) In a case falling under Sub-rule (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 subject to the provisions of Sub-rules (8) and (9), be paid such amount (not being the whole) of the pay and allowances to which he would have been entitled had he not been suspended, as the competent authority may determine, after giving the representations, if any, submitted by him in that connection within such period (which in no case shall exceed sixty days from the date on which the notice 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-rule (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-rule (1), who shall make an order according to the provisions of Sub-rule (3) or Sub-rule (6) as the case may be.

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

Provided that if the Government servant 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.

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 Government servant.

(8) The payment of allowances under Sub-rule (2), Sub-rule (3) or Sub-rule (5) shall be subject to all other conditions under which such allowances admissible.

(9) The amount 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.

(10) Any payment made under this rule to Government servant on his reinstatement shall be subject to adjustment of the amount, if any earned by him through an employment during the period between the date of suspension and the date of reinstatement or the date of retirement on superannuation while under suspension. Where the emoluments admissible under this rule are equal to or less than those earned during the employment elsewhere, nothing shall be paid to the Government servant."

3. Sub-rule (3) of Rule 54B provides that if the authority competent to order reinstatement is of the opinion that the suspension was wholly unjustified, the Government servant shall subject to the provisions of Sub-rule (8), be paid full pay and allowances to which he would have been entitled, had he not been suspended. It has, therefore, to be determined whether the suspension of the petitioner was wholly unjustified. The power of suspension of an employee of the Board is contained in U. P. State Electricity Board (Officers and Servants) (Conditions of Service) Regulations, 1975, which counsel for the parties agree apply in the petitioner's case. Regulation 4 gives . power to the appointing authority to place under suspension a servant of the Board pending a criminal investigation, enquiry or trial. It is not in dispute that the petitioner was involved in a case u/s 302 of the Indian Penal Code and remained in jail for the period 27.11.1998 until his acquittal on 16.8.1999. The suspension order passed against the petitioner was, therefore, within the scope of the provisions of Regulation 4 and as the petitioner was unable to make himself available or to render any service for the employer on account of incarceration, it cannot be said that the order of suspension was unjustified what to say of being wholly so. The result is that the petitioner cannot claim full salary during the period he remained in jail. The claim of the petitioner for full salary, therefore, fails. In such a situation Rule 54B (5) applies. This provision requires the competent authority to pass orders determining the pay and allowance to be paid to the Government servant for the period of suspension. Of course under Sub-rule (9) the amount determined cannot be less than the subsistence allowance and other allowances admissible under Rule 53.

4. In the Depot Manager, Andhra Pradesh State Road Transport Corporation, Hanumakonda Vs. V. Venkateswarulu and Another, etc. etc., the Supreme Court in the context of Sub-rule (2) (a) of Rule 21 of the Andhra Pradesh State Road Transport Corporation Employees Regulation, 1967, held that on the acquittal of a servant of the Corporation in a criminal case, it was not axiomatic that he will be paid full salary. Rule 21 (2) (a), which was applicable in that case, is quoted below :

"(2) (a) where such competent authority holds that the employee has been fully exonerated or, in the case of suspension, that it was unjustifiable, the employee shall be granted the full pay and allowances to which he would have been entitled had he not been dismissed, removed or suspended, as the case may be."

5. As the criteria for determining whether an employee should be given full pay during the period he was under suspension under the rule is the criteria of the suspension being unjustifiable, the rule is similar to the rule, which falls for interpretation in the present case. In both the cases, the acid test is to determine whether the order of suspension was justified. The decision of the Apex Court in the Depot Manager case is, therefore, applicable and goes against the petitioner's contention that he is entitled to full pay in view of his acquittal. Learned counsel for the petitioner relied upon a decision of this Court in Hansh

Raj Singh Vs. Managing Director, State of Bank of Patiala and others, The Court granted full wages to the employee who was acquitted in the criminal case against him. But the language of the Rule, which was interpreted in that case, was quite different and the decision is, therefore, of no help in this case.

6. In Ranchhodji Chaturji Thakore v. Superintendent Engineer, Gujarat Electricity Board, Gujarat and Anr. 1997 (1) ESC 565 the Apex Court held that even after the employee had been acquitted of the charges in the criminal case, he was not entitled to full pay during, the period he was in jail, the reason being that the employee had disabled himself from performing duties by getting involved in a criminal case. In view of this discussion the claim of the petitioner for full pay during the period he was under suspension is unjustified.

7. It is also clear from the facts that the petitioner had absented himself from 19.11.1998 to 26.11.1998, without any application for leave, Learned counsel for the petitioner could only show from the record that the first application, which the petitioner filed for his claim that the period 19.11.1998 to 26.11.1998, be treated as earned leave is dated 8.9.1999. In the circumstances as the petitioner had unauthorisedly absented himself, the order treating the period 19.11.1998 to 26.11.1998, as a period spent as leave without pay cannot be said to be arbitrary or unjustified. There remains then the question of payment of salary for the period after the acquittal of the petitioner up to the date when he was reinstated. The petitioner was no doubt acquitted on 16.8.1999 but it was only on 30.8.1999 that he filed the judgment of acquittal and presented himself for joining duty. There was no fault on the part of the petitioner if the respondents thereafter delayed in passing the order for reinstatement. As such, the petitioner is entitled to full salary for the period 30.8.1999 to 7.9.1999 and the impugned order of the Up Maha Prabandhak treating this period as leave without pay is unjustified.

8. The counsel for the petitioner submits that the petitioner has not been paid any subsistence allowance. In view of the provisions of Sub-rule (9) of Rule 54B, the pay and allowance determined under Sub-rule (5) of Rule 54B shall not be less than the subsistence allowance and other allowances admissible under Rule 53. As such, the petitioner is entitled to his pay and allowance be determined at an amount not less than the subsistence allowance for the entire period of his suspension. In the result, the writ petition is partly allowed. The respondents are directed to determine the pay of the petitioner at an amount at least equal to the subsistence allowance and other allowances payable under Rule 53 for the period he remained under suspension and also to pay full pay for the period 30.8,1999 to 7.9.1999. If any suspension allowance has been paid to the petitioner, the same shall be adjusted. The rest of the claim of the petitioner is turned down.