
(2016) 02 P&H CK 0265
In the Punjab And Haryana At Chandigarh
Case No : CWP No. 19104 of 2007 (O&M)

Baldev Singh

APPELLANT

Vs

Kurukshetra University, Kurukshetra and Others

RESPONDENT

Date of Decision : 01-02-2016

Acts Referred:

Constitution of India, 1950 — Article 311

Citation : (2016) 1 LLN 492 : (2016) 3 RSJ 503 : (2016) 3 SCT 184

Hon'ble Judges : Harinder Singh Sidhu, J.

Bench : Single Bench

Advocate : R.K. Malik, Sr. Advocate and Mandeep Singh, Advocate, for the Appellant; A.S. Virk, Advocate, for the Respondent

Final Decision : Disposed off

Judgement

Harinder Singh Sidhu, J.—1. This petition has been filed praying for directions to quash the order dated 25.07.2002 (Annexure P-5), by which the office of the petitioner as Technician Grade-D has been declared as vacant as also the order dated 03.10.2006 (Annexure P-14) by which the appeal of the petitioner against that order has been rejected by the Executive Council of the respondent University. It is further prayed that the petitioner be directed to be reinstated with all consequential benefits.

2. The petitioner was a regular/confirmed employee of the Kurukshetra University having been confirmed as Technician "D" w.e.f. 27.11.1990 (Annexure P-1). He applied for a job in Canada through Kurukshetra University, for which he was selected. On his request, the Vice Chancellor of the University sanctioned him one year extraordinary leave without pay vide letter dated 26.03.2002 (Annexure P-2). It was a condition in the letter that no further extension in leave would be allowed and that he would have to return to the University immediately on expiry of the leave. An undertaking by way of an affidavit was required to be given before proceeding on leave. It is the case of the petitioner that he submitted requisite affidavit as required and after being relieved on 26.03.2002

(A/N) immediately proceeded to Canada.

3. While there one relative of his from India, informed him that the affidavit submitted by him was not properly worded. Immediately, the petitioner forwarded another affidavit alongwith his letter dated 11.08.2002 to the Vice Chancellor (Annexure P-3) stating that he would re-join duty as per the terms of the letter dated 26th March, 2002 and would not seek extension of leave. Sometime thereafter the petitioner received a letter dated 7.11.2002 (Annexure P-4) from the Assistant Registrar stating that the application of the petitioner dated 11.8.2002 for grant of extension in Extraordinary Leave (without pay) could not be accepted in view of the fact that, for his failure to comply with the directions in the letter dated 3.5.2002, whereby he had been intimated that his leave had been cancelled and he had been asked to rejoin within one month, his office had already been declared vacant vide order dated 25.7.2002. A photocopy of letter dated 25.7.2002 was also enclosed.

4. Aggrieved against the order declaring his office to be vacant, the petitioner filed representation/appeal dated 15.12.2002 to the Vice Chancellor requesting that the decision treating his office as vacant be reconsidered. It was, inter alia, stated therein that the letter dated 3.5.2002 was never received by him and that he confirms that he would join his duties on expiry of his leave on 25.3.2003. On 5th February, 2003, the petitioner was informed that the Vice Chancellor had declined his request for allowing him to resume duty as his office had already been declared vacant.

5. The petitioner filed CWP No. 6519 of 2003 challenging the order dated 25.7.2002 whereby his office had been declared vacant as also the order dated 5.2.2003 by which his representation had been rejected. Before the Court, a preliminary objection was taken by the University that against the order of the Vice Chancellor dated 25.7.2002 an appeal lay to the Executive Council. However, the petitioner had wrongly filed the appeal before the Vice Chancellor himself, who had rejected it. In view of this stand, the writ petition was allowed. The order dated 5.2.2003 of the Vice Chancellor was set aside and the matter remanded to the Executive Council to take a decision on the appeal dated 15.12.2002 filed by the petitioner without being influenced by the observations made in the order dated 5.2.2003. It was also directed that the petitioner would be entitled to be heard in accordance with the Rules and Regulations.

6. The Executive Council after hearing the petitioner and considering his written arguments and his response to their queries, passed order dated 3.10.2006 rejecting the appeal.

7. Aggrieved, the petitioner has filed this petition challenging the order dated 25.7.2002, whereby, his office was declared vacant as also the order dated 3.10.2006 whereby his appeal was rejected.

8. In the written statement filed on behalf of the respondents, the sequence of events that led to the passing of the impugned orders have been narrated. It has

been stated that the petitioner had applied for extra ordinary leave (without pay) from 25.03.2002 to 24.03.2004 for two years vide his application dated 29.01.2002. The Vice Chancellor after considering the application of the petitioner allowed only one year extra-ordinary leave which was to expire on 25.03.2003. It was stipulated while granting the extraordinary leave (without pay) that no further extension will be allowed in any case, and that on the expiry of the leave he had to resume duty. He was also asked to submit an undertaking to this effect by way of an affidavit.

9. The affidavit dated 26.03.2002 submitted by the petitioner was to the effect:

"I Baldev Singh, Technician "D" USIC Kurukshetra University, Kurukshetra do hereby solemnly affirm and declare as under:-

1. That I shall not apply for extension of extra-ordinary leave beyond one year as far as possible the circumstances are under my control."

Sd/- Deponent"

10. As this affidavit was not as required in terms of the letter dated 26.03.2002, the Vice Chancellor passed the following order:-

"In case Sh. Baldev Singh is interested in proceeding on leave, he will have to submit an undertaking in clear terms as already ordered failing which it will not be possible to allow his leave requested for"

11. The petitioner was directed vide letter dated 08.04.2002 (Annexure R-1) to submit the requisite affidavit. However, the petitioner had already left the country without filing the affidavit. The matter was again taken up by the Vice Chancellor, who passed the following order on 29.04.2002 directing the petitioner to report for duty within one month failing which the office would be declared vacant:

"Mr. Baldev Singh was allowed leave subject to furnishing an undertaking. Since he has failed to submit the required undertaking, the orders allowing him leave have become infructuous. Therefore, he be directed to report for duty immediately within one month failing which his office be declared as vacant. Letter be sent at his permanent as well as present residential address as intimated to the University."

12. These orders were conveyed by sending a letter dated 3.5.2002 to the petitioner at the addresses as supplied by him. The letter sent on the local address was received back un-delivered. The letter sent to Canada on the address given by him was received with the remarks, "Return to sender-No one works here by the name-" No other address of the petitioner was available with the respondents.

13. As the petitioner failed to resume his duties which as per the letter dated 29.4.2002 he was required to do by 2.6.2002, vide order dated 25.7.2002 the office was declared vacant w.e.f., 26.3.2002. This was done in terms of clause

18(v) of the Leave Regulations, University Calender Volume III, treating the petitioner as being absent from duty. The order was communicated on the address available with the respondent University vide letter dated 18.06.2002. This letter was also received back un-delivered with the same remarks that no one by this name is working there.

14. It was much later that letter dated 11.08.2002 of the petitioner was received along with an affidavit which was in the same terms as earlier one. However, as by then, his office had already been declared vacant, he was informed accordingly. This letter sent by the answering-respondent on the fresh address was delivered to the petitioner.

15. It further stated that in compliance of the directions of this Court, his appeal has been considered by the Executive Council. After giving him opportunity of personal hearing on 25.03.2006 and considering his written arguments, the appeal has been rejected.

16. Sh. Ram Kumar Malik, Ld. Senior Counsel has raised the following arguments:

1. The petitioner having proceeded on leave after due sanction could not have been treated to be absent from duty during the leave period.

2. Even if were to be treated as absent from duty, the impugned order declaring his office vacant could not have been passed without holding a proper enquiry in terms of the University Regulations.

3. The Executive Council did not consider the core issue in the appeal that the order declaring his office as vacant was illegal and unjustified, but based its decision on wholly irrelevant facts and circumstances having no bearing on this issue.

4. The petitioner was working on a pensionable job and had rendered 21 years of service before the declaration of his office as vacant. This fact was not given due weight by the respondents.

17. Sh. A.S. Virk, Ld. Counsel for the respondents, on the other hand has defended the action on the ground that the leave sanctioned to the petitioner was rightly cancelled because of his failure to submit the affidavit as required. Despite the leave being cancelled he remained absent and hence the order declaring his office as vacant was rightly passed in accordance with the University Regulations.

18. I have heard Learned Counsel for the parties and perused the record.

19. The relevant Clause 18(v) of the Leave Regulations under which the impugned order has been passed is reproduced below:

"18(v) If the officer overstays his leave, he shall forfeit all his salary during the time of his remaining so absent, and if he overstays his leave for more than one week, his office shall be liable to be declared vacant."

20. The relevant clauses 13, 28, 29, 30 and 33 of the service regulations in Volume III of the University Calender which lay down the procedure for of Termination of Service" are as under:

"TERMINATION OF SERVICE

13. The service of an employee shall be liable to be termination on any of the following grounds:-

- a) Gross negligence in the discharge of duty;
- b) Misconduct;
- c) Insubordination or any breach of discipline;
- d) Absence from duty without leave;
- e) Physical or mental unfitness for the discharge of duty;
- f) Any act prejudicial to the University or its property; and
- g) Conviction in a Court of Law for offence involving moral turpitude;

Provided that in the case of a permanent employee, an order passed under this clause except under sub clause (g) shall be treated as a penalty under clause 28, and the procedure laid down in Clauses 29 & 30 shall also be followed.

PENALTIES:

28. The following penalties may, for good and sufficient reasons, be imposed on an employee:-

- i) Censure.
- ii) Withholding of increments or promotion, with or without cumulative effect.
- iii) Recovery from pay of the whole or part of any pecuniary loss caused to the University by negligence or breach of the rules of the University or orders or directions of superior authorities.
- iv) Reduction to a lower grade or post or to a lower stage in a time scale or pay.
- v) Compulsory retirement.
- vi) Dismissal from or termination of service; and
- vii) Suspension from service for a specified period.

N.B. During this period the employee will not draw any remuneration of any kind whatsoever but there will be no break in service.

DISCIPLINARY PROCEDURE FOR NON-TEACHING EMPLOYEES APPOINTED BY THE EXECUTIVE COUNCIL.

29. 1) If the Vice-Chancellor is the opinion that there is a prima-facie case of

misconduct, inefficiency or physical, mental incapacity against an employee, he shall appoint an Enquiry Officer to enquire in to the relevant charges or undertake the enquiry himself.

2) The charge-sheet shall be served by the Registrar on the employee concerned.

3) The Enquiry Officer shall give a reasonable opportunity of being heard to the employee.

4) The accused-employee may inspect any document in possession of the University, if it is proposed to rely on the same. Any other document may be allowed to be inspected if the Enquiry Officer considers it to be relevant.

5) The Enquiry Officer, after the hearing is over, shall give his findings on each of the charges levelled against the accused employee and make recommendations as to the action to be taken against the employee. He shall send his report to the Vice-Chancellor when the Enquiry Officer is other than the Vice-Chancellor himself.

6) The Vice-Chancellor shall place the report of the Enquiry Officer before the Executive Council. The Executive Council shall pass such orders as it deems fit.

FOR EMPLOYEES OTHER THAN THOSE APPOINTED BY THE EXECUTIVE COUNCIL:

30. The Registrar may subject to approval by the Vice-Chancellor suspend an employee when proceedings against him are contemplated.

30-A. The Registrar under the orders of the Vice-Chancellor shall serve the charge sheet on the employee concerned giving him at least 10 days time to submit his written reply. If additional charges are served, a further period of 10 days will be allowed. The Registrar at his discretion may extend the time.

30-B. The employee will be allowed copies of such documents as he may need for the purpose of his defence. The Registrar will be competent to refuse copies of such documents as he considers to be confidential or irrelevant.

30-C The Registrar shall appoint an Enquiry Officer, where he considers it necessary, to enquire into the case and when his report is received, he will place the report along with the whole proceedings before the Vice-Chancellor. There will be no bar for the Registrar to enquire into a case himself.

30-D. The Vice-Chancellor after consideration of the report of the Enquiry Officer may impose any of the penalties mentioned in Rule 28 or may exonerate the employee.

30-E. An employee, who is an illiterate person, may, on an application, be permitted to bring with him another employee of the University to assist him at the time of enquiry but in no case shall any outsider be permitted to be engaged by him for this purpose.

APPEALS AND REVIEW.

APPELLATE AUTHORITIES

33. An appeal may lie from any original order passed by the Vice-Chancellor to the Executive Council, and from any original order passed by the Executive Council to the Chancellor. Any appeal once rejected by the competent authority should not be brought for reconsideration before the same authority."

21. Mr. Malik has relied on *Jai Shanker v. State of Rajasthan*, , (1966) 1 SCR 825 and *Deokinandan Prasad v. State of Bihar*, , (1971) 2 SCC 330, to contend that the impugned order declaring the office held by the petitioner to be vacant under Clause 18(v) of the Leave Regulations could not be passed without complying with the procedure of termination of service as per the University Regulations. It is argued that such declaration amounts to removal or dismissal from service, which order cannot be passed without holding a proper enquiry and complying with the rules of natural justice. No such procedure was adopted and hence the order cannot sustain.

22. In *Jai Shanker's* case (*supra*), the Hon"ble Supreme Court was considering Regulation 13 of the Jodhpur Service Regulations as per which a person who absented himself without permission or who remained absent without permission for one month or longer after the end of his leave, was to be considered to have sacrificed his appointment and could only be reinstated with the sanction of the competent authority. The appellant *Jai Shanker*, who was a Head Warder in a Jail, was discharged because of his failure to join after two months leave, his applications for extension of leave having been refused. Quashing the action, the Hon"ble Supreme Court observed:

"4. The short question in this appeal is whether *Jai Shanker* was entitled to an opportunity to show cause against the proposed punishment as required by clause (2) of Article 311. It is admitted that no charge was framed against him. Nor was he given any opportunity of showing cause. The case for the State Government is that Government did not terminate *Jai Shanker's* service, and that it was *Jai Shanker* who gave up the employment by remaining absent. It is submitted that such a case is not covered by Article 311. In support of this contention certain Regulations of the Jodhpur Service Regulations are relied upon and we shall now refer to them. Regulation 7 lays down that leave cannot be claimed as a right and that Government has discretion to refuse or revoke leave of any description. Regulation 11 lays down that an individual who has been granted leave on medical grounds for a period of one month or more may not return to duty without producing a certificate of fitness signed by an officer authorised by a general or special order to grant such certificate. Regulation 12 lays down that an individual who absents himself without permission or remains absent at the end of his leave is entitled to no salary for the period of such absence and that period will be debited against his leave account unless the leave is sanctioned or extended under the ordinary rules by competent authority. Regulation 13 is important because it forms the basis of the contention that Article 311 does not apply to this case. That Regulation may be reproduced here:

"13. An individual who absents himself without permission or who remains absent without permission for one month or longer after the end of his leave should be considered to have sacrificed his appointment and may only be reinstated with the sanction of the competent authority.

Note.--The submission of an application for extension of leave already granted does not entitle an individual to absent himself without permission."

5. It is contended that this Regulation operated automatically and no question of removal from service could arise because Jai Shanker must be considered to have sacrificed his appointment. Under the Regulation he could only be reinstated with the sanction of the competent authority. We have, therefore, to determine whether this Regulation is sufficient to enable the Government to remove a person from service without giving him an opportunity of showing cause against that punishment, if any.

6. It is admitted on behalf of the State Government that discharge from service of an incumbent by way of punishment amounts to removal from service. It is, however, contended that under the Regulations all that Government does, is not to allow the person to be reinstated. Government does not order his removal because the incumbent himself gives up the employment. We do not think that the constitutional protection can be taken away in the manner by a side wind. While, on the one hand, there is no compulsion on the part of the Government to retain a person in service if he is unfit and deserves dismissal or removal, on the other, a person is entitled to continue in service if he wants until his service is terminated in accordance with law. One circumstance deserving removal may be over-staying one's leave. This is a fault which may entitle Government in a suitable case to consider a man as unfit to continue in service. But even if a regulation is made, it is necessary that Government should give the person an opportunity of showing cause why he should not be removed. During the hearing of this case we questioned the Advocate General what would happen if a person owing to reasons wholly beyond his control or for which he was in no way responsible or blameable, was unable to return to duty for over a month, and if later on he wished to join as soon as the said reasons disappeared? Would in such a case Government remove him without any hearing, relying on the regulation? The learned Advocate-General said that the question would not be one of removal but of reinstatement and Government might reinstate him. We cannot accept this as a sufficient answer. The Regulation, no doubt, speaks of reinstatement but it really comes to this that a person would not be reinstated if he is ordered to be discharged or removed from service. The question of reinstatement can only be considered if it is first considered whether the person should be removed or discharged from service. Whichever way one looks at the matter, the order of the Government involves a termination of the service when the incumbent is willing to serve. The Regulation involves a punishment for overstaying one's leave and the burden is thrown on the incumbent to secure reinstatement by showing cause. It is true that the Government may visit the

punishment of discharge or removal from service on a person who has absented himself by over-staying his leave, but we do not think that Government can order a person to be discharged from service without at least telling him that they propose to remove him and giving him an opportunity of showing cause why he should not be removed. If this is done the incumbent will be entitled to move against the punishment for, if his plea succeeds, he will not be removed and no question of reinstatement will arise. It may be convenient to describe him as seeking reinstatement but this is not tantamount to saying that because the person will only be reinstated by an appropriate authority, that the removal is automatic and outside the protection of Article 311. A removal is removal and if it is punishment for overstaying one's leave an opportunity must be given to the person against whom such an order is proposed, no matter how the Regulation describes it. To give no opportunity is to go against Article 311 and this is what has happened here."

23. It was held that he was entitled to an opportunity to show cause against the proposed removal from service on his overstaying his leave and as no such opportunity was given to him, his removal from service was illegal.

24. Similar view was taken in *Deokinandan Prasad v. State of Bihar*, (1971) 2 SCC 330 wherein, it was held that an order under Rule 76 of the Service Code which envisaged automatic termination on being continuously absent for a period of over five years could not be passed without giving opportunity to show cause against the order proposed.

25. In the present case as per the respondent University, the order dated 29.4.2002 informing that the petitioner's leave had become infructuous and asking him to join within one month failing which his office would be declared vacant, was sent to him vide letter dated 3.5.2002, which admittedly he never received. Apart from this, there was no communication or notice ever sent or received by him stating that his leave had been cancelled and that he would be terminated if he did not immediately re-join.

26. Accordingly, there is no escape from the conclusion that the order dated 25.7.2002 has been passed without complying with the elementary requirements of natural justice, what to talk of the procedure envisaged for termination as per the University Regulations which envisages holding of a proper enquiry. Thus, on the ratio of the aforementioned cases, which would hold good for the present case as well, though the petitioner does not enjoy the protection of Article 311 of the Constitution, the order dated 25.7.2002 has to be held to be illegal and void.

27. The Executive Council while considering the appeal of the petitioner did not address this issue at all. It asked the petitioner to submit an affidavit replying to five questions.

"1. Is it a fact that you have not joined the company for which you had got the leave sanctioned?

2. Is it a fact that the address furnished by you in your application for Canada was incorrect and you never informed for change of address in Canada and your avocation there?

3. Is it a fact that you kept concealed at the time of getting the leave sanctioned that you were proceeding to Canada as permanent resident on immigrant Visa? You are required to specify the kind of visa, you are holding and submit the attested copy of your passport and visa from Notary Public or Magistrate.

4. Is it a fact that from the date you proceeded on leave in March 2002 to Canada and stayed there upto March 2006 although you are allowed to stay there upto March 2003?

5. Is it a fact that you did not submit affidavit/agreement as desired before proceeding to Canada in March 2002 on the basis of Extra ordinary leave and proceeded without compliance."

28. These were replied by the petitioner through his affidavit dated 24.4.2006. He explained that the University had forwarded his application for the job to the employer in Canada who had offered him a job, pursuant where to he applied for leave which was sanctioned. However, as the petitioner was not able to obtain the SIN Card (Social Insurance Number) within time, the job offer was withdrawn. Regarding non-furnishing of the correct address in Canada, he explained that following the withdrawal of the offer by the first employer he was without a job for long. No sooner he got the job and learnt of the requirement of a fresh affidavit he wrote to the University on 11.8.2002 explaining that he would positively join back on the expiry of his leave and not seek any extension. To the question that he had concealed from the University the details regarding the type of his Visa, he explained that no such information was asked by the University. Regarding his staying in Canada till 2006, he explained that as his service had been terminated he had no option. However all through he continued to pursue his legal remedies. Regarding the incorrect affidavit, he explained that no specific proforma for the affidavit had been prescribed by the University. He stated that the affidavit clearly manifested that he intended to return to India on expiry of his leave. He had reiterated as much in his communication dated 11.8.2002. He pleaded that he had served the University for 20 years and his case be considered sympathetically.

29. But the Executive Council rejected his appeal by holding that he could not satisfactorily reply to the questions. It was observed that considering the circumstances that the petitioner had failed to submit the required affidavit before proceeding on leave on 26.03.2002 which was a pre-condition for his proceeding on Extraordinary leave and further that he did not join the company for which approval was granted by the University and that he accepted the assignment without the permission of the University and that he did not furnish his correct address on reaching Canada and that he had concealed the nature of his Visa, it was decided to reject the appeal.

30. Ld. Counsel for the petitioner appears to be right in his contention that most of these issues were not central to the determination of the question as to whether the impugned order dated 25.7.2002 was valid or not. Apart from the requirement of the affidavit. It has not been pointed out as which Rule, Regulation or condition had been violated by any lapse on the part of the petitioner regarding the five questions considered by the Executive Council and which would warrant his removal. In any case, the impugned order dated 25.7.2002 was not based on any of these grounds and the Executive Council could not sustain it on different/additional grounds.

31. It appears that a small issue was aggravated beyond proportion. The Vice Chancellor was of the view that the affidavit submitted by the petitioner was not as required, inasmuch as it did not contain an unequivocal undertaking that the petitioner would rejoin on expiry of the leave period. The letter dated 8.4.2002 calling upon the petitioner to submit a better affidavit strictly in terms of the Vice Chancellor's order dated 26.3.2002 did not reach him. Nor did the letter dated 3.5.2002 informing him of the decision dated 29.4.2002 cancelling his leave and calling upon him to rejoin within one month. Even the order dated 25.7.2002 declaring his office vacant did not reach him for want of his proper address. It was only much later, when the University wrote back to him on 7.11.2002 in response to his letter dated 11.8.2002 that he learnt that his office had been declared vacant. The petitioner immediately filed an appeal dated 15.12.2002 which came to be rejected vide order dated 5.2.2003. This order was set aside by this Court vide order dated 9.8.2014 in CWP No. 6519 of 2003 and the matter was remitted to the Executive Council of the University to take a decision on the appeal of the petitioner. The said appeal has been dismissed vide order dated 3.10.2006, whereafter, the petitioner filed this writ petition.

32. The end result is that since 25.7.2002 the petitioner stands removed from his service in the University where he claims to have served for about 20 years. It appears that because of the office of the petitioner having been declared vacant before the expiry of his leave period, he did not come back to India to rejoin, though he continued pursuing his legal remedies from Canada. Obviously, in course of time the petitioner would have landed a job in Canada and it appears that he has continued to stay there. This much is evident from the petition itself, wherein, it is stated that the petitioner is presently residing in Canada.

33. During the course of arguments it was pointed out that the petitioner had reached the age of superannuation in April, 2011. The question is what relief can be given in these circumstances?

34. As the order dated 25.7.2002 has been held to be illegal, it is directed that the petitioner would be treated to be in service till the date of superannuation. However he will not be paid any salary or other allowances for this period but would be entitled to notional benefits only for this period.

35. The petition is disposed accordingly.