
(2014) 01 CAL CK 0094
In the Calcutta High Court
Case No : W.P.C.T. No. 223 of 2013

Barman Das Pattanayak

APPELLANT

Vs

Union of India (UOI)

RESPONDENT

Date of Decision : 20-01-2014

Acts Referred:

Citation : (2014) 2 CHN 606

Hon'ble Judges : Subrata Talukdar, J; Nishita Mhatre, J

Bench : Division Bench

Advocate : Paramaswar Nath Mishra and Pragya Mishra, Advocate for the Appellant; Shyamali Banerjee, Advocate for the Respondent

Final Decision : Allowed

Judgement

Subrata Talukdar, J

1. In this petition, WPCT 223/2013, the Petitioner has impugned the order dated 19th February, 2013, passed by the Learned Central Administrative Tribunal, Calcutta Bench in OA 900 of 2012. By the order impugned the Learned Tribunal took the view that as per provision contained in Rule 25(2) of CCS (Leave) Rules, wilful absence from duty after the expiry of leave renders a government servant liable to disciplinary action. The Learned Tribunal took the further view that in the light of Rule 28 of CCS (Pension Rules), such service cannot be acknowledged as qualifying service for pension. The Learned Tribunal also opined that both orders passed by the authority imposing the punishment as well as treating the period of absence as "DIES NON" are appealable orders and no appeal was preferred. In the light of the above, the Learned Tribunal dismissed OA 900 of 2012 on 19th February, 2013.

2. The petitioner, in this application, is aggrieved by such order of the Learned Tribunal. The petitioner prays for setting aside the said order with direction to the authority not to treat the period of his absence from 8.1.83 to 7.4.88 as "DIES NON" and to release the pension and consequential financial benefits by treating

him as retired with effect from 8th April, 1988 along with arrear benefits.

3. Admittedly, the petitioner joined service under the Central Government as Assistant Foreman with Gun and Shell factory, Cossipore, Kolkata on 23rd January, 1973 and was confirmed in such post with effect from 1st December 1973. Admittedly, the authority granted him permission on 6th June, 1981 to visit U.S.A. for a period often months to facilitate his higher studies/training.

4. The petitioner was sanctioned Earned Leave and Half Pay Leave from 8th of March 1982 to 7th of January, 1983 for the aforesaid purpose. On 19th November, 1982, the Petitioner, from U.S.A., made a request to the authority to grant him Extraordinary Leave without pay from 8th January, 1983 to 7th May, 1986 for prosecuting higher studies/training in U.S.A.. On 4th April, 1982 the authority asked the petitioner to furnish an undertaking requiring him to render 2 years of service with the authority after completing his higher study and such undertaking was executed by the Petitioner on 23rd May, 1983.

5. In spite of the above backdrop the authority proceeded to charge sheet the Petitioner for gross misconduct on the 4th of April, 1987 charging him with fraudulent misrepresentation to visit U.S.A. for higher studies without taking formal admission in a University. The petitioner was also charged with unauthorized absence from duty.

6. The petitioner accepted such charge by his letter dated 14th January, 1988 (Annexure R 3 collectively to the affidavit in opposition) but mentioned that he could not join his duty after expiry of sanctioned leave as he was prosecuting higher studies/training at U.S.A. The petitioner therefore, requested the authority to consider his case for compulsory retirement having regard to the fact that he had already served under the authority for a period of 18 years and 3 months before proceeding to U.S.A. The petitioner prayed for release of all his terminal benefits.

7. The Director General, Estt. CVO, being the appointing authority of the petitioner accepted the explanation of the petitioner admitting the charges levelled against him and imposed the penalty of compulsory retirement from service by communication dated 8th April 1988 (Annexure" R 3 to the affidavit-in-opposition). In response, by his letter dated 13th September, 1988 the petitioner sought a clarification from the authority as to the effective date of his compulsory retirement. He also indicated that necessary claim forms signed by him have been deposited with the authority and his terminal benefits may be forwarded to his bank account.

8. By factory order No. 1674 dated 4th August, 1988 (Annexure R-3 to the affidavit-in-opposition) the petitioner was compulsorily retired effective from 8th April, 1988. However by further factory order dated 16th March 1989 (Annexure R-3 to the affidavit-in-opposition) issued by the General Manager the period of service from 8th January, 1983 to 7th April, 1988 was declared as "DIES NON" with the effect that such service will not count towards his qualifying service for

receipt of terminal benefits.

9. The Learned Advocate for the Petitioner has raised the following contentions:--

a. That the factory order dated 16th March, 1989 treating the period as "DIES NON" could not have been subsequently issued in the face of the earlier order dated 14th August, 1988 by which he was compulsorily retired with effect from 8th April, 1988;

b. That the earlier factory order dated 14th August, 1988 makes it amply clear that the Petitioner has been compulsorily retired with effect from 8th April, 1988 and therefore, for all purposes his services would be deemed to be continuous till 7th April, 1988;

c. That the order imposing punishment dated 8th April, 1988 only contemplated his compulsory retirement by way of penalty and did not envisage that the period between 8th January, 1983 to 7th April, 1988 will be treated as "DIES NON" and such order of "DIES NON" could not be subsequently issued;

d. That the order of compulsory retirement although issued by the competent authority, viz. the Director General, who is also the appointing authority of the Petitioner, the subsequent order of "DIES NON" was issued by the General Manager who was not the appointing authority of the Petitioner.

e. That under the rules and extant government circulars, no order of "DIES NON" can be issued without putting the Petitioner to notice and no such order can be issued in circumstances where such unauthorized leave is in continuation of any authorized leave of absence.

10. The Petitioner alleges that the said impugned order of "DIES NON" is ex facie arbitrary and de hors the rules. Hence it must be quashed.

11. The Learned Advocate for the Respondent authority by filing an affidavit in opposition supports the said factory order dated 16th March, 1989 arguing that the authority was within its competence under the rules to issue such order as the Petitioner was absenting himself continuously from duty and unauthorisedly from 8th January, 1983. It has been further argued on behalf of the authority that the Petitioner was entitled to file an appeal before the Appellate Authority challenging the said order of punishment. Further, the Petitioner instead of challenging the said order of punishment by way of appeal has filed a belated application before the Learned Tribunal which is hopelessly barred by limitation.

12. We are, however, not inclined to accept the arguments advanced on behalf of the authority for the following reasons.

13. Firstly, upon acceptance of the charges against him the Petitioner, as. already indicated above, applied for sympathetic consideration of his case for compulsory retirement from service which was accepted by the competent authority thereby compulsorily retiring him from service effective from 8th April, 1988. Once the Petitioner is compulsorily retired by way of penalty, in our opinion, a second

punishment by way of imposition of "DIES NON" should not have been imposed by a subsequent order, particularly when such subsequent order was issued after the lapse of nearly 8 months and by an authority, viz., the General Manager who was not the appointing authority of the Petitioner.

14. Secondly, in our opinion, once the Petitioner has been compulsorily retired with effect from 8th April, 1988, his services will be deemed to have continued till 7th April, 1988 and the Petitioner will be entitled to computation of his pensionary benefits treating such service to be continuous till 7th April, 1988. The authority acted arbitrarily by issuing a post-facto order treating a portion of such service, viz., between 8th January, 1983 to 7th April, 1988 as "DIES NON".

15. Thirdly, under the rules, the Petitioner ought to have been put on notice prior to treating any portion of his service as "DIES NON" We are not unmindful of the fact that under the extant rules a copy of which has been produced before the Court being FR & SR Part III Leave Rules Central Civil Services (Leave) Rules, 1972 issued by the Department of Personnel and Training vide clause 6 thereof it is provided that the Comptroller and Auditor General has specified that "...absence without leave when it stands singly and not (emphasis supplied) in continuation of any authorized leave of absence will constitute interruption of service for the purpose of pension...".

16. Finally, we do not accept the contention of the Learned Advocate for the authority that the claim of the Petitioner is barred by limitation in as much as we find that deprivation from pension and other terminal benefits is a continuing cause of action.

17. Furthermore, the plea of alternative remedy by way of an appeal is not a bar in all cases for ventilating grievances before the proper Court of forum.

18. In the facts of the present case it is not disputed that the petitioner was on authorized leave till 8th January, 1983 and thereafter he corresponded regularly with the authority for extension of his leave in order to complete his higher studies/training in the USA. However, on the charge of unauthorized absence being levelled against him, the petitioner decided to accept the penalty of compulsory retirement which was so granted with effect from 8th April, 1988. In the circumstances, there is no question of the petitioner proceeding on a single unauthorized leave which will tantamount to interruption in service. From the records it is clear that the petitioner proceeded on authorized leave and thereafter prayed for continuation of such leave and therefore deserves to be treated liberally under the extant rules and circulars of the Government of India. It is also evident that the petitioner, up to the date of his authorized leave had put in 18 years and 3 months which is adequate qualifying service for a government servant to be eligible to receive pension and other terminal benefits.

19. In support of his contentions the learned advocate for the petitioner has referred to the following decisions:

- i) State of Madhya Pradesh Vs. Ram Ratan,
- ii) (1997) 2 SCC 398, H.S. Arora v. Union of India (Para 7);
- iii) A.P. Srivastava (Dead by Lrs.) Vs. Union of India (UOI) and Others,
- iv) Gwalior District Co-operative Central Bank Ltd., Gwalior Vs. Ramesh Chandra Mangal and Others,

20. State of M.P. v. Ram Ratan (supra) is an authority on the point that compulsory retirement is different from removal from service in as much as compulsory retirement results in loss of service for certain years but the terminal benefits are assured whereas in removal there is further disqualification which may have some repercussion on terminal benefits.

21. In H.S. Arora v. Union of India (supra) the Hon"ble Apex Court allowed the petitioner to receive his pension and other retiral benefits for the period 19th July, 1982 to 31st October, 1985.

22. In A.P. Srivastava's case, although relied upon by the learned Counsel for the petitioner, is a case pertaining to voluntary retirement of a temporary government servant and therefore distinguishable on facts.

23. In Gwalior District Co-operative Central Bank's case the Hon"ble Apex Court was of the clear opinion that overstaying on leave by an employee would make him amenable to proceedings for misconduct and no further proceedings.

24. The Learned Advocate for the petitioner has also relied upon a decision of the Hon"ble Apex Court in reported in State of Punjab Vs. Dr. P.L. Singla, . In the said decision the Hon"ble Apex Court has held that unauthorized absence (or overstaying on leave) is an act of indiscipline and whenever there is unauthorized absence by an employee, two courses are open to the employer:

I. To condone the unauthorized absence by accepting the explanation and sanctioning leave; or,

II. To treat the unauthorized absence as a misconduct, hold an enquiry and impose a punishment.

25. However, none of the above courses were adopted by the authority. On the contrary the authority decided to treat the petitioner to be in service till 7th April 1988 and compulsorily retired him with effect from 8th April, 1988, albeit by way of a penalty.

26. For the reasons aforesaid, we quash the order of the authority treating the period from 8.1.83 to 7.4.88 as "DIES NON". We direct the authority to recalculate in accordance with the applicable rules the petitioner's pensionary and other retiral benefits by treating him to be in service till 7th April, 1988 and to release such benefits within a period of 3 months from the date of communication of this order.

27. WPCT 223/13 is accordingly allowed. There will be no order as to costs. Urgent certified photocopies of this judgement, if applied for, be given to the learned advocates for the parties upon compliance of all formalities.

N. Mhatre, J.

I agree.