
(2002) 03 DEL CK 0174
In the Delhi High Court
Case No : C.W.P. No. 6261 of 1998

Bhagwan Lal Arya

APPELLANT

Vs

Commissioner of Police and Others

RESPONDENT

Date of Decision : 16-03-2002

Acts Referred:

Central Civil Services (Leave) Rules, 1972 — Rule 17, 7, 7(2), 9(3)
Constitution of India, 1950 — Article 226
Delhi Police (Punishment and Appeal) Rules, 1980 — Rule 8

Citation : (2002) 03 DEL CK 0174

Hon'ble Judges : S.B. Sinha, C.J.; A.K. Sikri, J

Bench : Division Bench

Advocate : Gyan Prakash, for the Appellant; Alakh Kumar, for the Respondent

Final Decision : Dismissed

Judgement

S.B. Sinha, C.J.—An order dated 01.07.1998 of the Central Administrative Tribunal, Principal Bench, New Delhi (hereinafter referred to as "the Tribunal") in O.A. No. 1195 of 1998 dismissing the original application filed by the petitioner wherein he had questioned a penalty of removal from service by the disciplinary authority vide order dated 25.06.1996, the order of the appellate authority dated 26.09.1996 as also the order dated 02.06.1997 passed by the revisional authority, was dismissed, is in question in this writ petition.

2. Allegedly on 07.10.1994, the petitioner fell down while attending parade. The contention of the petitioner is that as he was not looked after by his colleagues and superiors; he had to get treatment from his own Doctor. Admittedly he remained absent for 7 months without obtaining any leave.

3. A departmental proceeding was initiated against him resulting in passing of the orders impugned before the Tribunal. The defense of the petitioner was that his absence from duty was not willful.

4. The learned Tribunal in its impugned order held that the impugned order

having not been passed without any evidence, no case has been made out for its interference. In support of the said findings, the learned Tribunal relied upon the decision of the Apex Court in State of U.P. v. Ashok Kumar Singh 1996 (1) SLR 291.

5. Mr. Gyan Prakash, the learned counsel appearing on behalf of the petitioner, would submit that the learned Tribunal have failed to take into consideration various questions raised by the petitioner herein.

6. According to the learned counsel, the principles for inflicting penalties as contained in Rule 8 of the Delhi Police (Punishment & Appeal) Rules, 1980 (hereinafter referred to as "DPPA Rules") had not been followed.

7. The learned counsel would contend that having regard to the fact that he had applied for leave on the basis of medical certificate issued by Government Doctor, the charge of willful absence must be held to have been arrived at without any evidence. It was pointed out that he was in service from June, 1995 to June, 1996.

8. The learned counsel further contended that an order sanctioning his leave was passed on 16.01.1995 for the period 07.10.1994 to 14.12.1994, during which period the enquiry was held and thus the impugned order must be held to be bad in law as the absence of the petitioner cannot be said to be unauthorised.

9. It is submitted that the competent authority had not refused the petitioner's application for leave applied for earlier in terms of Rule 7 of the Central Civil Services (Leave) Rules, 1972 (hereinafter referred to as "the CCS Leave Rules").

10. The learned counsel would contend that for the intervening period, namely 31.12.1994 to 24.05.1995, an order was passed on 20.08.1996 but prior thereto no opportunity of being heard was given to the petitioner.

11. The learned counsel would submit that once the leave has been granted, the question of issuing charge-sheet would not arise and in support of the said contention, reliance has been placed on The State of Punjab and Others Vs. Bakshish Singh, .

12. Mr. Alakh Kumar, the learned counsel appearing on behalf of the respondents, on the other hand, would support the findings of the disciplinary authority, appellate authority, as also the revisional authority.

13. By an order dated 16.01.1995, the Deputy Commissioner of Police, IV Battalion decided that the said un-authorized absence period of the petitioner be treated as "leave without pay" in the following terms:-

"The Dy. Commissioner of Police, IV Bn. DAP, Delhi has decided that the following unauthorized absence period i/r of R/Ct. Bhagwan Lal, No. 1525/NE as Leave Without Pay:-

S.No. DD. No. & Date of absence DD No. & Date of arrival PERIOD

Month Day HRs. MN.

1. 55, dt. 7.10.94 24, dt. 15.12.94 2 8 17 -
2. 74, dt. 11.8.94 12, dt. 12.8.94 - - 13 40
3. 6, dt. 28.9.94 34, dt. 6.10.94 - 8 8 10
4. 34, dt. 18.12.94 13, dt. 24.12.94 - 5 12 30

TOTAL 2 21 50 80

For Dy. Commissioner of Police,

IV Bn. DAP, Delhi.

No. 109-12/Trg. Br./IV Bn. DAP, dated, Delhi, the
16-1-95.

14. It is not in dispute that the matter relating to leave of the petitioner is governed by the CCS Leave Rules. Rule 7 of the said CCS Leave Rules provides that the leave cannot be claimed as of right. Sub-rule (2) of Rule 7 of the said CCS Leave Rules provides that when the exigencies of public service so require, leave of any kind any be refused or revoked by the authority competent to grant it, but it shall not be open to that authority to alter the kind of leave due and applied for except at the written request of the Government servant.

15. In the instant case, the services of the petitioner were terminated by an order dated 31.12.1994 in terms of Rule 5(1) of the Temporary Service Rules. The petitioner submitted a representation against the termination of services whereupon by an order dated 16.01.1995, the period 07.11.1994 to 15.12.1994 was directed to be treated as "leave without pay".

16. Admittedly the summary of allegation was served upon the petitioner on initiation of the disciplinary proceedings for unauthorized and willful absence of 2 months and 7 days, i.e., 07.10.1994 to 15.12.1994.

17. The aforementioned order dated 16.01.1995 must have been passed on the basis of the leave application filed by the petitioner. The question, as to whether absence of an employee from duty is willful or not, is essentially a question of fact. Such a finding can be arrived at by the Enquiry Officer on the basis of materials-on-record. Unless, it is well settled, the order of punishment passed by the Disciplinary Authority relying on or on the basis of the report of the Enquiry Officer is found to be illegal or irrational, a writ court would not ordinarily interfere therewith.

18. From a perusal of the impugned order passed by the learned Tribunal, it appears that various contentions raised, in this writ petition, had not been considered by the learned Tribunal at all. The learned Tribunal in its impugned order proceeded on the basis that the applicant has admitted his unauthorized

absence for a period of 7 months. It failed and/or neglected to take into consideration the fact that the contention of the petitioner had all along been that he has not committed any misconduct inasmuch as no order on his leave application had been passed.

19. In *State of Madhya Pradesh v. Harihar Gopal* 1969 SLR 274, the Apex Court observed as follows:-

"7. It was urged before the High Court on behalf of the State that the order granting leave was only for the purpose of regularizing the absence from duty and for maintaining a true account of absence from duty, and had not the effect of first sanctioning leave to the respondent to which he was entitled, and then removing him from service for absence from duty. The High Court rejected this contention observing:

".....When the leave was granted even though belatedly, it had the effect of authorizing with retrospective effect the petitioner's (respondent's) absence from duty during the period for which it was sanctioned. Having thus authorized the petitioner's (respondent's) absence from duty, it was not open to the State Government to proceed on the basis that his absence was unauthorized."

These observations proceed upon a misconception of the sequence in the orders passed by the State Government and the true effect of the order granting leave. The order granting leave was made after the order terminating the employment and it was made only for the purpose of maintaining a correct record of the duration of service, and adjustment of leave due to the respondent and for regularizing his absence from duty. Our attention has not been invited to any rules governing the respondent's service conditions under which an order regularizing absence from duty subsequent to termination of employment has the effect of invalidating termination. Both the orders, one terminating the employment of the respondent and the other granting leave are made "by order and in the name of the Governor of Madhya Pradesh", and they are signed by L.B. Sarje, Deputy Secretary to the Government of Madhya Pradesh, General Administration Department. We are unable to hold that the authority after terminating the employment of the respondent intended to pass an order invalidating the earlier order by sanctioning leave so that the respondent was to be deemed not to have remained absent from duty without leave duly granted.

8. There is another aspect of the case, which is also does not appear to have been considered by the High Court. The charge against the respondent was that he had absented himself "without obtaining leave in advance". The Enquiry Officer characterized the conduct of the respondent as "irresponsible in extreme and can hardly be justified". The Enquiry Officer clearly intended that in failing to report for duty and remaining absent without obtaining leave, the respondent had acted in manner-irresponsible and unjustified. On the finding of the Enquiry Officer that charge was proved and the order, dated March 9, 1962, had no effect on the charge that the respondent had remained absent without obtaining leave

in advance."

20. However, in Bakshish Singh's case (Supra), the Apex Court held thus:-

"3. Having affirmed the findings of the trial court that the charge of absence from duty did not survive, the lower appellate court proceeded to consider the question whether absence from duty was misconduct of the gravest kind so as to warrant the maximum penalty of "dismissal from service" or it was a mere "misconduct" for which lesser punishment would be appropriate. Having found that it was not a case of misconduct of the gravest kind, the lower appellate court remanded the case back to the punishment authority for passing a fresh order of punishment. The appellant then filed a second appeal in the High Court, which was dismissed summarily.

4. It will thus be seen that the trial court as also the lower appellate court had both recorded the findings that the period of absence from duty having been regularized and converted into leave without pay, the charge of absence from duty did not survive. Once it was found as a fact that the charge of unauthorized absence from duty did not survive, we fail to understand how the lower appellate court could remand the matter back to the punishing authority for passing a fresh order of punishment. In the face of these findings, specially the finding of the trial court that proper opportunity of hearing was not given and the signatures of the respondents were obtained under duress during departmental proceedings which have not been set aside by the lower appellate court, we are of the view that there was no occasion to remand the case to the punishing authority merely for passing a fresh order of punishment."

21. The conflicting views in the aforementioned two judgments came up for consideration before a Division Bench of this Court in C.W.P. No. 876 of 1999 titled Ex. Constable Maan Singh v. Union of India and Ors. disposed of on 18.04.2000.

22. In the aforementioned decision, this Court distinguished Bakshish Singh's case (Supra) and held that Harihar Gopal's case (Supra) still holds the field. It was observed that:-

"The Supreme Court in Harihar Gopal's case cannot be said to have laid down the law to the effect that the dismissal order is protected only because it has been made on a different sheet of paper, although by the same authority and on the same date.

The judgment of the Supreme Court in Bakshish Singh's case is per incuriam and does not over rule nor differentiate the judgment in Harihar Gopal's case. In this View of the matter, we are of the opinion that the order of termination does not suffer from any illegality and that the regularization of leave without pay is only for purposes of maintaining correct record of service which does not interfere with nor obliterate the order of dismissal from service."

23. The learned counsel appearing for the petitioner, however, submitted that in

the instant case Sub-rule (3) of Rule 9 of the said CCS Leave Rules shall apply. We do not agree.

24. Sub-rule (3) of Rule 9 of the said CCS Leave Rules reads thus:-

"(9) Effect of dismissal, removal or resignation on leave at credit

(3) A Government servant, who is dismissed or removed from service and is reinstated on appeal or revision, shall be entitled to count for leave his service prior to dismissal or removal, as the case may be."

The said CCS Leave Rules apply in a different situation.

25. Rule 17 of the said CCS Leave Rules is in the following terms:-

"17. Leave not to be granted in certain circumstances

Leave shall not be granted to a Government servant who s competent punishing authority has decided to dismiss, remove or compulsorily retire from Government service."

26. Furthermore, having regard to Rule 17 of the said CCS Leave Rules, the petitioner cannot take benefit of the purported order of regularization of his leave.

27. So far as the order imposing punishment is concerned, the same has attained finality. Such an order could not have been re-opened only because an order was passed on 16.01.1995. Furthermore, the question of waiver of an order of termination does not arise.

28. This Court is not concerned in exercise of its jurisdiction under Article 226 of the Constitution of India as to what happened during the intervening period, this Court is concerned with the correctness of the decision of the Tribunal. In any event, the question as regards the consequence of the order with regard to the intervening period has not been raised before the learned Tribunal, this cannot be permitted to be raised herein for the first time.

29. For the reasons aforementioned, we are of the opinion that no case has been made out for interference with impugned judgment and order, which is accordingly dismissed. However, in the facts and circumstances of the case, no order as to costs.