
(1968) 04 PAT CK 0035
In the Patna High Court

Birendra Kumar Singh

APPELLANT

Vs

State of Bihar and Others

RESPONDENT

Date of Decision : 02-04-1968

Acts Referred:

Bihar Service Code, 1952 — Rule 14, 180(b), 43

Citation : (1969) 1 LLJ 667 : (1968) 1 PLJR 98

Hon'ble Judges : R.L. Narasimham, C.J.;B.D. Singh, J

Bench : Division Bench

Judgement

R.L. Narasimham, C.J.—The petitioner is a non-gazetted Government servant working as a lower division assistant in the office of the Inspector-General of Police, Bihar, Patna. During the last strike of the non-gazetted officers of Bihar, it was alleged that the petitioner absented himself from duty without permission for five days, viz., from 20 to 24 February 1968 (inclusive). The petitioner, while not denying expressly the fact that he absented himself from duty, however, stated that, during the said period, he remained within his sphere of duty, viz., in the city of Patna, and that he did not leave the place. The expression " sphere of duty " has been defined in Rule 43 of the Bihar Service Code, 1952, as the local area within which the duties of the Government servant are ordinarily confined. On 28 February 1968, the Assistant Inspector-General of Police, who is said to be the head of the office in which the petitioner was working, issued an order (annexure A) to the effect that those non-gazetted employees who absented themselves without authority during the strike will not be permitted to draw their pay for the period of absence. This writ was filed by the petitioner on 4 March 1968, challenging the validity of that order. The Assistant Inspector-General of Police, on receipt of further instructions from the Government (annexure D), issued another order (annexure C), superseding the earlier order and granting extraordinary leave in exercise of the powers conferred by Rule 180(b) of the Bihar Service Code to those members of the non-gazetted staff of his office who were absent from duty without authority, while on strike. The petitioner, thereupon, filed an amendment to his petition, and challenged the validity of the

subsequent order (annexure C), granting him extraordinary leave.

2. Thus, the facts which are unchallenged are these. The petitioner did not attend his duties in the office of the Assistant Inspector-General during the strike period from 20 to 24 February 1968, though he was within the sphere of his duty. The expression " duty " has been defined in Rule 14 of the Bihar Service Code, and, admittedly, the petitioner's case will not come under any of the various clauses of that definition. Rule 58(a) of the Bihar Service Code says that a Government servant

shall begin to draw the pay and allowances attached to his tenure of a post with effect from the date on which he assumes the duties of that post, and shall cease to draw them as soon as he ceases to discharge those duties,

It is true that there are other provisions in the Service Code (such as provisions dealing with casual leave, etc.) under which a Government servant may be deemed to be on duty, even though he may not be actually discharging his duties. But these special circumstances, where the deeming provisions may be applied, cannot be availed of by the petitioner because of the absence of the necessary averments for such application.

3. There are two prayers In the writ petition as amended, viz.,-

(i) the orders contained in annexure D and duly implemented by the Assistant Inspector-General in annexure C should both be quashed ; and

(ii) a direction should issue to the competent authority not to make any deductions from the salary of the petitioner for the said period.

4. Taking the first question, It is necessary to refer briefly to some of the provisions of the Bihar Service Code dealing with the circumstances under which extraordinary leave may be granted to a Government servant, Chap. VI of the Service Code deals with the subject of leave. It has been divided into several sections. Section IV contains the heading "grant of leave." Rule 180, which occurs in that section is as follows:

(a) In special circumstances and when no other leave is under these rules admissible, extraordinary leave may be granted. Such leave is not debited against the leave account. No leave salary is admissible during such leave.

(b) The authority empowered to sanction leave may grant extraordinary leave in combination with, or in continuation of, any leave that is admissible, and may commute retrospectively period of absence without leave into extraordinary leave.

Note 1.-The State Government may for special reasons dispense with the condition that extraordinary leave may be granted only when no other leave is by rule admissible, provided that a Government servant cannot be compelled to take extraordinary leave when leave with allowance is admissible to him.

Note 2.-The power of commuting periods of absence without leave into

extraordinary leave under Sub-rule (6) is absolute, in other words, such commutation is permissible even when other leave was admissible to Government servant at the time his absence without leave commenced.

Section VIII of that chapter refers to revised leave rules. These are applicable (omitting immaterial portions) to Government servants in the superior service. The definition of " superior service " read with the definition of " inferior service " (rules 47 and 24) shows that the petitioner belongs to the superior service, and hence the revised leave rules mentioned in Section VIII of Chap. VI of the Service Code would, undoubtedly, apply to him. In the same section is found Rule 223, which is as follows:

Rules in other sections of this chapter in so far as they are not inconsistent with these rules apply *mutatis mutandis* to all persons to whom these rules apply in respect of matters not dealt with in these rules.

Rule 236, which also occurs in Section VIII, refers to the conditions under which extraordinary leave may be granted. This rule may be quoted:

Extraordinary leave may be granted to a Government servant in special circumstances:

- (i) when no other leave is admissible under these rules;
- (ii) when, other leave being admissible, the Government servant concerned applies in writing for the grant of extraordinary leave.

The impugned order, granting extraordinary leave to the petitioner, cannot be justified under Rule 236 because the petitioner's statement that other leave was admissible to him is not challenged. It is also not denied that he never applied in writing for grant of extraordinary leave. On behalf of the petitioner, therefore, Sri Mukherji contended that the two conditions under which extraordinary leave may be granted to a Government servant in superior service as mentioned In Rule 236 have not been fulfilled, and hence the grant of extraordinary leave to him was null and void. Against this contention, the learned Advocate-General urged that, by virtue of Rule 223(already quoted), the provisions of Rule 180 would also apply to the petitioner because those provisions were not in any way inconsistent with Rule 236. They deal with matters which have not been dealt with in Rule 236.

5. I am inclined to accept this contention. Rule 236 is not exhaustive. This is the special reason why, in Rule 223, the rule-making authority made it clear that the other rules in Chap. VI would also apply *mutatis mutandis* even in respect of these Government servants whose leave is regulated by the revised leave rules, provided

- (i) those other rules are not in any way inconsistent with the rules mentioned in Section VIII, and
- (ii) they deal with matters not dealt with in these rules.

6. If the provisions of Rule 180 are carefully scrutinized, it will be found that they are not inconsistent with Rule 236, and they deal with matters not provided for in Rule 236. Thus, Clause (a) of Rule 180 permits the grant of extraordinary leave in special circumstances, when no other leave is admissible. To that extent, it is a mere repetition of Clause (i) of Rule 236. But the further provision therein that such leave is not debited to leave account and no leave salary is admissible during such leave will be applicable to the petitioner because they are not inconsistent with Rule 236, and they deal with matters not provided for in that rule. For the same reason, Clause (6) of Rule 180 also will apply to the petitioner. That clause:

(i) permits the grant of extraordinary leave in combination with, or in continuation of any leave that is admissible, and

(ii) authorizes the commutation retrospectively of the period of absence without leave into extraordinary leave.

It will be noticed that these matters have not been dealt with in Rule 236. These provisions are made for the benefit of the Government servant concerned. In the absence of such a provision, the authority may feel helpless if a Government servant is absent without leave and subsequently requests the appropriate authority to commute it as extraordinary leave so that there may be no break in his service, which may otherwise adversely affect his pension. I am, therefore, of the view that the provisions of Rule 180 will also apply to a Government servant whose leave is regulated by Section VIII of the Service Code, and that the competent authority could commute retrospectively the period of absence without leave into extraordinary leave. The impugned order, viz., annexures C and D, cannot be held to be invalid on the ground of lack of jurisdiction.

7. But this does not conclude the matter. The further question which arises is whether any extraordinary leave can be forced on a Government servant who neither asks for the same nor is willing to accept the same, acceptance being either express or implied. The answer to this will depend on the true nature and scope of "leave" as provided in the Service Code. The first rule in Chap. VI, viz., Rule 149, is as follows:

Any leave admissible under these rules may be granted by the State Government.

The use of the word "grant" in this rule is very significant. That word occurs again and again (subject to grammatical variations) in almost all the other rules in that chapter. In Rule 180 also, it is made clear that extraordinary leave is "granted" to a Government servant. Rule 152 clarifies this point by saying:

Leave cannot be claimed as of right.

Thus, the concept of leave in the Service Code seems to be that it is somewhat in the nature of a grant, and it is not a right of a Government servant, though certain provisions have been made for the purpose of calculating the leave due and crediting it to the leave account. Once it is held to be a grant, it necessarily

follows that there must be a grantor and a grantee. Here, the grantor is undoubtedly either the State Government or the delegated authority, and the grantee is the public servant concerned. But it is implicit in the concept of grant that the grantee must accept the same either by making express or implied request for such grant or by accepting the grant when it was made without his consent. Without such acceptance, the grant will not be complete. As far as I could see, there is no provision in the Service Code authorizing the appropriate authority to force any type of leave on a public servant who neither asks for the same nor is willing to accept it. It is true, that in many instances, the Government pass general orders for the benefit of Government servants without the latter asking expressly for the same. But, in those instances, there is subsequently implicit acceptance of the order by the Government servants concerned. Here, the petitioner has not only not accepted the grant of the extraordinary leave to him but he has protested against it by challenging its validity in this Court. Hence, though I cannot go to the extreme limit of saying that the orders (annexures C and D) are invalid and should be quashed, nevertheless I must make it clear that, where extraordinary leave is granted to a Government servant without his asking for the same, it will cease to be operative in respect of that Government servant who does not accept it either expressly or impliedly. The orders (annexures C and D) should, therefore, be held to be inoperative so far as the petitioner is concerned.

8. As regards the second prayer, the learned Advocate-General rightly contended that, on the unchallenged facts, the petitioner was not entitled to salary and other allowances for the period of his absence. The right to receive salary arises only when a Government servant is either on duty or is deemed to be on duty, his leave of absence having been subsequently regularized in any of the various methods provided in the Service Code. Admittedly, this has not yet been done. The petitioner cannot, therefore, ask this Court to issue a direction on the appropriate authority not to deduct the salary for the period of his absence. Sri Mukherji for the petitioner, however, stated that he would not press this relief, and would remain content with the declaration as regards the inoperative nature of the orders (annexures C and D) in their application to the petitioner. He stated that he would pursue this relief administratively with the Government.

9. One of the points urged (I believe, somewhat half-heartedly) was that the petitioner was a servant in the Secretariat, governed by the Secretariat instructions, and that the Assistant Inspector-General of Police had no jurisdiction to grant him extraordinary leave. This question is somewhat academic because I have already held that the order granting extraordinary leave to him is inoperative. But, from the counter-affidavit filed on behalf of the opposite party, it appears that though his original recruitment was made on the basis of certain provisions in the Secretariat instructions, his services were transferred to the office of the Inspector-General of Police and, under Rule 862(6) of the Police Manual, the Assistant Inspector-General of Police will be his appointing and promoting authority, and, as such, entitled to grant him

extraordinary leave.

10. Sri Mukherji further urged that the impugned orders are essentially in the nature of punishment, and that no punishment can be passed on the petitioner without drawing up regular proceedings. This argument is not tenable. Once it is unchallenged, that the petitioner did not attend his official duties and it is not shown that such absence has been regularized by the appropriate authority, the petitioner's right to draw pay for the period of absence ceases to exist. This is not a case of punishment by any authority but is a case where the petitioner, by his own conduct, has deprived himself of his right to pay and other allowances.

11. For these reasons, I reject the prayer of the petitioner for the issue of an appropriate direction to the Government and the head of his office, viz., Assistant Inspector-General of Police, not to deduct the salary and other allowances due to the petitioner for the period from 20 to 24 February 1968. I further declare that the orders (annexures C and D) will not be operative against the petitioner. The writ petition is disposed of accordingly. There will be no order for costs.

B.D. Singh, J.

12. I agree.