

(2008) 05 SHI CK 0003
In the High Court Of Himachal Pradesh

Brij Bhushan Lal

APPELLANT

Vs

Kendriya Vidyalaya Sangathan and Others

RESPONDENT

Date of Decision : 07-05-2008

Acts Referred:

Constitution of India, 1950 — Article 311(2)

Kendriya Vidyalaya Sangathan Education Code — Article 81(d)

Citation : (2008) 3 ShimLC 511

Hon'ble Judges : Kuldeep Singh, J;Deepak Gupta, J

Bench : Division Bench

Judgement

Deepak Gupta, J.—The petitioner by means of this writ petition has challenged the order of the learned Central Administrative Tribunal (for short Tribunal) passed in O.A. No. 1206-HP of 2001 dated 21.11.2002 whereby the original application filed by the present petitioner was rejected.

2. Briefly stated the facts of the case are that the petitioner was working as SUPW teacher in Kendriya Vidyalaya, Jakhu. He was transferred to Port Blair vide transfer order dated 25 October, 1999. He was relieved of his duties on 30th October, 1999. The petitioner represented against his transfer to Port Blair on various grounds. When his request was not acceded to he filed O.A. No. 102/HP/2001. The said O.A. was disposed of by directing the respondents to pass a speaking order on the representation filed by the petitioner. This representation was rejected on 9th March, 2001 by a speaking order.

3. The petitioner still did not join at Port Blair and continued to represent against his transfer. Since the petitioner did not join, he was issued a memorandum on 12.2.2001 in terms of Sub-clause (1) of Clause (d) of Article 81 of the Education Code applicable to the Kendriya Vidyalaya Sangathan and he was directed to file reply to the said notice and show-cause why he should not be deemed to have voluntarily abandoned his service. The petitioner replied to the said notice. This reply was not accepted and respondent No. 3 vide order dated 27.4.2001 held that the petitioner was deemed to have been removed from service w.e.f.

31.10.1999 the date from which he remained willfully absent. The petitioner filed an appeal against the said order. Since the appeal was not decided the petitioner filed O.A. No. 1206-HP-2001. During the pendency of this O.A. the learned Tribunal passed an order directing the respondents to pass a speaking order on the appeal. Thereafter, the appellate authority passed a speaking order on 21.10.2002 rejecting the appeal of the petitioner. The O.A. was also rejected by the learned Tribunal holding that the order of termination was passed strictly in accordance with the law. Hence, the present petition.

4. We have heard Shri Ajay Mohan Goel, learned Counsel for the petitioner and Sh. Sandeep Sharma, learned Assistant Solicitor General for the respondents.

5. On behalf of the petitioner the main argument is that Article 81(d) of the Education Code of the Kendriya Vidyalaya Sangathan is violative of Article 311(2) of the Constitution of India. It is further argued that the CCS (CCA) Rules are applicable to the petitioner and he could have been removed from service only under the said Rules. Lastly it is submitted that the petitioner could not have been terminated with retrospective effect.

The respondents have supported the orders passed by the learned Tribunal.

6. To appreciate the rival contentions of the parties it would be pertinent to refer to Clause 81 (d) of the Education Code of Kendriya Vidyalaya Sangathan in detail. It reads thus:

Article 81(d), Voluntary abandonment of service:

(1) If an employee has been absent/remains absent without sanctioned leave or beyond the period of leave originally granted or subsequently extended, he shall provisionally lose his lien on his post unless:

(a) he returns within fifteen calendar days of the commencement of the absence or the expiry of leave originally granted or subsequently extended, as the case may be; and

(b) satisfies the appointing authority that his absence or his inability to return on the expiry of the leave as the case may be was for reasons beyond his control. The employee not reporting for duty within fifteen calendar days and satisfactorily explaining the reasons for such absence as aforesaid shall be deemed to have voluntarily abandoned his service and would thereby provisionally lose lien on his post.

(2) An employee, who has provisionally lost lien on his post in terms of the aforesaid provisions, shall not be entitled to the pay and allowances or any other benefit after he has provisionally lost lien on his post:

Provided that payment of such pay and allowances will be regulated by such directions as the appointing authority may issue while ordering reinstatement of the employee in terms of Sub-clause (6) of this Article.

(3) In cases falling under Sub-clause (1) of this Article, an order recording the factum of voluntary abandonment of service by the employee and provisional loss of his lien on the post, shall be made and communicated to the employee concerned at the address recorded in his service book and/or his last known address, to show-cause why the provisional order above mentioned may not be confirmed.

(4) The employee may make a written representation to the appointing authority, within ten days of receipt of the order made under Sub-clause (3).

(5) The appointing authority may on receipt of the representation, if any, and perusal of materials available on record as also those submitted by the employee, grant, at his discretion, an oral hearing to the employee concerned to represent his case.

(6) If the appointing authority is satisfied after such hearing that the employee concerned has voluntarily abandoned his service in terms of the provisions of Sub-clause (1) of this Article, he shall pass an order confirming the loss of employee's lien on his post, and, in that event, the employee concerned shall be deemed to have been removed from the service of the Kendriya Vidyalaya Sangathan with effect from the date of his remaining absent. In case the appointing authority is satisfied that the provisions of Sub-clause (1) of Clause (d) of this Article are not attracted in the facts and circumstances of the case, he may order re-instatement of employee to the post last held by him, subject to such directions as he may give regarding the pay and allowances for the period of absence.

(7) APPELLATE AUTHORITY : An employee aggrieved by an order passed under Sub-clause (g) of this Article may prefer an appeal to the appellate authority as notified by the Kendriya Vidyalaya Sangathan from time to time.

(8) PERIOD OF LIMITATION FOR APPEALS : No appeal preferred under this Article shall be entertained unless it is preferred within a period of 45 days from the date on which a copy of the order appealed against is served on the appellant:

Provided that the Appellate Authority may entertain the appeal after the expiry of the said period, if it is satisfied that the appellant was prevented by sufficient cause from not preferring the appeal in time.

(9) FORM AND CONTENTS OF APPEAL : Form and contents of appeal shall mutatis mutandis be the same as prescribed under the CCS (CCA) Rules 1965.

(10) CONSIDERATION OF APPEAL : The appellate authority shall consider:

Whether the requirements laid down under Sub-clause (1), (3), (5) and (6) of this Article have been complied with and, if not, whether such non-compliance has resulted in failure of justice; and

Whether the order confirming loss of employee's lien on his post and his

consequent removal from service is warranted on record;

And pass order confirming, modifying or setting aside the order passed under Sub-clause (6) of this Article.

(11) IMPLEMENTATION OF ORDER OF APPEAL : the appointing authority shall give effect to the order passed by the Appellate Authority.

(12) FINALITY OF ORDER PASSED IN APPEAL : The order of the Appellate Authority made under this Article shall be final and shall not be called in question by way of any further application/ petition for revision, review etc.

(13) APPLICABILITY OF THE CCS (CCA) RULES : In matters falling under this Article and in those matters alone, the procedure prescribed for holding inquiry in accordance with the CCA (Classification, Control & Appeal) Rules, 1965 as applicable to the employees of the Kendriya Vidyalaya Sangathan as also other provisions of the said rules which are not consistent with the provisions of this Article shall stand dispensed with.

(14) REMOVAL OF DIFFICULTIES : Notwithstanding anything contained in any rule or order for the time being in force in KVS, the Commissioner KVS may, with the approval of the Vice-Chairman, KVS issue such instructions as he may deem fit to remove difficulties in the implementation of these provisions.

(15) POWER TO ISSUE INSTRUCTIONS : Without prejudice to the generality of the foregoing provisions, the Commissioner, Kendriya Vidyalaya Sangathan may, with the approval of the Vice-Chairman, Kendriya Vidyalaya Sangathan, issue, from time to time (whether by way of relaxation of the aforesaid provisions or otherwise) general or special orders as to the guidelines, principles or procedures to be followed in giving effect to the provisions of this Article.

7. A perusal of this clause shows that under Sub-clause (1) if an employee remains willfully absent without sanctioned leave or beyond the period of leave sanctioned he would provisionally lose his lien on the post. However, in case he returns within 15 days and satisfies the appointing authority that his absence was for reasons beyond his control he would retain his lien on the post. In case he fails to satisfy the authorities about the reasons for his absence he shall be deemed to have voluntarily abandoned his job and provisionally lose lien on the post. A person who has provisionally lost lien on his post would not be entitled to pay and allowances. The order regarding loss of provisional lien has to be communicated to the official at the address recorded in his service book and memo is to be served upon him to show-cause why the provisional order of loss of lien may not be confirmed. Sub-clause (4) allows the employees to make a written representation to the appointing authority. The authority may pass appropriate orders taking into consideration the facts of the case. Provision for appeal has been made under Sub-clause 6. Sub-clause 13 clearly provides that in matters falling under Article 81(d) the CCS (CCA) Rules would not be applicable.

8. As far as Article 311(2) of the Constitution is concerned we are of the considered opinion that the petitioner is not governed by the said Article. The petitioner is an employee of the Kendriya Vidyalaya Sangathan. He does not hold a civil post under any State Government or the Union of India. The Kendriya Vidyalaya Sangathan is a Society and therefore, in our opinion, the petitioner being an employee of the Society and not of the Union of India or the State is not entitled to the benefit of Article 311(2) of the Constitution of India.

9. Even assuming for the sake of arguments that Article 311 of the Constitution of India is applicable, we are of the considered view that Article 81(d) of the Education Code as quoted hereinabove does not in any manner violate the provisions of the Constitution of India. Article 311(2) of the Constitution of India reads as follows:

311. Dismissal, removal or reduction in rank of persons employed in civil capacities under the Union or a State.

(1) xxxxxxxxxx

(2) No such person as aforesaid shall be dismissed or removed or reduced in rank except after an inquiry in which he has been informed of the charges against him and given a reasonable opportunity of being heard in respect of those charges.

10. The Apex Court in Khem Chand Vs. The Union of India (UOI)and Others, , considered the scope of Article 311(2) and summarized what was envisaged by the phrase "reasonable opportunity" in para 19 of the judgment which reads as follows:

19. To summarise: the reasonable opportunity envisaged by the provision under consideration includes:

(a) An opportunity to deny his guilt and establish his innocence, which he can only do if he is told what the charges levelled against him are and the allegations on which such charges are based;

(b) an opportunity to defend himself by cross-examining the witnesses produced against him and by examining himself or any other witnesses in support of his defence; and finally

(c) an opportunity to make his representation as to why the proposed punishment should not be inflicted on him, which he can only do if the competent authority, after the enquiry is over and after applying his mind to the gravity or otherwise of the charges proved against the government servant tentatively proposes to inflict one of the three punishments and communicates the same to the Government servant.

In short the substance of the protection provided by rules, like R. 55 referred to above, was bodily lifted out of the rules and together with an additional opportunity embodied in Section 240(3) of the Government of India Act, 1935 so

as to give a statutory protection to the government servants and has now been incorporated in Article 311(2) so as to convert the protection into a constitutional safeguard.

11. Thereafter, the Apex Court again considered this point in *Jai Shanker Vs. State of Rajasthan*, . Much reliance has been placed on this case in which the Regulations provided for automatic termination of service on over-stay. The Supreme Court held that removal from service without giving opportunity to show-cause is illegal. The relevant observations read as follows:

6. ...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 overstaying 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.

7. In our judgment, *Jai Shankar* 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. He is entitled to this declaration....

12. In our view this judgment is not applicable to the facts of the present case. Article 81 (d) provides a complete machinery in itself. No doubt, the lien of the employee on his service stands provisionally lost on his abandoning or over staying leave but the Article itself provides for the issuance of a memorandum and an opportunity to show-cause before final decision is taken. Remedy of appeal has also been provided. The employee has three opportunities to put up his case. The first opportunity is if he approaches the employer within 15 days of absence or over stay of leave. The second opportunity is when he is issued a show-cause and the third opportunity is when he files an appeal.

13. Reliance on behalf of the petitioner is also placed on the judgment of the Apex Court in Delhi Transport Corporation Vs. D.T.C. Mazdoor Congress and Others, , wherein the Court set-aside the Regulation which permitted the employer to terminate the service of a permanent or confirmed employee without assigning any reason or without giving any opportunity of hearing. We are of the considered view that this judgment is not applicable since in the present case as pointed out above the employee has an opportunity of putting forward his case to the higher authority and there is a provision for issuance of notice and hearing of the employee. The requirement of law is only that the employee should know the nature of the complaint or accusation, he should have an opportunity to put-forward and defend his case and the Management should act fairly and reasonably.

14. In the present case it is apparent that the petitioner despite having been transferred from Shimla to Port Blair did not join. Even after he filed the first O.A. and his representation was rejected he still did not join at Port Blair. He kept on making one excuse or the other and therefore in our view he can be deemed to have abandoned service.

15. Article 81 (d) was introduced w.e.f. 17th July, 2000. It has been urged on behalf of the petitioner that the same cannot be made retrospectively applicable. We are in agreement with the petitioner to the extent that the petitioner could not have been deemed to have voluntarily abandoned the service prior to 17th July, 2000 when this Article was introduced in the Education Code for the Kendriya Vidyalaya Sangathan. However, after 17th July, 2000 also the petitioner never joined. Even if he had joined service at Port Blair after issuance of the memorandum to him we may have been inclined to take a lenient view but since the petitioner has never joined, in our opinion, he should be deemed to have voluntarily abandoned his service w.e.f. 17th July, 2000 when this Article was introduced.

16. In view of the above discussion, we partly allow the writ petition and modify the order of removal of service dated 27.4.2001 and hold that the petitioner shall be deemed to have voluntarily abandoned his service only w.e.f. July 17, 2000. Consequently, the petitioner shall be entitled to the benefit of his service upto 17th July, 2000 for retiral benefits. He shall however not be entitled to any pay for the said period. The order of the learned Tribunal is also modified to the aforesaid extent.

The petition is disposed of in the aforesaid terms. No order as to costs.