
(2012) 05 DEL CK 0473
In the Delhi High Court
Case No : LPA No.950-51 of 2006

Cement Corporation of India Ltd and Another	APPELLANT
Vs	
Shri D.B. Mathur and Another	RESPONDENT

Date of Decision : 17-05-2012

Acts Referred:

Citation : (2013) LabIC 336 : (2013) LLR 273

Hon'ble Judges : Rajiv Sahai Endlaw, J

Bench : Single Bench

Advocate : Arun Birbal, for the Appellant; Shankar Raju, for the Respondent

Final Decision : Allowed

Judgement

Rajiv Sahai Endlaw, J.—The appeal impugns the judgment dated 2nd January, 2006 of the Learned Single Judge allowing WP(C) No. 3121/1994 preferred by the respondent, by setting aside the Inquiry Report dated 10th September, 1993 and the order dated 5th October, 1993 of the Disciplinary Authority of the appellant imposing the penalty of dismissal from service on the respondent and further holding the respondent to be entitled to full salary for the period of 1st January, 2002 onwards; liberty was however given to the appellant to hold a fresh enquiry into the charges against the respondent and it was directed that if the appellant chose to hold the said enquiry, it be completed within six months. Notice of this appeal was issued and subject to the appellant depositing the back wages as directed to be paid by the learned Single Judge, the operation of the judgment of the learned Single Judge was stayed. In compliance of the said order dated 31.07.2006, a sum of Rs. 12,82,073/- was deposited by the appellant in this Court. Though mediation was attempted but failed. The appeal was admitted for hearing and the interim order was confirmed till the decision of the appeal and the respondent was permitted to withdraw the sum of Rs.4 lacs out of the amount deposited by the appellant in this Court. The said amount of Rs. 4 lacs is reported to have been released to the respondent. We have heard the counsels.

2. The respondent, an Electrical Engineer, joined the employment of the appellant on 24th September, 1979 and though his services were transferable, largely remained posted at Delhi only. On 27th March, 1992, he was transferred to the Tendur Plant (in Andhra Pradesh) of the appellant. On representation of the respondent thereagainst, on the ground of illness of his father, the place of his transfer/posting was changed to Charkhi Dadri, close to Delhi. The respondent however failed to join at the transferred post.

3. The respondent was on 14th July, 1993 charged for having remained absent w.e.f. 31st March, 1992, though absence from 31st March, 1992 to 5th February, 1993 was regularized by grant of leave and extraordinary leave admissible to the respondent. The charge memo further stated, that though the respondent vide his letters dated 12th February, 1993, 11th March, 1993, 8th April, 1993, 5th May, 1993 and 14th May, 1993 had sought leave from 6th February, 1993 to 26th May, 1993 totalling 110 days but since the Rules provided for leave on medical grounds beyond the period of 90 days to be on recommendation of Medical Board, a Medical Board was constituted and which visited the residence of the respondent on 16th June, 1993 and 23rd June, 1993; on both occasions the respondent was not met; though the respondent reported for duty on 25th June, 1993 but on being tendered the transfer order, again left; thereby the respondent did not comply with the transfer order for more than 15 months.

4. The Inquiry Officer reported that the respondent had avoided participation in the inquiry also and on the basis of the evidence of the appellant submitted a report against which also the respondent failed to represent despite opportunity.

5. The Disciplinary Authority as aforesaid, imposed the penalty of dismissal from service on the respondent.

6. The learned Single Judge, in the impugned judgment, has observed/found/held:

(i) that though the respondent had set up a case of the order of his transfer as also the proceedings against him being vitiated on account of malafide but even the pleadings of the respondent lest material did not support such a plea;

(ii) that as per the Rules of the appellant, applications for leave on medical grounds beyond 90 days were to be dealt with on the basis of recommendations of the Medical Board; however the five applications made by the respondent between 12th February, 1993 and 14th May, 1993 did not seek 90 days medical leave at a stretch and thus the said provision was not applicable thereto;

(iii) that even otherwise the procedure for dealing with such applications on the recommendation of the Medical Board had been introduced only w.e.f. 8th June, 1993 and thus could not be applied for the leave applications of the respondent of prior thereto;

(vi) that the Inquiry Officer had acted in a haste and had unreasonably refused the adjournments sought by the respondent; the inquiry was thus not fair.

(vii) that since another writ petition preferred by the respondent impugning the transfer order had been dismissed, the disciplinary proceedings in the entirety could not be quashed.

7. Though the counsel for the respondent has sought to urge the ground of malafides, which has not found favour with the learned Single Judge, but has not been able to show any material therefor except for generally averring that the proceedings against the then Managing Director of the appellant (who is impleaded hereinabove as respondent no.2) for various illegalities have since been taken. However there is nothing to show that the then Managing Director of the appellant was vindictive or had any reason for being vindictive towards the respondent. We are thus, to only adjudicate as to whether the learned Single Judge was correct in holding the inquiry held to be unfair. We must however record that the counsel for the respondent though also sought to urge that even if the inquiry report were to be accepted, the punishment meted out was disproportionate to the charge but upon our inquiring from him as to how long unauthorized absence could be condoned, was not able to support the said argument. We are of the opinion that if such indiscipline is allowed to be perpetuated, the functioning of entities as the appellant would come to a standstill. No organization can afford to have its managerial level persons so absenting for long span of time.

8. Before examining the aspect of the fairness of the inquiry, we may record another admitted fact. The respondent, even if had continued in the employment would have attained the age of superannuation on 31st August, 2007. The learned Single Judge also has not found the respondent entitled to wages from 1993 till 2002. The only question therefor is of the wages from 2002 to 2007 and of the retiral benefits of the respondent. In this regard however it may be noticed that it is the plea of the appellant and not rebutted by the respondent that the respondent is gainfully employed since April, 2003, though the counsel for the respondent states that he was so employed till the year 2006 only. Once it is so found, the question of back wages for the said period would also not arise. The counsel for the respondent also has not been able to press the same. He has thus pressed for retiral benefits only but informs that the respondent has served the appellant only for 17 years.

9. The crux of the matter being as to whether the respondent was justified in remaining absent on medical grounds, we have first asked the counsel for the respondent to show to us the documents in support thereof. The counsel for the respondent has invited our attention to pages 152-154 of the paper book, being the OPD Card of All India Institute of Medical Science (AIIMS). The argument raised is that the respondent having visited a premier medical institution and such premier medical institution having certified the illness of the respondent, the non submission of the respondent to the Medical Board constituted by the appellant pales into insignificance. It is further argued that the Medical Board so constituted, did not find the respondent at his residence because the respondent

on those days was visiting AIIMS.

10. However a careful perusal of the OPD Card of AIIMS shows that the respondent had complained of "Episodic loss of muscle tones, difficulty in reading in morning" and was referred to Cardiothoracic & Neuroscience Centre of AIIMS. The said Neuroscience Centre found "no evidence of neurological disease" and that "those episodes are related to acute anxiety and stress". Upon such diagnosis, the respondent was prescribed only "Alprax 0.25 mg" and "Capsule Becosule" which are a mild sedative and vitamin B supplement respectively. Minute perusal of the OPD Card does not show any other treatment to have been prescribed to the respondent. Though the respondent in his leave applications had cited the ailment of low blood pressure, hyper tension, typhoid, viral hepatitis, asthmatic disease with eczema but no medical records in support thereof are shown nor do we find any on record.

11. It is also worth highlighting that the OPD Card aforesaid records only a complaint of respondent but does not record any investigation to have established the same. Experience of life shows that prescription of mild sedative and vitamin supplement is common on such complaint being made to a medical practitioner. Today's life styles, especially in metropolitan cities are fraught with stress and tension and if such stress and tension were to become a cause for absents from work, the entire country would come to a standstill. We are thus not satisfied that the respondent had any medical reasons for remaining absent from the work and it is clear as day light that the cause for absence was the reluctance of the respondent to join at the transferred place.

12. At this stage another argument of the counsel for the respondent may be noticed. It is argued that the transfer order was not even served on the respondent. This argument itself shows the conduct of the respondent. The respondent after representing against transfer to far away Andhra Pradesh, managed the affairs to evade even the service of subsequent order of change of posting on himself.

13. We may clarify that we have examined the medical records not with the intent of appropriating to ourselves the jurisdiction of the Inquiry Officer but only to take a bird's eye view of the matter inasmuch as we are of the opinion that the proceedings before the Inquiry Officer would necessarily be coloured by an overview of the matter. If the Inquiry Officer, on the basis of the material before him were to find no defence to the charge and no material requiring detailed inquiry, no fault can be found with his action of expediting the matter. Often the Courts themselves, finding a litigant to be abusing the process of law, expedite the hearings by giving preference over other matters, to reach the conclusion which is inevitable and writ large. The learned Single Judge has recorded that the Inquiry Officer was appointed on 2nd August, 1993; notice of preliminary hearing on 9th August, 1993 was served on the respondent on 7th August, 1993; the respondent did not appear before the Inquiry Officer on 9th August, 1993 but on 10th August, 1993 when he submitted an application for adjournment; that the

Inquiry Officer asked the respondent to appear on 16th August, 1993 when again adjournment on medical ground accompanied with medical certificate dated 17th August, 1993 was made; that the Inquiry Officer fixed 23rd August, 1993 for final hearing; again a request for adjournment was received which was refused and inquiry proceeded with on 23rd and 24th August, 1993 and report dated 10th September, 1993 submitted. The learned Single Judge has on the basis of said dates held the said procedure to be hasty.

14. In the facts aforesaid, we are unable to find that the Inquiry Officer showed any haste. If even in such circumstances when the employee is remaining unauthorisedly absent and is seeking adjournments during inquiry, the inquiry is allowed to go on indefinitely, it would clearly amount to abuse of the procedure of inquiry. It was the duty of the respondent to participate in the disciplinary proceedings (see *Pepsu Road Transport Corp. Vs. Rawel Singh*,) and which he failed to do. Similarly, in *Chairman-Cum-M.D., Coal India Ltd. and Others Vs. Ananta Saha and Others*, it was held that the Inquiry Officer, on failure of employee to appear inspite of service of notice, is entitled to proceed ex parte. It is found that violation of the principle of natural justice has become the sword of the delinquent officials with no substantial defence to the charge against them. The Supreme Court recently in *S.B.I. Vs. Hemant Kumar*, observed that the principles of natural justice cannot be stretched to a point where they would render the in-house proceedings unworkable. Earlier, in *Board of Directors, H.P.T.C. and Another Vs. K.C. Rahi*, it was held that non participation in departmental proceedings is at own risk and in such event principle of natural justice is deemed to have been waived and the delinquent employee is estopped from raising the plea of non compliance with principles of natural justice. The allegations made of victimization have already been negatived and no cause of any malafides on the part of the Inquiry Officer is urged. A departmental inquiry is not to proceed like Court cases. It is not as if a litigant in a Court has a right for the litigation to prolong for several years. That happens only owing to number of cases being far more than the number of Courts. However that still does not accrue any right in a litigant to have his case prolonged. As aforesaid, the medical ground set up by the respondent for his absence has already been found to be a sham. There is nothing to show that the respondent on the days of hearing fixed by the Inquiry Officer was unable to participate in the inquiry. Stress and strain even if suffered by the respondent, were a result of order of transfer and reluctance thereto and cannot themselves become a ground for vitiating the inquiry proceedings. The counsel for the appellant has also invited our attention to the order dated 16th August, 1993 in Civil Writ No.3790/1993 also preferred by the respondent where also a direction for completing the inquiry proceedings as expeditiously as possible, was issued by this Court.

15. The counsel for the appellant has also argued that Rule of the respondent requiring application for leave beyond 90 days to be dealt with only on the recommendation of the Medical Board cannot be allowed to be defeated by repeatedly applying for leave for less than 90 days but in all for more than 90

days. However, in the light of the view we have taken, need is not felt to deal with the said aspect.

16. The counsel for the respondent has invited our attention to Union of India Vs. I.S. Singh, 1994 Supp (2) SCC 518 to contend that in that case the action of the Inquiry Officer of proceeding ex parte inspite of request for adjournment was held to be bad. However, in that case it was found that the Inquiry Officer had not paid any attention to the said request. Moreover, ultimately in that case a consent order was passed. On the contrary, a perusal of the order sheet dated 9th August, 1993 of the Inquiry Officer shows that warning was given to the respondent that upon his non appearance on the next date of 16th August, 1993 he will be proceeded against ex parte; the respondent was also asked to, besides his reply to the charges, also place the documents in support thereof. The respondent in his application for adjournment merely stated that on account of suffering from viral fever he could not concentrate and contribute towards the inquiry. The order sheet dated 23rd August, 1993 of the Inquiry Officer shows that the said request of the respondent was duly considered and found to be frivolous and rejected. The constitutional requirement for judging the question of reasonableness and fairness on the part of the State, must be considered having regard to the factual matrix obtaining in each case. It cannot be put in a straight jacket formula. It must be considered keeping in view the doctrine of flexibility. Before an action is struck down, the Court must be satisfied that a case has been made out for exercise of power of judicial review. (Ref M.P. Gangadharan and Another Vs. State of Kerala and Others, In the present case, no case for judicial review is made out.

17. For this reason alone, the judgment cited by the counsel for the respondent is not applicable. As far as the ground for rejection of leave application being not communicated is concerned, we have already concluded hereinabove that the ground of illness suffered by the respondent has not been substantiated. The Inquiry Officer in his report also has recorded that due intimation of each and every date of hearing / order sheet was sent to the respondent and while the copies sent through courier were served, the copies sent by registered post were refused and that the adjournments sought were without any reason and the respondent had avoided to participate in the inquiry.

18. We are afraid the learned Single Judge has taken bookish view of the matter inspite of seeing through the game which the respondent was playing and once it is found that the grounds set up by the respondent for remaining absent for inordinately long time were not genuine and the reasons for not participating in the inquiry are also unsubstantiated, it would be travesty of justice to allow the respondent a second inquiry particularly when the respondent has been unable to show as to what he is likely to produce or prove therein.

19. Before parting with the case we may notice that though the counsel for the respondent has during the hearing handed over synopsis of submission with case laws, with copies of several other judgments but has in oral hearing not referred

to any other judgment except the one noticed above. We do not deem it appropriate to burden our judgment with the judgments included in the compilation handed over to us. The said compilation is however placed on record. We thus allow this appeal, set aside the judgment of the learned Single Judge and dismiss the writ petition of the respondent impugning the order of his dismissal from service. Axiomatically the amount deposited by the appellant in this Court together with interest accrued therein be refunded to the appellant. Since no argument has been raised before us qua the amount of Rs. 4 lacs which the respondent was permitted to withdraw and which he, on the appeal being allowed, is liable to refund to the appellant, even though the respondent is liable to refund the same with interest, we direct the respondent to refund the same without any interest, within ten weeks of today, failing which it will be refunded with interest thereon at 10% per cent per annum. We also refrain from imposing any costs on the respondent.