
(2016) 02 DEL CK 0368
In the Delhi High Court
Case No : W.P. (C) 7962/2014

Dinesh Kumar Upadhyay

APPELLANT

Vs

Union of India and Others

RESPONDENT

Date of Decision : 19-02-2016

Acts Referred:

Constitution of India, 1950 — Article 14, Article 21, Article 311, Article 311(2)

Citation : (2016) 229 DLT 26

Hon'ble Judges : Sanjiv Khanna and Najmi Waziri, JJ.

Bench : Division Bench

Advocate : Amit Anand Tiwari and Abhinav Ranghuvanshi, Advocates, for the Appellant; Arun Bhardwaj, CGSC and Gunjan Bansal, Advocate, for the Respondent

Final Decision : Dismissed

Judgement

Sanjiv Khanna, J.—1. Original records have been produced by the respondents before us and we have also heard the learned counsel for the petitioner and the respondent.

2. The instant writ petition is directed against the order dated 9th May, 2014, passed by the Central Administrative Tribunal, Principal Bench, New Delhi (Tribunal, for short) in OA No. 4319/2011. The impugned order rejects the petitioner's challenge to the order dated 9th April, 2008, declaring that the petitioner should be treated as having resigned from service with effect from 29th June, 2001. The reason was that the petitioner had remained unauthorisedly absent from duty for more than five years as he had failed to report to his parent cadre- Manipur-Tripura till 9th April 2008 after he was relieved by the State of Chhatisgarh on 29th June 2001. Rule 7(2)(a) of the All India Service (Leave) Rules, 1955 was invoked.

3. The petitioner, a 1989 batch officer of the Indian Forest Service was allocated to the Manipur-Tripura cadre. The petitioner was kidnapped by a terrorist

organisation and had sustained a gunshot injury on his chest, for which he remained under treatment at Bilaspur, Madhya Pradesh, from September, 1995 to April, 1996. In view of the said incident and the petitioner's medical condition, he was sent on inter-state deputation to Madhya Pradesh (now Chhattisgarh), for a period of three years by notification dated 14th June, 1996. By order dated 15th July 1999, the deputation period was extended for two years upto 23rd June, 2001.

4. The petitioner had applied for cadre change to Madhya Pradesh on humanitarian grounds, but the request was rejected vide order dated 8th September, 1998. Aggrieved, the petitioner filed W.P. (C) No. 43/2000 before the High Court of Chhattisgarh, which was dismissed by order dated 25th June, 2001. The petitioner thereafter filed Special Leave Petition (Civil) No. 10869/2001, in which a notice was issued and the Ministry of Environment and Forests was directed to examine the request sympathetically in light of the circumstances and new guidelines. The Appointments Committee of the Cabinet upon consideration did not accept the request for inter-cadre transfer from Manipur-Tripura to Chhattisgarh and the petitioner was informed vide letter dated 3rd May, 2002 by the Ministry of Personnel, Public Grievances and Pensions. The Supreme Court examined and considered the prayer of the petitioner and on 10th May, 2002, the following order was passed:-

"Heard learned counsel for the parties.

In our view, it is well settled that a Government employee, may be the highest officer, has no right to be posted at a place of his choice. It is for the department to transfer an employee and post him at an appropriate place in accordance with rules or the set guidelines.

Hence, this petition is rejected."

5. In the meantime, the Government of Chhattisgarh informed the petitioner that he has been released by the said government with effect from 28th June, 2001 and he should join the parent State cadre. The petitioner did not join service and remained noticeably silent.

6. Left with no alternative and after waiting for a period of five years, the respondents issued a proposed action memo dated 27th March, 2006, to which the petitioner replied on 21st April, 2006, professing that he was still awaiting the implementation of the ACC decision regarding extension of his deputation with bona fide intention. The petitioner asserted that he was not resigning from service by way of unauthorised absence for a period of more than one year. This representation by the petitioner was not accepted by the General Administration (Personnel & Training) Department, Govt. of Tripura, and by letter dated 9th August, 2007, the petitioner was called on to submit his representation against the proposed action within 30 days. Thereafter, the petitioner by representation dated 6th October, 2007, expressed his desire to join service in the parent cadre. Responsive and concerned about the petitioner, the respondents by letter dated

26th October, 2007, required the petitioner to report for joining the Tripura segment of the Joint Manipur-Tripura cadre within 30 days of the receipt of the letter. As the petitioner did not respond, another letter dated 14th December, 2007, was written by the respondents calling upon the petitioner to join by 31st December, 2007. The petitioner inspite two opportunities failed to respond or report for joining. Left with no option and noticing the petitioner's persistent and unrelenting absence, the respondents took recourse to Rule 7(2)(a) of the All India Service (Leave) Rules, 1955, and passed the order dated 9th April, 2008, declaring the petitioner as deemed to have resigned from service with effect from 29th June, 2001 i.e. the date of being relieved from the State of Chhattisgarh.

7. The petitioner had challenged this order by way of OA No. 4319/2011, which has been dismissed by the impugned order dated 9th May, 2014.

8. The primary contention of the petitioner before us is that the petitioner never received the two letters dated 26th October, 2007 and 14th December, 2007, written by the respondents, by which he was asked to join the parent cadre in Tripura segment within 30 days of the first letter and by 31st December, 2007 by the second letter.

9. We are not impressed with the said contention, for it is apparent that the petitioner was not interested in joining the parent cadre inspite of repeated letters and opportunities. The petitioner, by his letter dated 6th October, 2007, had expressed his willingness to join at Tripura, but thereafter did not report, and subsequently became incommunicado and inaccessible. The contention of the petitioner that he had not received the said letters is clearly an afterthought and unbelievable. His inferral conduct belies and is at odds with the said stance. Normally, if the petitioner had not heard and received any further communication, he would have followed up his letter dated 6th October, 2007. It is not disputed that there was no follow-up and the petitioner had remained absent and completely quiet till 9th April, 2008, when the deemed resignation order was passed. This flaccid approach and prevarication is also apparent from the belated challenge to the order dated 9th April, 2008, by a writ petition which was filed before the Gauhati High Court after more than two years in December, 2010. Thereafter, the O.A No. 4319/2011 was filed.

10. The petitioner had earlier filed OA No. 275/2005 before the Central Administrative Tribunal, Jabalpur Bench, inter alia, contending that the respondents had failed to comply with and abide by the undertaking given before the Supreme Court in the Special Leave Petition (Civil) No. 10869/2001 as recorded in the order dated 18th February, 2002, that the petitioner would be granted another year of deputation in the state of Chhattisgarh. The Special Leave Petition (Civil) No. 10869/2001 as recorded above was dismissed by a speaking order on 10th May, 2002. It is pertinent to record that the aforesaid OA was filed in the year 2005, a long time after the order dated 18th February, 2002. The petitioner obviously was not ready to join duty and report to his

parent cadre.

11. Before us, learned counsel for the petitioner has submitted that the Government of Tripura, which had passed the order dated 9th April, 2008, was not the disciplinary authority and that the appointing authority, i.e., the Union of India had not given their concurrence. This plea and contention was not taken before the Tribunal and is also not raised in the grounds of the present writ petition. We would not permit the petitioner to raise the said oral contention at the stage of final hearing, as this requires examination of facts. Ascertained facts in this regard are not pleaded and are not on record.

12. The last question relates to Rule 7(2)(a) of the All India Service (Leave) Rules, 1955. The said Rule reads as under:-

"7. Maximum period of absence from duty"(1) No member of the Service shall be granted leave of any kind for a continuous period exceeding five years.

(2) A member of the Service shall be deemed to have resigned from the service if he -

(a) is absent without authorisation for a period exceeding one year from the date of expiry of sanctioned leave or permission, or

(b) is absent from duty for a continuous period exceeding five years even if the period of unauthorized absence is for less than a year, or

(c) continues of foreign service beyond the period approved by the Central Government:

Provided that a reasonable opportunity to explain the reason for such absence or continuation of foreign service shall be given to the member of the Service before the provisions of this sub-rule are invoked."

Question would arise whether this Rule violates Clause (2) of Article 311 of the Constitution of India, which reads as under:-

"311. (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."

The proviso to Rule 7(2) of the All India Service (Leave) Rules, 1955, requires that the absentee must be given a reasonable opportunity to explain the reasons for such absence. The termination or cessation of service, described as resignation, is not automatic or self-activating, but is hedged and conditional upon compliance with the principles of natural justice. The reason if given for absence, has to be reflected and considered. The officer is thus given an opportunity to explain and explicate. The question is whether the procedure stipulated in the proviso to sub-section 2 to Section 7 of the All India Service (Leave) Rules, 1955, satisfies the mandate of clause (2) to Art. 311?

13. The Supreme Court in *Jai Shanker versus State of Rajasthan*, , AIR 1966 SC 492, had examined Regulation 13 of Jodhpur Service Regulation, as per which an individual's wilful absence, without permission for one month or longer was considered as sacrificing one's appointment. Regulation 13 was struck down as unconstitutional for violating protection under clause (2) to Article 311 of the Constitution, as the impugned regulation did not postulate and require opportunity of representation.

14. In *Deoki Nandan Prasad versus State of Bihar*, , (1971) 2 SCC 330, the decision in *Jai Shanker* (supra) was followed and Rule 26 of the Bihar Service Code was struck down, for the rule mandated mechanical termination of service if a government employee was continuously absent for a period of five years. The said employee was deemed to have ceased to be a government employee. This, it was observed, would amount to removal from service without adequate opportunity and would accordingly fall foul of Clause (2) of Article 311 of the Constitution.

15. This line of reasoning is also discernible in *D.K. Yadav versus J.M.A. Industries Limited*, , (1993) 3 SCC 259, wherein Articles 14 and 21 of the Constitution were invoked, as the employee had been removed/terminated without complying with the principles of natural justice. This was a case relating to private employment and it was observed that the "right to life- enshrined in Article 21 would include "right to livelihood-. Any action putting an end to the tenure of employment must be fair and should be post reasonable opportunity. Domestic enquiry conducted by a private employer must comply with the principles of natural justice. This ratio has been reiterated in *Uptron India Limited versus Shammi Bhan*, , (1998) 6 SCC 538 and *Scooters India Limited versus M. Mohd. Yaqub*,, (2001) 1 SCC 61.

16. However, the position may be different where the employee has been given an opportunity of being heard, and the explanation regarding his unauthorised absence is not forthcoming and the employee despite being given an opportunity, fails to join duty as was the case in *Punjab & Sind Bank versus Sakattar Singh*, , (2001) 1 SCC 214.

17. In *Aligarh Muslim University versus Mansoor Ali Khan*, , (2000) 7 SCC 529, the Supreme Court examined the applicable Rules, which stipulated that an absentee employee was deemed to have vacated his post. It was observed that principles of natural justice should be followed, i.e., show-cause notice and reply would be necessary. The employee in that case had sought extension of leave and was warned that in case of overstay, deemed vacation of office rule would follow, but he did not join. The Court in this factual background observed that no prejudice was caused for even if notice had been given, it would not have made any difference.

18. In *Viveka Nand Sethi versus Chairman, J&K Bank Limited*, , (2005) 5 SCC 337, the Supreme Court opined that principles of natural justice were required to

be complied with, but a full-fledged enquiry was not necessary, holding:-

"20..... A limited enquiry as to whether the employee concerned had sufficient explanation for not reporting to duties after the period of leave had expired or failure on his part on being asked so to do, in our considered view, amounts to sufficient compliance with the requirements of the principles of natural justice."

19. This legal position was specifically referred to with approval on the question of what is meant by the term "enquiry- in V.C., Banaras Hindu University and Others versus Shrikant, , (2006) 11 SCC 42.

20. The ratio has been lucidly explained by a Division Bench of the Kerala High Court in M.P. Joseph versus Union of India and Others, , (2013) Lab IC 2790: 2013 (2) LLN 411 (Ker.), wherein it has been observed as under:

"10. We shall first consider the challenge against Rule 7(2) of AIS (Leave) Rules. We have to first look at the decisions relied on by the learned Senior Counsel to understand the law on the point. As noticed, the main challenge is that the said Rule is against Article 311 of the Constitution of India, the mandate and procedure of which has been laid down by the following decisions of the Hon"ble Supreme Court, Khem Chand v. Union of India, , AIR 1958 SC 300; Moti Ram Deka v. General Manager, North East Frontier Railway, , AIR 1964 SC 600; Jai Shanker v. State of Rajasthan, , AIR 1966 SC 492; Deoki Nandan Prasad v. State of Bihar, , AIR 1971 SC 1409; State of Assam v. Akshaya Kumar Deb, , AIR 1976 SC 37; and D.K. Yadav v. J.M.A. Industries Ltd., , 1993 (2) LLN 575 (SC) : 1993 (3) SCC 259; according to the learned Senior Counsel for the Petitioner.

11. Khem Chand v. Union of India, , AIR 1958 SC 300, considered the efficacy and reasonableness of the opportunity to show cause against the action proposed. Considering Article 311(2), as it stood then, the Hon"ble Supreme Court set aside the order of dismissal on the ground that the delinquent was not given a further opportunity to show cause on why, that punishment should not be inflicted on him, which right was taken away by the 42nd amendment. The Constitution Bench in Moti Ram Deka v. General Manager, North East Frontier Railway, , AIR 1964 SC 600, tested Rules 148(3) and 149(3) in the Railway Establishment Code, which provided for termination; with no clear mandate for notice. While recognizing that Article 311 within the field covered by it, is absolute and paramount, it was noticed that the protection afforded therein is limited to the three major penalties of dismissal, removal or reduction in rank. A subtle distinction was also drawn where service of an Employee is regulated by contract and a termination simpliciter as per the terms of a contract not attracting the rigor of procedure contemplated by Article 311. A person holding a substantive post was held to have a right to continue in service subject only to the rules of superannuation and compulsory retirement. The invasion of his right to continue in service by any other means resulting in termination was held to be in the nature of a penalty, amounting to removal. Article 311(2) was emphasized as intended to afford a sense of security to public servants who are substantively

appointed to a permanent post and continuing therein to legitimately expect pension after rendering public service for the period prescribed by the Rules. Article 311 was succinctly held to be a Constitutional protection given to Government servants who have title to office against arbitrary and summary dismissal. This ensured purity in action, not tainted by external influences."

21. The bench had made reference to Jai Shanker and Deoki Nandan Prasad (supra) and it was observed that the Rules in question were held to be violative of Article 311(2) as they did not provide for show cause notice or consideration of the explanation for such absence. State of Assam and Others versus Akshaya Kumar Deb, , (1975) 4 SCC 339, was referred and the following observations from this decision were quoted:-

"23. In the light of the above decisions, there can be no escape from the conclusion, that the impugned order dated February 13, 1963 was violative of Article 311(2) of the Constitution and, as such, illegal. It was imperatively necessary to give the servant an opportunity to show cause against the proposed action, particularly when he was persistently contending that his failure to join duty or absence was involuntary and due to circumstances beyond his control."

22. In M.P. Joseph (supra), the Kerala High Court has elucidated:-

"25. In the above cited decision, the rule which provided for notice though relevant was not invoked and no notice was given before terminating the employee. Still the Supreme Court upheld the termination. The learned Senior Counsel would alertly point out the distinction between sitting in review of an administrative decision on grounds of violation of Principles of Natural Justice and violation of Constitutional mandate. We are conscious of the same and the "useless formality" theory or even the "prejudice principle" may not strictly apply when a decision is challenged as violative of the principles enshrined in Articles 311(2). But we cannot also shut our eyes to the fact that the Principles of Natural Justice are embodied and epitomized in Articles 311. The mandate is an opportunity to explain, that too a reasonable one, the absence of which would definitely cut at the root of the exercise embarked upon. Rule 7(2) provides for an opportunity and that was granted in the instant case....."

23. When we apply the legal ratio to the factual matrix, it is apparent that the respondents have fully complied with the principles of natural justice and the petitioner was given ample and fair opportunity to submit a reply. The petitioner had pleaded that he wants to join work vide letter dated 6th October 2007 but had failed to report and join till 9th April 2008, when the order of deemed resignation was passed. In fact, the respondents were indulgent and the petitioner was persistent and obdurate for he did not join duty and work at Tripura.

24. In light of the aforesaid reasons, the impugned order does not merit interference and the writ petition is accordingly dismissed.