

(2009) 05 DEL CK 0213

In the Delhi High Court

Case No : Writ Petition (C) No. 9125 of 2007

Employees State Insurance Corporation and Others

APPELLANT

Vs

Dr. Mohan Kumar

RESPONDENT

Date of Decision : 15-05-2009

Acts Referred:

Central Civil Services (Leave) Rules, 1972 — Rule 11, 32(2), 50, 50(5), 65

Citation : (2009) 05 DEL CK 0213

Hon'ble Judges : Suresh Kait, J;A.K. Sikri, J

Bench : Division Bench

Advocate : Jyoti Singh, for the Appellant; Rashmi Chopra, for the Respondent

Final Decision : Dismissed

Judgement

A.K. Sikri, J.—The respondent herein has preferred an OA No. 1997/2006 before the Central Administrative Tribunal, Principal Bench, New Delhi. In this OA, he had challenged the orders dated 24.03.2006 and 27.07.2006 passed by his employer, viz., Employees State Insurance Corporation (the petitioner herein). By these orders, period of two years from 01.07.2003 to 30.06.2005 during which the respondent had done the DNB course was treated as dies non, that too as a special case on the ground that normally the respondent was not entitled to leave or to undertake the said course as per the Rules. He was also directed to refund the excess amount of pay and allowances drawn by him during this period over and above his entitlement as per Rules. The Tribunal has allowed his OA holding that the plea of dies non could not be opposed for the said period and also held the direction of the petitioner to the respondent to refund the excess amount of pay and allowances as unsustainable. The judgment of the Tribunal is dated 01.05.2007, validity whereof is challenged by the petitioner by means of the present writ petition.

2. The circumstances under which the orders dated 24.03.2006 and 27.07.2006 came to be passed treating the period as dies non may be recapitulated at this stage. The respondent herein joined the service with the petitioner as a Doctor

on 16.06.2001. On 18.06.2003, a Circular was issued by the ESI Hospital at Basaidarapur stating that it had been recognized for DNB course and two primary candidates and two associate candidates have been approved for admission in ophthalmology. Vide this Circular, nominations of interested candidates seeking their admission to DNB course in Ophthalmology were called for and candidates were supposed to apply on or before 24.06.2003. An advertisement was also issued in June 2003 in the leading newspapers calling for applications from Medical Graduates for admission to DNB course. The respondent herein applied for admission as associate candidate in response to the said advertisement. He was selected for admission at the ESI Hospital, Basaidarapur, New Delhi. Accordingly, he was relieved from his duty as GDMO, Gr. II, ESI Hospital, Noida with instructions to report the Medical Superintendent, ESI Hospital, Basaidarapur, Delhi for the DNB course and orders dated 01.07.2003 were issued stating therein that the respondent was to join the course on the same day, i.e., 01.07.2003. The respondent satisfactorily completed two years DNB course from 01.07.2003 to 30.06.2005, during which he submitted a thesis and maintained his log-book, etc. as certified by the Medical superintendent of ESI Hospital, Basaidarapur, New Delhi on 01.07.2005. Thereafter, he rejoined the duty with GDMO, Gr. II with ESI Hospital, Noida.

3. It so happened that after the respondent had joined the aforesaid course on 01.07.2003, Memo dated 13.09.2003 was issued advising him to apply for study leave for DNB course as required by Headquarters letter dated 25.08.2003. We may mention at this juncture that as per Rule 50(5)(i) of FRSR, Part III, Leave Rules that study leave can be granted to a Government Servant who has satisfactorily completed period of probation and has rendered not less than 5 years of regular continuous service including the period of probation. Since the respondent had joined the petitioner's hospital on 16.06.2001 and had not completed 5 years of regular continuous service, he was not entitled to study leave. However, he took the stand that in his application for admission to DNB course, he had disclosed all the particulars based whereupon he was selected for that course and no pre-condition of study leave was mentioned in the advertisement nor was he declared ineligible for admission. A circular dated 23.03.2004 was issued by the ESIC to the effect that those GDMOs selected for the post, but not entitled to study leave, would be required to resign from their post to pursue the study as in external candidate. Aggrieved by this circular, the respondent along with three other doctors approached the Tribunal and filed OA Nos. 880 -883/2008. These OAs were disposed of by a common judgment dated 03.11.2004 with a direction that "the respondents should resolve the matters in consultation with the National Board of Examination and also the Ministry of Health and Family Welfare, Government of India." It was also directed that the respondent and other applicants will not be required to apply for study leave till such time the matter had been given a careful consideration and resolved in consultation with the aforesaid authorities.

4. The ESIC took considerable time to comply with the orders of the Tribunal for

consulting the National Board of Examination and Ministry of Health and Family Welfare, Government of India. The respondent even finished the course on 30.06.2005. Till then nothing had happened. Much thereafter, i.e. on 24.03.2006, the impugned orders were passed stating that those doctors who are entitled to study leave should apply for study leave from the date when they joined the DNB course and refund the excess amount, if any, drawn by them during the period over and above their entitlement as per Rules. Another order dated 24.07.2006 was passed in respect of the respondent herein. It was stated in the order that since the respondent did not fulfil the eligibility criteria for sanction of study leave nor was he eligible for extra-ordinary leave under Rule 32(2)(e) of the Leave Rules, the competent authority had accorded his approval for granting relaxation under Rule 65 of CCS Leave Rules to the extent that the entire period of study leave (i.e. two years) will be treated as dies non. He was also directed to refund the excess amount of pay and allowances as drawn by him during the said period over and above his entitlement as per Rules.

5. The respondent in his OA challenged this order on the ground that when he was given admission, there was no pre-condition attached to seek study leave and he was not communicated any such condition in the initial communication or in the advertisement by which applications for admission were called for. Insofar as the respondent is concerned, he had given complete and correct particulars about joining the ESI Hospital and had not concealed anything. He was still selected for the course after observing due process and even deputed for the said course of DNB. Much after completion of the course during which period he attended to his duty as well, it was impermissible for the ESIC to treat the said period as dies non which course of action is resorted to in case of those persons who do not discharge their duties or remain unauthorizedly absent. He also contended that recovery was ordered without any issuance of show cause notice or without granting opportunity of hearing. He relied upon GOI instructions under Rule 11 of CCA (CCS) Rules 65 at Sl. No. 6 which are to the following effect:

(6) When a day can be marked as dies non and its effect. - Absence of officials from duty without proper permission or when on duty in office, they have left the office without proper permission or while in the office, they refused to perform the duties assigned to them is subversive of discipline. In cases of such absence from work, the leave sanctioning authority may order that the days on which work is not performed be treated as dies non, i.e., they will neither count as service nor be construed as break in service. This will be without prejudice to any other action that the Competent Authorities might take against the persons resorting to such practices.

6. The aforesaid contentions of the respondent found favour with the Tribunal on the ground that the respondent had specifically mentioned his date of joining the service on 16.06.2001 in his application for DNB course. Therefore, there was no misrepresentation on his behalf, still the ESIC selected him for the said course with proper sanction. If he was not eligible for grant of study leave/ELO, the

ESIC could not explain as to why the respondent was selected and not even any steps were taken to recall him from continuing the said course nor any action was initiated for disregarding the direction of the requirement of the study leave. The ESIC thus acquiesced in the respondents' continuing the course. Midway, a Circular dated 23.03.2004 was issued stating therein that regular GDMOs selected for the post, but not entitled to study leave, would be required to resign from their post to pursue the study as an external candidate. These orders were challenged and the Tribunal stayed the effect of these orders while disposing of the earlier OA filed by the respondent vide its orders dated 03.11.2004. Even then the ESIC took considerable time in deciding the issue and impugned orders came to be passed much after the completion of the course. The Tribunal also accepted the contention of the respondent that there was no provision for treating such period as dies non.

7. Submission of Ms. Jyoti Singh, learned Counsel appearing for the ESIC was that the communication dated 30.06.2003/01.07.2003 vide which the respondent was offered admission for DNB course of Ophthalmology, it was specifically mentioned therein that the study period shall be governed under the relevant provision of FRSR as applicable for study leave. Therefore, the respondent was admitted to the course subject to the said study leave. The respondent was fully aware of the fact that he was not entitled to grant of study leave as he had not completed five years of regular continuous service including that of probation period, which was precedent for grant of such leave as per Rule 50 of the Leave Rules. Therefore, it was not a case of acquiescence by the ESIC. She submitted that as the ESIC was directed to take action in consultation with National Board of Examination and Ministry of Health and Family Welfare, Government of India, the said consultation took some time and before the decision could be taken, the respondent had completed his course of DNB. In these circumstances, he could not have been asked to resign and complete the course as an external candidate. Therefore, in this peculiar circumstance, decision was taken vide orders dated 24.07.2006 treating the aforesaid two years period as dies non.

8. We are not impressed with this submission of learned Counsel for the ESIC. No doubt, in the communication informing the respondent about admission to DNB course, it is stipulated that study period is to be governed by the relevant Rules and the respondent was not entitled to the leave. At the same time, it is also to be borne in mind that insofar as the respondent is concerned, he had mentioned complete particulars in his application for admission to the said course, without any concealment. From these particulars, the petitioner should have known that the respondent was not entitled to study leave. In these circumstances, the ESIC was either supposed to review his admission to the course or to call upon the respondent to resign from the job and then pursue the DNB course. Instead, it relieved the respondent from his place of posting, i.e., ESI Hospital, Noida and allowed him to join the ESI Hospital, Basaidarapur to pursue his DNB course. Again it is the ESIC which compounded the problem

further by not taking the decision immediately after the directions dated 03.11.204 were issued by the Tribunal in the first OA filed by the respondent.

9. Important question in these circumstances which arises for consideration is as to whether in a case like this two years period during which the respondent did his DNB course can be treated as dies non, as done by the ESIC in its impugned orders dated 24.07.2006. Answer has to be in the negative. The respondent was not only pursuing the DNB course while he was posted in ESI Hospital, Basaidarapur, but he was also performing the duties there, as well. As is well known and also clear from the instructions of the Government of India at Sl. No. 6 under Rule 11 of the CCS (CCA) Rules, extracted above, it is only in case of absence of official from duty without permission or leaving the office without permission or refusing to perform the duties assigned to such an official, the said period can be treated as dies non. Thus, even if it is presumed that to some extent the respondent is also responsible who was informed that the period of DNB course shall be regulated by Study Leave Rules and thus he should also have known that he was not entitled to the said Study Leave, but the effect cannot be so harsh, i.e., to treat the period as dies non when no such orders of dies non can be passed under the given circumstances. He had performed his duties during this period and was given salary, which was ultimately due to him. The petitioner is seeking to recover the payment on the purported ground that it was excess amount of pay and allowances, over and above his entitlement as per Rules, would clearly be impermissible as there was no "excess" payment made. Even if it is presumed that there is an excess payment, concededly it was not because of any misrepresentation or fraud on the part of the respondent. Therefore, as per well-settled principle of law, it cannot be recovered. The Supreme Court has repeatedly reiterated this principle in the following judgments:

- i) P.H. Reddy v. NTRD and Ors. JT 2008 (2) SC 483.
- ii) Shyam Babu Verma and Others Vs. Union of India (UOI) and Others,
- iii) Sahib Ram v. State of Haryana 1995 SCC L&S 248.
- iv) SI (M) Shankar Lal v. UOI 2002 III AD (Delhi 456).

10. In the present case, not even a show-cause notice or an opportunity of being heard was given before passing the impugned orders dated 24.07.2006.

11. We are thus in agreement with the view taken by the Tribunal and finding no merit in this writ petition which is accordingly dismissed.