
(2001) 09 DEL CK 0043
In the Delhi High Court
Case No : CW. No. 113 of 2000

Ex. Constable Jal Singh

APPELLANT

Vs

Commissioner of Police and Others

RESPONDENT

Date of Decision : 19-09-2001

Acts Referred:

Constitution of India, 1950 — Article 226

Citation : (2002) 63 DRJ 198

Hon'ble Judges : Sharda Aggarwal, J;B.A. Khan, J

Bench : Division Bench

Advocate : Ms Avnish Ahlawat, for the Appellant; Mr. Anil Sapra, for the Respondent

Final Decision : Dismissed

Judgement

Sharda Aggarwal, J.—The petitioner, by this petition under Article 226 of the Constitution of India, seeks to challenge the judgment and order of the Central Administrative Tribunal (Principal Bench) (in short the Tribunal) dated 14th July, 1999 in OA.No.1529/93 whereby the Tribunal dismissed the OA upholding the orders of the Disciplinary and Appellate Authority.

2. The petitioner was a Constable in Delhi Police. he fell sick and applied for leave with medical rest from 26th March, 1991 to 8th April, 1991. He was advised medical rest for 14 days. he failed to report for duty on 9th April, 1991, but he sent telephonic information through his brother for extension of his medical rest for 15 more days on 9th April, 1991. He did not again report on 23rd April 1991, but again an information through his brother was received for further extension of 15 days's medical rest which was also recorded vide DD.No.14/PAP/Line on 23rd April, 1991. After expiry of further 15 days, he neither reported for duty nor sent any request for extension of medical rest. He was recorded absent since 8th May, 1991. Thereafter two absentee notice dated 4th June, 1991 and 24th June, 1991 were sent to petitioner. The first notice was received by his nephew whereas second notice was acknowledged by him on 27th June, 1991 but he chose to

ignore the notices and failed to inform the department and seek permission for his unauthorised absence from 8th May, 1991. He ultimately resumed his duties on 26th July, 1991. He ultimately resumed his duties on 26th July, 1991 after an unauthorised absence for a period of 2 months, 18 days, 6 hours and 25 minutes. The petitioner was also found to be a habitual absentee as he had absented himself unauthorisedly on 40 earlier occasions. On the grounds of his unauthorised absence amounting to mis-conduct, a departmental enquiry was initiated against him vide order dated 1st November, 1991. Summary of allegations was issued against the petitioner on 25th November, 1991. He was charged on 21st February, 1992. After conducting the enquiry, the Enquiry Officer vide his report dated 9th April, 1992 found the charges proved against him. The Disciplinary Authority vide orders dated 17th July, 1992 dismissed him from service. An appeal against the said order also failed on 1st February, 1993. Aggrieved by the said two orders, petitioner filed OA.No.1529/93 before the Tribunal which was dismissed vide the impugned order dated 23rd July, 1999. Aggrieved by the same, petitioner has preferred the present writ petition.

3. The main contention of Ms. Avnish Ahlawat, learned counsel for the petitioner is that the petitioner had not remained absent unauthorisedly as he had initially proceeded on medical leave which was extended from time to time, for which he also produced medical certificates when he resumed his duties on 26th July, 1991, which was not rejected by the respondents by a formal order. Learned counsel for the petitioner contends that where medical certificates submitted by the delinquent employee on his rejoining the duty are not rejected by the Competent Authority by a formal order, the alleged period of absence would not be unauthorised in the eyes of law warranting his dismissal. While arguing the petition this was the only issue canvassed by the learned counsel, for the petitioner before us. No other issue was pressed or argued by her. At her request the learned counsel was given liberty to place on record any judgment/authority in support of her contention. She filed written submissions.

4. The record shows that summary of allegations was duly served on 25th November, 1991, wherein it was also stated that he was a habitual absentee as according to his past record he absented unauthorisedly on 40 occasions for which he was awarded punishment. As per the evidence, of 40 occasions, 15 times his absence was noted but awarded punishment for 25 times. Accordingly, he was charged as follows:

i) You absented yourself unauthorisedly and willfully on 8th May, 1991 and resumed duty after a lapse of 2 months, 18 days, 6 hours and 25 minutes violating. Delhi Police (Leave) Rules and SO No.111 of Delhi Police.

ii) Perusal of your past record shows that you have been punished 25 times previously for absenting yourself unauthorisedly from duty but you fail to show any improvement.

5. The petitioner was given full opportunity to contest the enquiry proceedings

and the Enquiry Officer after considering the entire evidence returned the finding of guilt on both the charges. The Disciplinary Authority, after considering the enquiry report and the proceedings, punished the petitioner by imposing a penalty of dismissal. The fact that despite two absentee notices, petitioner failed to resume duty from 8th May, 1991 to 26th July, 1991 is not disputed. Service of absentee notices on the petitioner was proved by the department. In fact the receipt of the second absentee notice by the petitioner is not denied. He, however, completely ignored the same and failed to seek permission for leave or resume duty. The fact that the petitioner submitted the medical certificates for the entire period of his absence on his rejoining is also not disputed.

6. According to learned counsel for the respondents, medical certificate for the period 8th May, 1991 to 26th July, 1991 was not accepted by the Department. It is also pointed out that the medical certificates produced on his rejoining contradicted the allegations made in the writ petition as according to medical certificates, petitioner had suffer some injury in his hand whereas in the writ petition he claims that he had suffered some liver problem. The plea of the petitioner is that since the medical certificate though produced at the time of rejoining duty was not rejected by a formal order, the period of his absence could not be treated as unauthorised amounting to mis-conduct and warranting his dismissal. Learned counsel for the petitioner has failed to produce any authority or show any rule or regulation to support her contention.

7. In her written submissions, the learned counsel has taken the plea that the department had accepted the medical certificate of the first 42 day but had failed to accept for the period subsequent to 8th May, 1991. The submission is that once the department had come to know that the absence of the petitioner was on account of sickness and it could not be said that the absence was deliberate and willful, he could not have been punished and dismissed for service. In its support, reliance is placed on 1996 (2) SLR 17 Malkiat Singh Vs. State of Punjab. This authority has no application to the present case on facts. In the said, case, the wife of the delinquent had developed some serious complication after delivery and he had to attend to her and because of that reason he would not come to duty for one day. Medical certificate was produced and on the basis of that it was held that his absence was not willful and deliberate and his discharge from service was set aside.

8. Another point taken by the learned counsel in the written submissions is that the Disciplinary Authority had regularised the period of absence as leave without pay while passing the orders of dismissal, and once the absence was regularised, the charges of unauthorised absence from duty did not survive and the same could not be made the basis of penalty against the petitioner. For this proposition, reference is made to some decisions of the Tribunal but the same cannot be taken as precedents for this court. Learned counsel has also placed reliance on the Supreme Court decision in the case of The State of Punjab and Others Vs. Bakshish Singh, and a Single Bench judgment of this court in the case

of Satya Pal Yadav Vs. Union of India and Others, . In Satyapal Yadav's case, a Singly Judges of this court did held that once the period of unauthorised absence was regularised by the Department, charge on account of unauthorised absence did not survive. This decision was given following a judgment of Punjab High Court in the case of State of Punjab Vs. Chanan Singh 1988(3) SLJ 216. This judgment does not hold the filed in view of the earlier judgment of Supreme Court in the case of State of Madhya Pradesh Vs Harihare Gopal 1969 SLR 274. The Supreme Court judgment in Harihar Gopal's case was in fact not considered in Satyapal Yadav's case. The charge against Harihar Gopal was that he had absented himself without obtaining leave in advance. The Enquiry Officer characterised the conduct of the delinquent as irresponsible in extreme. On the finding of the Enquiry Officer, the charge was proved against him and vide orders dated 9th March, 1962 his services were terminated. Subsequently on the same date, by another order of the same Authority, the of period of unauthorised absence was regularised as leave without pay. The said order was challenged before the High Court of Madhya Pradesh by the delinquent. It was urged before the High Court on behalf of the State that the order granting leave was only for the purpose of regularising the absence from duty and for maintaining the true account of absence and had not the effect of first sanctioning leave to the delinquent and then removing him from service for absence form duty. The High Court rejected this contention holding that he leave was granted even though belatedly, it had the effect of authorising absence from duty during the period for which it was sanctioned. The High Curt held that by authorising the delinquent's absence it was not open to the government to proceed on the basis that his absence was unauthorised. This order was challenged by the State before the Supreme Court. The Supreme Court in that case in no uncertain terms held as under:

"The order granting leave was made after the order terminating the employment and it was made only for the purpose of maintaining a correct record of the duration of service, and adjustment of leave due to the respondent and for regularising this absence from duty. Or attention has not been invited to any rules governing the respondent's service conditions under which an order regularising absence from duty subsequent to termination of employment has the effect of invalidating termination."

9. It was further held that:-

"We are unable to hold that the authority after terminating the employment of the respondent intended the pass an order invalidating the earlier order by sanctioning leave so that the respondent was to be deemed not to have reminded absent from duty without leave duty granted."

10. This judgment is by three Hon"ble Judges of the Supreme Court in contrast to the decision of Division Bench judgment of Supreme Court in Bakshish Singh" case (supra). Perusal of Bakshish Singh's case would show that it was decided of its own facts and the earlier judgment of Supreme Court in Harihar Gopal's case

(supra) was not placed before the Court nor its attention was drawn to the question of law decided by it, namely, that merely by regularising the absence from duty subsequent to termination of employment did not have the effect of invalidating termination. In Bakshish Singh's case (supra) his services were terminated after holding a departmental enquiry on the charge of unauthorised absence for duty. He challenged the order of dismissal in a suit seeking setting aside the order of dismissal. The Trial Court decreed the suit holding that the department having themselves regularised and treated the period of absence from duty as the period of leave without pay could not legally show that the delinquent was guilty of mis-conduct or unauthorised absence from duty. The Trial Court also recorded a finding that the delinquent's statement that he was not given an opportunity of personal hearing and that his signatures were obtained under duress in the departmental proceedings was not controverted by the Department. The Trial Court's decision was challenged in appeal before the District Judges and the Additional District Judge Jalandhar upheld the findings of the Trial Court that once the absence was treated as leave of any kind whatsoever, the charge of absence from duty could not be sustained. Having confirmed this finding, the Appellate Court considered the question as to whether the absence from duty was a mis-conduct of the gravest kind so as to warrant the maximum punishment of dismissal from service or it was a mere mis-conduct for which lesser punishment would be appropriate. Having found that it was not a case of mis-conduct of gravest kind, the lower Appellate Court remanded the case back to the Punishing Authority for passing a fresh order of punishment. The State of Punjab challenged the said before the High Court. But the High Court without passing a speaking order, dismissed the same. In this regard, Supreme Court observed as under:

"It will thus be seen that the Trial Court as also the lower appellate Court had both recorded the findings that the period of absence from duty having been regularised and converted into leave without pay, the charge of absence from duty did not survive. Once it was found as a fact that the charge of unauthorised absence from duty did not survive, we fail to understand how the lower appellate court could remand the matter back to the punishing authority for passing a fresh order of punishment. In the face of these findings, specially the findings of the trial Court that proper opportunity of hearing was not given and the signatures of the respondents were obtained under duress during departmental proceedings which have not been set aside by the lower appellate court, we are of the view that there was no occasion to remand the case to the punishing authority merely for passing a fresh order of punishment."

11. Thus it is apparent that in Bakshish Singh's case (supra), Supreme Court has not dealt with the proposition of law already settled in Harihar Gopal's case (supra) as it had only dealt with the question whether it was open to the first Appellate Court to remit the matter back to the punishing authority in view of findings of the fact arrived at by the Trial Court and upheld by the first Appellate Court. Also the earlier judgment of Supreme Court in Harihar Gopal's case

(supra) was not placed before the Court nor was its attention drawn to the question of law decided by it i.e. merely by regularising absence from duty subsequent to termination of employment did not have the effect of invalidating the order of dismissal. To our mind, Harihare Gopal's case still holds the field. In fact the judgment of Supreme Court in Bakshish Singh's case in a judgment *per incuriam* inasmuch as it did not take into account the decision of earlier Larger Bench judgment in Harihar Gopal's case.

12. A Division Bench of this Court in a recent case of Deputy Commissioner of Police Vs. Jorawar Singh & ors 2000 (iv) AD (Del) 873 had an occasion to consider Harihare Gopal's case and Bakshish Singh's case (supra). The facts of the said case were identical to those of the present case. Jorawar Singh's a Constable was dismissed from service on the ground of unauthorised absence. The Disciplinary Authority while passing the order of dismissal also treated the period of absence as leave without pay. The said order was challenged before the Tribunal and the Tribunal relying on its earlier judgment in Ex.Head Constable Ram Pyara Singh Vs. Union of India (OA.No.2223/95), wherein it had followed the judgment in Satyapal Yadav's case (supra) and the decision of Supreme Court in Bakshish Singh's case allowed the OA and set aside the order of dismissal of the Disciplinary Authority. The Department had filed the writ petition challenging the order of Tribunal and considering the Supreme Court decision in Bakshish Singh's case and Harihar Gopal's case (supra), the Division Bench held that the judgment in Bakshish Singh's case was *per incuriam* as it did not consider the judgment of Harihar Gopal's case and holding that Harihare Gopal's case still held the field, allowed the writ petition.

13. In the present case the orders of dismissal and regularising the leave without pay were not separate but rolled in one, however, the Disciplinary Authority first imposed the penalty of dismissal on the petitioner w.e.f. date of issuance of the said order and then regularised and treated the unauthorised absence as leave without pay. This was obviously done with the purpose of regularising the absence from duty and for maintaining a true account of absence. In view of Harihar Gopal's case (supra), we are unable to hold that the Authority after terminating the employment of petitioner intended to pass order invalidating its own order by regularising the period of unauthorised absence as leave without pay.

14. Thus in view of the observations made above, we are of the opinion that the order dismissal of the petitioner does not suffer from any illegality and the regularisation of leave without pay is only for the purpose of maintaining correct record of service which does not interfere with or obliterate the order of dismissal from service. The writ petition is accordingly dismissed and the order of Tribunal dated 14th July, 1999 in OA.No.1529/93 is upheld.