
(2001) 08 PAT CK 0075
In the Patna High Court
Case No : C.W.J.C. No. 4363 of 2001

Joycee Jones

APPELLANT

Vs

The State of Bihar and Others

RESPONDENT

Date of Decision : 23-08-2001

Acts Referred:

Citation : (2001) 08 PAT CK 0075

Final Decision : Dismissed

Judgement

Shiva Kirti Singh, J.—The Petitioner, an ex-member of the Bihar Health Service, has filed this writ petition to seek quashing of order passed by Secretary, Health Department, Government of Bihar vide Memo No. 40 (HS) dated 2.2.2001 contained in Annexure-5. By the said order the Health Secretary has declined Petitioner's request to regularize her absence from duty from 6.5.1993 till her retirement on 30.11.1995 and has held that in view of Rule 152 of the Bihar Service Code, leave cannot be claimed as of right. Petitioner has also sought a mandamus to command the Respondents to regularize the period from 6.5.1993 to 30.11.1995 by granting various kinds of leave.

2. The facts necessary for deciding the present case are as follows. The Petitioner while posted as Sub Divisional Medical Officer at Bhagalpur was transferred to Patna City Hospital to the post of Deputy Superintendent vide order dated 30.12.1992. The Petitioner represented against such transfer but her representation was rejected on 15.4.1993. She was relieved at Bhagalpur on 30.4.1993 and reported her joining at Patna City Hospital on 5.5.1993. After that she did not work till her retirement on 30.11.1995. Her case is that on 5.5.1993 the Civil Surgeon, Patna was not available hence, she handed over charge report to Head Assistant of the Patna City Hospital along with an application for casual leave from 6.5.1993 to 9.5.1993 and proceeded on leave. Petitioner claims to have sent an application for extension of leave on account of her mother's illness from 10.5.1993 to 9.6.1993 and another application dated 6.6.1993 for further extension of leave on account of her own illness from 10.6.1993 to 8.9.1993.

She claims to have sent another application on 4.9.1993 for special medical leave from 9.9.1993 to 6.9.1994. She claims to have submitted her joining in the Health Department before an Under Secretary on 6.3.1995 with an application for extraordinary leave for the earlier period 7.9.1994 to 5.3.1995 under Rule 234 of the Bihar Service Code. She claims to have filed an application for her posting at Bhagalpur and remained waiting for such posting till she superannuated on 30.11.1995.

3. It is not in dispute that prior to passing of the impugned order contained in Annexure-5, the Health Secretary, Government of Bihar had earlier rejected Petitioner's similar claims and representations through an order dated 3.9.1997 which was challenged by the Petitioner through a writ petition bearing CWJC No. 3778/1999 which was disposed of by order dated 31.7.2000 as contained in Annexure-2. By the said order this Court noticed the relevant facts and came to a conclusion that the Petitioner was not interested in performing her duties at Patna City Hospital. This Court treated her conduct as wilful absence from duty and viewed it seriously because being a Doctor Petitioner remained absent from the Hospital at Patna City for over two years with least concern for the patients. With such findings the Court, however, noticed the fact that no disciplinary action was taken against the Petitioner and none can now be taken after her retirement. Thereafter the Court considered a submission that even if Petitioner remained unauthorisedly absent from duty such absence can be regularized as leave under provisions of the Bihar Service Code such as Rules 234, 240 and 243. On such submission, the Court expressed no opinion and observed that "if the Petitioner is entitled to have the period of absence regularized against any kind of leave due under the Bihar Service Code the same should be considered independently". Since such claim for regularization had not been considered with specific reference to the provisions of the Bihar Service Code, this Court quashed the earlier order dated 3.9.1997, not on merits but only to enable the Secretary, Health Department to reexamine the claim of the Petitioner afresh in accordance with law. Thereafter, the Health Secretary gave notice and opportunity of hearing to Petitioner's representative as indicated in the impugned order itself and passed the order contained in Annexure-5 rejecting the Petitioner's claim that she was entitled to various leaves and hence her unauthorized absence should be regularized.

4. Learned Counsel for the Petitioner first made an attempt to persuade this Court to enter into facts and hold that Petitioner has been given an unfair treatment and that her applications for leave as and when filed, should have been allowed by the Respondents. But in view of earlier order of this Court contained in Annexure-2 and clear observations that Petitioner was guilty of wilful absence from duty without any sanctioned leave, the learned Counsel for the Petitioner confined his submissions only to the various Rules under the Bihar Service Code to support the submissions raised before the Health Secretary that Petitioner was entitled to various leaves and hence, the Health Secretary was bound in law to allow her application for leave and regularize her absence from

duty. This submission could not find any support from the provisions of Rules 234, 240 and 243 of the Bihar Service Code. No doubt, these rules contain provisions for different kinds of leave but they are all subject to Rule 152 upon which reliance has been placed by the Health Secretary and which provides that leave cannot be claimed as of right. Thereafter learned Counsel for the Petitioner placed reliance upon Rules 165(1) and 180.

5. Rule 165(1) of the Bihar Service Code grants benefit of various kinds of leave in a case where a Government servant who was on valid leave remained absent, in other words overstayed after the end of leave. In this case, it is found that even the application for casual leave said to have been filed on 5.5.1993, was admittedly not filed before the competent authority who could grant such leave and nothing has been brought on record to show that such leave was actually sanctioned. None of the later applications appear to have been filed before the proper authority and in any case, there is no order of the competent authority sanctioning leave to the Petitioner for any period after she was relieved from Bhagalpur on 30.4.1993. In view of such facts Petitioner's case is found to be not one of overstayal after the expiry of a leave granted by the competent authority. Hence, the Petitioner is not entitled to the benefit of Rule 165(1). So far as Rule 180 is concerned, the same provides for extraordinary leave which may be granted in special circumstances and when no other leave is admissible under the rules. This leave is again found to be Dependent upon discretion of the competent authority and is meant to cover special circumstances. Clearly, Rule 152 will apply to Rule 180 also and such leave also cannot be claimed as of right. Thus, it is found that Rule 165(1) and Rule 180 do not help the case of the Petitioner.

6. Lastly, learned Counsel for the Petitioner made a submission that the competent authority has no option but to grant leave of permissible varieties and regularize Petitioner's service otherwise break of Petitioner's service, as found by the Health Secretary, will be illegal because a break in service in any event will amount to a punishment of removal from service without any disciplinary proceeding. In support of this proposition learned Counsel for the Petitioner has placed reliance upon a Division Bench judgment of this Court in the case of Sobhana Das Gupta Vs. The State of Bihar and Another, and two other judgments of learned single Judge in the case of Kameshwar Jha Vs. The State of Bihar and Others, and in the case of Sushila Devi Vs. The State of Bihar and Others, The aforesaid submission is based upon a misconception that a break in service resulting on account of non-grant of leave for any period during service tenure of a Government employee amounts to an order of punishment such as removal from service. In the case of Shobhna Das Gupta (supra), this Court was considering the vires of Rule 76 of the Bihar Service Code and found it to be ultra vires because Rule 76 permitted removal from service within the meaning of Article 311 of the Constitution of India without the safeguards provided by the said Article. Unlike the present matter, the other two cases dealt with manner of fixation of pension and in that context it was held that fixation of pension has to

be on the basis of last pay drawn as per rules and it was also held that the period of unauthorised absence, for the purpose of computation regarding entitlement/eligibility for the pensionary benefits, cannot be ignored so long as service was not terminated. Thus, the aforesaid decisions do not support the Petitioner's case that finding of unauthorised absence which is also expressed as break in service amounts to termination of service.

7. In the opinion of this Court, a break in service clearly implies that service continues or was intended to continue after the break. Termination of service leaves no scope of continuity in service. Break in service due to non-availability or non-grant of leave may have adverse effects as a necessary consequence of service Rules but that alone cannot make non-grant of leave penal. In view of this finding, it is not necessary to consider the judgment cited by learned AAG appearing on behalf of the Shahoodul Haque Vs. The Registrar, Co-operative Societies, Bihar and Another, . That judgment was cited in support of a proposition that service of a Government servant may be terminated for unauthorised long leave after giving him an opportunity to explain his conduct. In the facts of the present case, the said judgment has no application.

8. Rule 152 of the Bihar Service Code is a salutary provision reminding all Government servants that the exigencies of public service stand on a higher footing and hence leave cannot be claimed as of right. Discretion to revise or revoke leave of any description has been, therefore, reserved to the authority empowered to grant it. No doubt, such discretion must mean proper and judicious discretion. Refusal or revocation of leave is the prerogative of the competent authority subject to the principle of fairness which governs, all spheres of administrative action. Refusal of leave may be held justified or arbitrary depending upon facts of each case. In the present case, facts do not leave any scope for this Court to interfere with the decision of the Health Secretary in refusing to allow the Petitioner's prayer for leave. The earlier order of the Health Secretary (Annexure-A to the counter affidavit) shows that all the relevant facts had been considered by him earlier and the remand of the matter to him was only for a fresh consideration regarding entitlement of the Petitioner to leaves claimed by her under the provisions of Bihar Service Code. This aspect of the matter has also been correctly decided by the order of the Health Secretary under challenge. Petitioner cannot claim any leave as a matter of right.

9. This Court finds no error of fact or law to warrant any interference with the impugned order in exercise of writ jurisdiction. The writ petition is accordingly dismissed but without any order as to costs.