
(2005) 01 GAU CK 0027
In the Gauhati High Court
Case No : Writ Petition (C) No. 38 of 2003

Lalherliana

APPELLANT

Vs

State of Mizoram and Others

RESPONDENT

Date of Decision : 20-01-2005

Acts Referred:

Central Civil Services (Temporary Service) Rules, 1965 — Rule 5(1)
Constitution of India, 1950 — Article 311

Citation : (2005) 3 GLT 234

Hon'ble Judges : B.P. Katakey, J

Bench : Single Bench

Advocate : C. Lalramzauva, A.R. Malhotra and R. Lalduhawmi, for the Appellant;
N. Sailo, for the Respondent

Judgement

B.P. Katakey, J.—This writ petition has been filed by the Petitioner challenging the order dated 7.9.01 passed by the Joint Sebrtary to the Govt. of Mizoram Health and Family Welfare Department whereby it was ordered that the period for which the writ Petitioner did not performe his duty with effect from 15.11.1992 shall not be treated as on duty and no pay and allowances for the said period shall be paid.

2. I have heard Mr. C. Lalramzauva, learned Counsel for the Petitioner and also heard Mr. N. Sailo, learned Government advocate appearing on behalf of the Respondents.

3. Mr. C. Lalramzauva, learned Counsel for the Petitioner submits that the second part of the impugned order dated 7.9.2001 in so far as it relates to the order that the Petitioner will not be treated on duty for the period for which he, did not performed the duty with effect from 15.11.1991 and also to the fact that no pay and allowances for the said period shall be payable to him, is contrary to the provisions of Rule 54 of the Fundamental Rules. According to Mr. C. Lalramzauva, learned Counsel for the Petitioner, the Government of Mizoram having decided to reinstate the Petitioner by the order dated 7.9.2001 by setting aside the order of

termination passed by the Medical Superintendent, Civil Hospital, Aizawl, the authority is bound to pay the pay and allowances payable to the Petitioner for the period of for which he could not performed his duty because of the illegal termination from the service. The learned Counsel for the Petitioner has further submitted that the having filed an appeal immediately after the order of termination dated 27.11.91, the Petitioner can not be found to be at fault for non disposal of the said appeal which was disposed of by the authority vide order dated 7.9.2001 by reinstating him in service. The service of the Petitioner having being reinstated by setting aside the order of termination, he is entitled to full back wage as provided under Rule 54(2) of the Fundamental Rules as according to the writ Petitioner the same amount to fully exonerating of the Petitioner from the charges.

4. Mr. C. Lalramzauva, learned Counsel for the Petitioner in support of his contention has relied upon the decisions of the apex court in Mohan Lal Vs. Management of Bharat Electronics Ltd., ; in the Central Cooperative Consumers Store Ltd. Through its General Manager v. Labour Court, H.P. at Shimla and Anr. reported in 1993(4) SLR (SC) 94 ; in Manorma Verma (SMT) vs. The State of Bihar and Ors., 1994 Supp. (3) SCC 671 ; in Vimal Kumari Vs. The State of Haryana and Others, and also a decision rendered by a single judge of this Court in Amitangshu Dhar v. The President Shillong Cantonment Board, Shillong reported in 1998 (1) GLT 95 .

5. Mr. Sailo, learned Government advocate, relying on the affidavit-in-opposition filed on behalf of the Respondents, has submitted that the writ Petitioner is not entitled to the back wage on the principles of no work no pay as admittedly the writ Petitioner was not in service with effect from 15.11.91 till he was reinstated in service vide order dated 7.9.01. According to Mr. Sailo, learned Counsel, the Government has a power under Rule 54(4) of the Fundamental Rules to pass any order regarding the payment of back wages and also treating the period during which the employee did not performed the duty as not on duty when the order of termination from service is set aside by the appellate authority or by reviewing authority solely on ground of noncompliance with the requirement of the Clause 1 or Clause 2 of Article 311 of the Constitution of India. In the instant case according to Mr. Sailo the order of termination ofthe Petitioner dated 27.11.91 was set aside by the appellate authority solely on the ground that the Medical Superintendent was not the competent authority to terminate the service of writ Petitioner and therefore it can not be held that he was fully exonerated from the charges so as to attract the provisions of Rule 54(2) of the Fundamental Rules.

6. The writ Petitioner was appointed as Grade-IV employee (Mechanic) vide order of appointment dated 12.1.87. The service ofthe writ Petitioner was terminated with effect from 15.11.91 by the Medical Superintendent, Civil Hospital, Aizawl vide order dated 27.11.91 under Rule 5(1)(b) of Central Civil Services (Temporary Service) Rules, 1965. But interestingly enough after termination of the writ Petitioner from the service by the said order of termination, the writ

Petitioner's service as Grade-IV staff was confirmed by the Directorate of Health services, Mizoram vide office order dated 8.1.1993 with effect from 15.9.88. Against the said order of termination the writ Petitioner submitted an appeal, on the basis of which the comments from the Directorate of Health Services were sought for by the appellate authority. The appellate authority thereafter vide order dated 7.9.01 set aside the order of termination dated 27.11.91 and reinstated the Petitioner in service on ground that the Medical Superintendent, Civil Hospital, Aizawl was not a competent authority to terminate the services of the Government servant as he is not appointing authority.

7. It is the case of the writ Petitioner in the writ petition that the order of termination dated 27.11.91 was set side by the appellate authority as the same was passed contrary to the provision of Clause 1 of Article 311 of the Constitution of India It is also evident from the order dated 7.9.01 that the Petitioner was reinstated in the service by setting aside the order of termination solely on the ground that the Medical Superintendent, who issued the order of termination is not the competent authority and therefore, the order of termination was set aside on technical ground. The Petitioner has not been reinstated in service by setting aside the order of termination after fully exonerating him from the charges, which was absence from the duty unauthorized without leave.

8. In Mohan Lal v. Management of M/s. Bharat Electronics Ltd (Supra) the Hon'ble Supreme Court while dealing with the matter under the Industrial Disputes Act, 1947 has held that in case of illegal termination of service the worker is deemed to be continuing service and is entitled to reinstatement with full back wages, similarly, in the Central Co-operative Consumers' Store Ltd. v. Labour Court, H.P. at Shimla and Anr. (Supra) the apex court in a matter relating to Industrial Dispute Act, 1947 has refused to interfere with the order of the High Court granting the back wages. The said decisions having being rendered in cases relating to the industrial Dispute Act and having not deal with the provisions of the Fundamental Rules, is not applicable in the present case.

9. The Apex Court in Manorama Verma (Smt.) v. State of Bihar and Ors. (supra) has held that once the termination is found to be illegal consequential order of back wages will follow unless there are reasons justifying a departure from normal order. In the said case also the question of entitlement of the back wages under the Fundamental Rules was not raised and hence not decided by the Apex Court. In Bimal Kumari v. State of Haryana and Ors. (supra) the Apex Court while dealing with a matter regarding the reversion of the Petitioner to a lower grade has held that when the reversion order was quashed the direction of payment for all consequential benefits including arrears of salary is to be passed. The said decision rendered by the Hon'ble Supreme Court is also not applicable in the instant case in view of the fact that in the present case the Petitioner was terminated from service and subsequently reinstated by the appellate authority and therefore, the Petitioner's case is governed either by Sub-rule 2 of Rule 54

or by Sub-rule 4 of Rule 54 of Fundamental Rules.

10. A Single judge of this Court in *Amitangshu Dhar v. The President Shillong cantonment Board, Shillong* (supra) has held that in case a dismissed employee is reinstated in service after fully exonerating him from charges, he is entitled to the full back wages under Sub-rule 2 of Rule 54 of the Fundamental Rules subject to the Sub-rule 6. In the present case, as already stated, the Petitioner was not fully exonerated from the charges so as to attract the provision of Sub-rule 2 of Rule 54 of the Fundamental Rules and his order of termination was set aside on the technical ground i.e. on the ground that the Medical Superintendent, Civil Hospital, Aizawl had no power to issue the order of termination. Therefore, the decision rendered by the Single bench of this Court is also not applicable in the instant case. However, this Court in the said judgment has accepted the position that the payment of back wages in case of dismissed employee, when reinstated in service, is governed by the provisions of the Rule 54 of Fundamental Rules.

11. Sub-rule 2 of Rule 54 of the Fundamental Rules provides that when the competent authority passes any order of reinstatement by setting aside the order of dismissal, removal or compulsory retirement by fully exonerating him from charges, the employee shall be entitled to full pay and allowances to which he would be entitled, had he not been dismissed, removed or compulsorily retired or suspended prior to such dismissal, removal or compulsory retirement, as the case be, subject to the provisions of Sub-rule 6 of Rule 54. proviso to the said Sub-rule 2 also stipulate that if the proceedings instituted against the government servant is delayed due to reasons directly, attributable to the Government servant, the authority may pass an order after giving reasonable opportunity to the Government servant to make representation, determining the amount of such pay and allowances by taking into account the period of such delay.

12. Sub-rule 4 of Rule 54 of the Fundamental Rules provides that when the appellate or reviewing authority set aside the order of dismissal, removal or compulsory retirement of a Government servant solely on the ground of non-compliance with the requirements of Clause (1) or Clause (2) of Article 311 of the Constitution of India and no further inquiry is proposed to be held, the Government servant shall be paid such amount, not being the whole, of pay and allowances to which he would have been entitled, had he not been dismissed, removed or compulsory retired or suspended prior to such dismissal, removal or compulsory retirement, as the case may be, as the competent authority may determine after giving notice to the Government servant of the quantum proposed and after considering the representation, if any, submitted by the Government servant in that regard, subject to the provision of Sub-rule 5 and Sub-rule 7 of the said Rule.

13. It is evident from the statement made in the writ petition as well as the order dated 7.9.2001 that the writ Petitioner was reinstated in service by setting aside the order of termination solely on the ground that Medical Superintendent was

not the competent authority to pass the order of termination. By the said order dated 7.9.01 no further proceeding has also been proposed to be held. The writ Petitioner has not been reinstated in service by the appellate authority by setting aside the order of termination by fully exonerating him from charges but his order of termination was set aside on the technical ground that the person who issued the order of termination was not competent authority to do so. That being the position it can not be held that the Petitioner was fully exonerated from the charges so as to entitle himself for full pay and allowances as payable under Sub-rule 2 of Rule 54 of the Fundamental Rules. The writ Petitioners having being reinstated in service by order dated 7.9.01 after setting aside the order of termination on technical ground, the authority is at liberty to determine the amount of the pay and allowances to be paid to the writ Petitioner after setting aside the order of termination and reinstating him in service but the said power can only be exercised after giving a notice to the writ Petitioner of the quantum of pay and allowances proposed to be paid and after considering the representation, if any, to be submitted by the writ Petitioner pursuant to the said notice. However, the said order under Sub-rule 4 of Rule 54 of the Fundamental Rules is subject to the provisions of Sub-rule 5 and 7 of Rule 54. The competent authority may also pass an order as to how the period of absence from duty to be treated for any specified purpose and in case the Government servant so desire, such authority may direct that the period of absence of duty preceding his termination from service shall be converted into leave of any kind due and admissible to the employee concerned. Sub-rule 5 of the Rule 54 also provides that in a case falling under Sub-rule 4, the period of absence from the duty preceding that the termination from service shall not be treated as a period spent on duty, unless the competent authority passes a specific order as stated above.

14. In this case the appellate authority has passed the order dated 7.9.01 to the effect that the period of absence from duty preceding the order of reinstatement will be treated as on duty and no pay and allowances for the said period shall be paid to the writ Petitioner, without issuing any notice and without affording any opportunity to the writ Petitioner to make a representation as required under Sub-rule 4 or Rule 54 of the Fundamental Rules. The appellate authority also did not consider as to whether the said period of absence of duty preceding his termination can be converted into leave of any kind due or admissible to the writ Petitioner.

15 In view of the above the second part of the impugned order dated 7.9.01 in so far as it relates to the direction that the writ Petitioner shall not be entitled to pay and allowances for the period for which he did not perform the duty and also in so far as it would not be treated as on duty, was passed without following the provision contained in Sub-rule 4 and 5 of Rule 54 of the Fundamental Rules and hence liable to be set aside, which I hereby do.

16. Keeping in view, the facts and circumstances of the instant case, I direct the

Respondents to issue notice to the Petitioner intimating the quantum of pay and allowances proposed to be paid to the Petitioner for the period during which he was under the order of termination, subject to Sub-rule 5 and 7 of Rule 54, and after considering the representation, if any, that may be submitted by the writ Petitioner in pursuant to the said notice, determine the quantum of pay and allowances to be paid to the writ Petitioner for the period, subject of the provisions of Sub-rule 5 and 7 of Rule 54. The Respondents shall also take into consideration whether his period of absence from duty can be converted into leave of any kind, if due and admissible to the Petitioner, as required under Rule 54(5) of the Fundamental Rules and pass necessary order thereafter. The entire exercise is directed to be completed within a period of 4 (four) months from today.

17. With the above observation the writ petition is disposed of. No cost.