

(2003) 09 MP CK 0039
In the Madhya Pradesh High Court
Case No : Writ Petition No. 1320/99

Mathura Prasad Dixit

APPELLANT

Vs

Union of India (UOI) and Others

RESPONDENT

Date of Decision : 18-09-2003

Acts Referred:

Constitution of India, 1950 — Article 21, 226, 311(2)
Railway Protection Force Rules, 1987 — Rule 147XV

Citation : (2003) 4 MPHT 298 : (2004) 2 MPLJ 113

Hon'ble Judges : S.P. Khare, J

Bench : Single Bench

Advocate : Anoop Nair, for the Appellant; S.P. Sinha, for the Respondent

Final Decision : Allowed

Judgement

S.P. Khare, J.

This is a writ petition under Article 226 of the Constitution of India for quashing the order dated 26-2-1998 (Annexure P-1) by which the petitioner has been removed from service.

It is not in dispute that the petitioner was employed as a Constable in Railway Protection Special Force at Itarsi. He was placed under suspension by order dated 9-5-1997 (Annexure P-3). He was not paid subsistence allowance from 9-5-1997 to 29-10-1997 as per rules. He was served with a charge-sheet dated 3-11-1997. The charge against him was that he sat on "hunger strike" on 29-10-1997 and thereby he committed breach of Rule 147 (XV) of R.P.F. Rules, 1987. The petitioner was paid subsistence allowance upto 29-10-1997 on that very date. The petitioner submitted an application for payment of the subsistence allowance from 29-10-1997 but it was not paid to him. He did not participate in the inquiry which was held at Bina. The report of the enquiry officer was supplied to the petitioner with a show-cause notice. Thereafter the impugned order removing him from service was passed.

The petitioner's case is that he was not being paid subsistence allowance as per rules and, therefore, to invite the attention of the authorities he sat in front of the Office of the Divisional Manager (Railways) and then the amount of subsistence allowance was paid to him on that very date. He denies having gone on hunger strike. The petitioner submitted application dated 2-2-1998 for payment of his subsistence allowance from October, 1997 so that he may participate in the inquiry. A copy of his application is Annexure P-7. But the petitioner was not paid subsistence allowance from October, 1997. According to him the report of the enquiry officer is perverse as he has not considered the effect of non-payment of subsistence allowance to him after the commencement of the department enquiry.

The respondent's case is that the subsistence allowance could not be paid to the petitioner as he had not furnished the "non-employment certificate". It is stated that the petitioner sat on hunger strike in front of the Office of the D.R.M. and this was in violation of Rule 147 (XV) of the R.P.F. Rules and, therefore, he has been removed from service after the departmental enquiry. It is also stated that the bills for payment of subsistence allowance from October, 1997 were passed but the payment was not made to the petitioner as he had not furnished the non-employment certificate. He did not deliberately participate in the enquiry and, therefore, it proceeded ex parte.

The learned Counsel for both the sides have been heard. Reliance is placed by the respondents on Rule 2043-R-II (1342 of 1987 Ed.) [F.R. 53 (2)]. It provides that no payment under Sub-rule (1) shall be made "unless the railways servant furnishes a certificate that he is not engaged in any other employment, business, profession or vocation". In the present case the respondents never asked the petitioner in writing to furnish the non-employment certificate. In the enquiry report or in the impugned order also it is not specifically stated that the payment of subsistence allowance was not made to the petitioner because he did not furnish the non-employment certificate. Therefore, the stand taken by the respondents in the return that the subsistence allowance was not paid because the petitioner did not furnish the non-employment certificate is not justified.

It has been held by the Supreme Court in Capt. M. Paul Anthony Vs. Bharat Gold Mines Ltd. and Another, , that suspension notwithstanding, non-payment of subsistence allowance is an inhuman act which has an un-propitious effect on the life of an employee. When the employee is placed under suspension, he is demolished and the salary is also paid to him at a reduced rate under the nick name of "subsistence allowance", so that the employee may sustain himself. The very object of paying the reduced salary to the employee during the period of suspension would be frustrated. If even subsistence allowance is not paid because "subsistence" means of supporting life, especially a minimum livelihood. The act of non-payment of subsistence allowance can be likened to slow-poisoning as the employee, if not permitted to sustain himself on account of non-payment of subsistence allowance, would gradually starve himself to death. It

has also been observed that on joining Govt. service, a person does not mortgage or barter away his basic rights as a human being, including his fundamental rights, in favour of the Govt. The Govt. only because it has the power to appoint does not become the master of the body and soul of the employee. The fundamental rights, including the Right to Life under Article 21 of the Constitution or the basic human rights are not surrendered by the employee. It has been further held that if the employee is not able to participate in the disciplinary proceedings because of non-payment of subsistence allowance, the ex parte proceedings stand vitiated.

In *Jagdamba Prasad Shukla Vs. State of U.P. and Others*, it has been held that the payment of subsistence allowance, in accordance with the Rules, to an employee under suspension is not a bounty. It is a right. An employee is entitled to be paid the subsistence allowance. Non-payment of subsistence allowance on grounds that the applicant had not furnished the address where the amount was to be sent and had also not given the requisite certificate indicating that he was not employed else during the period of suspension, is not justified. At no stage, the employee was told that he had to furnish such a certificate, and that he could not be paid subsistence allowance without it. Because of the financial crunch on account of non-payment of subsistence allowance, the employee was unable to appear in enquiry. It is a clear case of breach of principles of natural justice on account of the denial of reasonable opportunity to the employee to defend himself in the departmental enquiry. Thus, the departmental enquiry and the consequent order of removal from service also are liable to be quashed. The same principles have been reiterated in *Anwarun Nisha Khatoon Vs. State of Bihar and Others*, and *State of Punjab and Others Vs. K.K. Sharma*. In these cases also it has been emphasised that the certificate of non-employment is required to be furnished when the employee is asked to do so and non-payment of subsistence allowance would tantamount to denial of a reasonable opportunity in the departmental enquiry.

The learned Counsel appearing on behalf of the respondents has submitted the book on *Railway Servants (Discipline & Appeal) Rules, 1968* published by Bahri Brothers. In this book at Page 26 a circular dated 18-8-1981 is quoted in which it is mentioned that where a Government servant under suspension pleads his inability to attend inquiry on account of financial stringency caused by the non-payment of subsistence allowance to him, the proceedings conducted ex parte against him will not be in order and will violate Article 311(2) of the Constitution for denial of a reasonable opportunity to defend himself. The circular has been issued on the basis of a decision of the Supreme Court. It was therefore, necessary for the respondents to pay the subsistence allowance to the petitioner in time. In case the respondents wanted the non-employment certificate, they should have specifically asked him to furnish such certificate. The subsistence allowance could not be denied to the petitioner on this technical ground.

The next question is whether the finding of the enquiry officer and the

disciplinary authority regarding the hunger strike by the petitioner is perverse. In this case the petitioner was under suspension and, therefore, he was not required to do any work. There was no cessation of work by him amounting to strike. He sat in front of the office of the D.R.M. to invite the attention of the authorities to the fact that he was not being paid subsistence allowance for several months. That does not amount to going on strike or hunger strike. The action of the respondents is without considering the legitimate request of the petitioner to pay his subsistence allowance. It can not be said that the petitioner went on hunger strike. There is no violation of Rule 147 (XV) of the R.P.F. Rules, 1987. That rule is attracted when the employee goes on strike for "forcing" under duress or threats any supervisory authority to concede anything or striking work. It was not a case of duress or threats by the petitioner. He was only asking for payment of the subsistence allowance which was being denied to him without any cogent ground.

In the result this petition is allowed. The impugned order dated 26-2-1998 (Annexure P-1) by which the petitioner has been removed from service is quashed. It is declared that the petitioner is continuing in service and he will be entitled to all the benefits as if he is continuing in service. He will immediately join his duties.