
(2012) 08 GAU CK 0024
In the Gauhati High Court
Case No : Writ Petition (C) No. 3194 of 2010

Md. Sharfraj Khan

APPELLANT

Vs

Union of India and Others

RESPONDENT

Date of Decision : 31-08-2012

Acts Referred:

Citation : (2013) 1 GLD 568 : (2013) LLR 176

Hon'ble Judges : Biplab Kumar Sharma, J

Bench : Single Bench

Advocate : R. Mazumdar, for the Appellant; S. Baruah, Advocate and C.G.C., for the Respondent

Judgement

Biplab Kumar Sharma, J.—Heard Mr. R. Mazumdar, learned counsel for the petitioner as well as Mr. S. Baruah, learned CGC. By means of this writ petition, the petitioner has prayed for a direction to the respondents to pay the pay and allowances for the period from 3.2.2001 to 29.5.2009, during which he was under order of removal from service. In this connection, the petitioner has called in question the Annexure-E Office Order dated 2.5.2010, by which it was conveyed that the petitioner would not be entitled to any pay and allowances for the said period but the same would be counted for pension purpose only. The petitioner while was serving under the respondents as Water Carrier, was removed from service by order dated 3.2.2001. The appeal preferred by him followed by revision petition, were also dismissed vide order dated 6.9.2001. Being aggrieved, he preferred a writ petition being WP(C) No. 936/2002. Although, the copy of the said writ petition has not been annexed to the writ petition but from the judgment delivered in the said writ petition on 15.2.2008, the prayer made in the writ petition could be gathered. In this connection, paragraph 4 of the judgment is quoted below:--

4. In this writ petition, the petitioner is praying for setting aside the order dated 7.7.2000 (Annexure-C), the order dated 31.7.2000 (Annexure-C 1) and the order dated 3.2.2001 (Annexure-F), issued by the respondent No. 5 and for

directing the respondents to reinstate him in service with all service benefits.

2. By the said judgment, it has been held that the impugned order of removal from service dated 3.2.2001 was passed without jurisdiction and accordingly direction was issued for reinstatement of the petitioner in service. In this connection, paragraph 16 of the judgment is quoted below:--

16. In view of the above findings and for the reasons already recorded, the impugned orders including the order passed by the respondent No. 3 on 6.9.2001 are hereby set aside. The concerned respondents shall pass an appropriate consequential orders in respect of the service of the petitioner in accordance with law. With these, the writ petition stands disposed of.

3. Being aggrieved by the said judgment and order, the respondents had preferred an appeal being WA No. 384/2008. However, the appeal was dismissed by order dated 13.3.2009 upholding the judgment of learned single Judge.

4. After the aforesaid development, the Commandant by his order dated 31.5.2009 ordered for reinstatement of the petitioner in service. It was also conveyed by the said order that the petitioner would be entitled to all the pay and allowances and other benefits for the period during which he remained under order of removal. However, the order was modified by the impugned Office Order dated 2.5.2010 stating that the petitioner would not be entitled to any pay and allowances for the period from 3.2.2001 to 29.5.2009 but the same would be counted for pension purpose.

5. Mr. R. Mazumdar, learned counsel for the petitioner submits that when the order of removal from service has been set aside by this Court holding the same to be without any jurisdiction, the petitioner is entitled to get full pay and allowances for the period during which he remained under order of removal. He further submits that considering the matter in its entirety, the Commandant having passed the reinstatement order providing full pay and allowances to the petitioner for the period in question, the same could not have been set at naught by the impugned order dated 2.5.2010. In this connection, he has placed reliance on two decisions of the Apex Court reported in *The Commissioner, Karnataka Housing Board Vs. C. Muddaiah*, and *Somesh Tiwari Vs. Union of India (UOI) and Others*, .

6. In the counter-affidavit filed by the respondents, it has been stated that the decision not to provide salary to the petitioner for the period in question has been taken on the principle of "no work no pay". It has been stated that under the facts and circumstances of the case, the impugned decision was arrived at, not to provide salary for the period in question. However it has been stated in the affidavit that the petitioner would be entitled to all other service benefits. Mr. S. Baruah, learned CGC submits that since the petitioner did not render any work for the period in question and also that the order of removal that was passed against the petitioner, cannot be said to be wholly irrelevant, the petitioner cannot claim back-wages for the period in question. Emphasizing on the principle

of "no work no pay", he has also placed reliance on two decisions of the Apex Court reported in State of U.P. and Others Vs. Madhav Prasad Sharma, Sharma, State of U.P. and Others Vs. Madhav Prasad Sharma, .

7. I have given my anxious consideration to the submissions made by the learned counsel for the parties and also perused the entire materials on record.

8. First thing to be considered is as to what was the prayer in the writ petition filed by the petitioner in the earlier round off litigation. As noted above, the prayer in the writ petition was to set aside and quash the impugned order. Further prayer made in the writ petition was to reinstate the petitioner in service with all service benefits. Mr. R. Mazumdar, learned counsel for the petitioner submits that "all service benefits would mean full back-wages for the period in question". The fact of the matter is that the said prayer was not granted by the learned single Judge while passing the judgment dated 15.2.2008. The operative part of the judgment has already been; quoted above= Although, the impugned orders were set aside and quashed but a direction was issued to the respondents to pass "appropriate consequential orders in respect of the service of the petitioner In accordance with law."

9. Although, pursuant to the said judgment and order affirmed by the Division Bench, the Commandant passed the order of reinstatement of the petitioner in service providing pay and allowances for the period in question but later on the same was modified by the impugned order dated 2.5.2010, intimating that for the period of removal from service from 3.2.2001 to 29.5.2009, the petitioner will not be entitled to any pay and allowances, however, the period would be counted for pension purpose.

10. The decisions on which the learned counsel for the petitioner has placed reliance i.e., Somesh Tiwari Vs. Union of India (UOI) and Others, , dealing with the principle relating to no work no pay, it has been held that the said principle is not a rigid principle and that ultimately, principles of justice, equity and good conscience have to prevail. It has been held that where the employee is prevented from earning or deprived of legitimate benefits, wrongfully, unfairly and with oblique motive, the Court can direct extension of all those benefits which would have been obtained but for illegal deprivation. It has also been held that in appropriate cases, the Court can hold that the willing employee was illegally or unlawfully disallowed to perform duty and in such an eventuality the employee will be entitled to pay for the period during which he was unable to render his service.

11. In Somesh Tiwari Vs. Union of India (UOI) and Others, , dealing with the aforesaid principle of "no work no pay" in reference to certain orders of transfer, the Apex Court found fault with the respondents in issuing the transfer order when the matter was sub-judiced before the Tribunal.

12. The decision on which Mr. S. Baruah, learned CGC has placed reliance are also on the principle relating to entitlement of full salary or otherwise during the

period of absence from duty pursuant to the order of removal etc. In *State of U.P. and Others Vs. Madhav Prasad Sharma*, , it has been held that denial of pay on principle of no work no pay is not a penalty. In the said case, the High Court has held that denial of pay and allowances during the period of removal from service would entail a second punishment interfering with such finding, the Apex Court has held that the principle of double jeopardy will not come into play on the application of principle of "no work no pay".

13. In *Vijay Pal Singh (supra)*, the Apex Court held that the post dismissal period of the respondents would entail no pay and allowances to him on the principle of "no work no pay".

14. In the instant case, the petitioner had made the prayer for his reinstatement with all service benefits. However, the said prayer for all service benefits was not granted by the learned single Judge and the matter was left open to be decided by the respondents while passing the appropriate consequential order.

15. The Apex Court in the case of *State Bank of India Vs. Ram Chandra Dubey and Others*, , dealing with the entitlement or otherwise to back-wages on the basis of the prayer and relief granted held that the relief for back-wages must be deemed to have been denied for what is claimed but not granted necessarily get denied in judicial or quasi-judicial proceeding. The consequential order that was passed by the Commandant on 31.5.2009 was modified by impugned order dated 2.5.2010. The fact of the matter is that a departmental proceeding was initiated against the petitioner for his alleged suppression of pendency of a criminal case at the time of his appointment. Thus, it cannot be said that the departmental proceeding was wholly unwarranted. It is another thing that the order of removal, from service was found not sustainable in law but it is altogether different to initiate a departmental proceeding on the preponderance of probability of suppression of material fact at the time of appointment. It is not a case of passing an order restraining the petitioner from serving the respondents with an oblique motive. Thus, it cannot be said that the departmental proceeding and the consequential order of removal were wholly unjustified.

15A. The aforesaid order of removal from service was set aside by this Court with the direction to pass consequential order of reinstatement in service. If the authorities decided to reinstate the petitioner in service with the rider that he would not be entitled to pay and allowances for the period in question, I am of the considered opinion that no fault can be attributed to the respondents. However, it is made clear that the petitioner would be entitled to continuity in service with all other benefits.

With the above observation, the writ petition stands disposed of, without however, any order as to costs.