
(2013) 02 DEL CK 0099

In the Delhi High Court

Case No : Writ Petition (C) No. 1443 of 2002

Ravinder Singh Achreja

APPELLANT

Vs

Vijaya Bank and Others

RESPONDENT

Date of Decision : 04-02-2013

Acts Referred:

Citation : (2013) 2 AD 710

Hon'ble Judges : Valmiki J Mehta, J

Bench : Single Bench

Advocate : Kanchan Kaur Dhodi, for the Appellant; P.S. Shetty, for the Respondent

Final Decision : Dismissed

Judgement

Valmiki J Mehta, J.—By this present petition filed under Article 226 of the Constitution of India the petitioner/employee seeks quashing of the penalty order dated 9.10.1998 imposing the penalty of compulsory retirement on the petitioner, passed on account of continuous unauthorized absence of the petitioner from duty, and which absence continued till passing of the impugned order. The impugned penalty order dated 9.10.1998 was preceded by the report of the Enquiry Officer dated 16.7.1998, and the chargesheet dated 30.12.1996 issued to the petitioner. The appeal filed by the petitioner before the Appellate Authority was rejected vide order dated 30.3.1999. The petitioner, therefore, seeks setting aside of the orders dated 9.10.1998 and 30.3.1999 and claims reinstatement in service and all consequential benefits. The facts of the case are that the petitioner joined the services of the respondent no. 1-bank on 5.3.1976. During his service, the petitioner suffered physical disability with regard to both his lower limbs and therefore, he after taking sanctioned leave underwent two surgeries in USA. The hip replacement surgeries were performed on 12.10.1993 and 21.4.1994. The petitioner thereafter joined his duties on 23.1.1995, however, he again applied for medical leave from 1.5.1995 to 30.5.1995. By an application dated 12.4.1995, the petitioner sought preponement of leave period

from 15.4.1995 to 15.5.1995, and the leave was thereafter sought to be extended for a total period of 89 days ending on 12.7.1995. The petitioner around 12.4.1995, without waiting for sanctioning of the leave, proceeded to USA claiming requirement of medical treatment in terms of the certificate dated 2.4.1995 issued by one Dr. Sudhir Kumar which prescribes that the petitioner had to report to the orthopedic surgeon who had conducted his hip replacement surgeries. This certificate dated 2.4.1995 was given by the said Dr. Sudhir Kumar after the petitioner had fallen down from stairs. The certificate of Dr. Sudhir Kumar besides asking the petitioner to report to the orthopedic surgeon, also advises rest and to avoid climbing of stairs or lifting weights. The petitioner by his subsequent application dated 21.1.1996 (i.e. about 8 months after first application dated 12.4.1995) again applied for extension of the leave up to 18.7.1996 i.e. the leave was sought to be taken for about one year from 12.7.1995 to 18.7.1996. Be it noted that the only leave period which was sanctioned to the petitioner in this period from 12.4.1995 to 21.1.1996 was for a period of 89 days commencing from 15.4.1995 and ending on 12.7.1995. Rest of the period of the leave taken by the petitioner was without any sanction having been granted. The third application which was filed by the petitioner for continuation of his leave for 3-6 months is dated 15.5.1996. During this period, the employer/respondent no. 1 had written letters to the petitioner to resume duty and these letters are dated 26.9.1995, 23.11.1995, 15.4.1996 and 13.6.1996. By these letters, the petitioner was also informed by the respondent no. 1-bank to report back immediately to duty. The petitioner was also asked to file an affidavit that he was not earning in USA as also information regarding the source of his income for meeting the expenditure of the stay in USA. The bank also called upon the petitioner to submit leave applications supported by the medical certificates in support of his treatment at USA.

2. The fact of the matter is that the petitioner, right from 12.4.1995 till today has not returned back from USA. The petitioner has not joined his duties with the respondent no. 1 even after the passing of the orders by the Disciplinary Authority.

3. The petitioner was issued a charge sheet dated 30.12.1996 and the article of charge against the petitioner is reproduced in the order of Enquiry Officer and which reads as under:-

ARTICLE OF CHARGE:-

While working at RI, Delhi, he after initially availing 4 days C.L. had left to USA allegedly for Post-Operation checkup in respect of hip replacement surgery conducted on him. Even though he had initially applied for 89 days sick leave from 15/04/1995 to 12/07/1995, he had failed to comply with the leave rules of the Bank and continued to stay at USA without producing any medical certificate especially the nature of treatment taken by him except the medical certificate dated 11/-/1996 of one Dr. Pierre A. Calilhanna, which certificate that he was examined on 08/12/1995 and further to appear for re-examination every three

months. However, he failed to produce medical certificate thereto afterwards and also failed to comply with the instructions of Head office by furnishing necessary details sought for by Head office. In respect of his Visa, source of income for meeting expenditure at USA and affidavit to the effect that he was not earning at USA etc. even though he was instructed to return to India and avail medical facility locally, since post operative facilities are available in India also, he failed to comply with the instructions. Therefore, the Bank has every reasons to believe that he has continued to overstay at USA on the grounds of signed sickness without complying with the leave rules of the Bank.

By his above said acts he has acted in a manner unbecoming of a bank officer thereby contravened regulations 3(1), 13(1) and (2) of Vijaya Bank Officer Employees (Conduct) regulations, 1981.

4. The petitioner did not personally appear before the Enquiry Officer for making his statement to dispute the article of charges against him and neither did he file any written statement denying the imputation of charges contained in the charge sheet. The petitioner of course did seek to appear through a Defence Assistant namely Sh. S.P. Makkar, however, the Enquiry Officer in view of applicable rules did not permit the said Assistant to appear without the chargesheeted officer because the chargesheeted officer had to personally appear at least once or he had to file a written statement, and neither of which was done by the petitioner.

5. After the respondent no. 1/management led evidence, the Enquiry Officer has given the following findings.

7. FINDINGS:

ISSUE NO: 1

As per H.O. Codified Circular No. 65/93 dated 06/05/93 and 101/93 dated 24/09/93

a) if an employee is absenting from duty without satisfying the provisions of leave rules can be deemed as unauthorised absence.

b) if any staff member seeks leave on medical grounds he/she should invariably submit medical certificate along with the leave application or within 3 days from the date of application seeking leave on medical grounds. In case an application for sick-leave is submitted after inordinant delay without proper justification the delay cannot be condoned and the period of absence upto the date of receipt of the application shall be treated as unauthorised absence and hence on loss of pay.

c) if the employee is absent from duty for more than a day and if there is no leave application from the employee her or his absence should be treated as unauthorised absence and hence on loss of pay.

d) No leave or Extension of leave shall be deemed to have been granted unless an order to that affect is passed and also communicated to the employee

concerned. After going through the above I have no hesitation in reporting that the CSO was on unauthorised absence. Further Sh. M. Dinkar Shetty, Chief Manager, ZO, Delhi, (Then Chief Manager, RI, Delhi)(MVV-1) has stated during the enquiry (Refer page No. 3 to 8 of EP dated 18/03/98) that the CSO has remained absence unauthorised from 15/04/98 till the date of enquiry.

Now I would like to dwell upon the Management Exhibits. As per MEX No: 3, 4, 13 the Chief Manager of RI, Delhi has send letters/notice to CSO informing him about his unauthorised absence at a frequent intervals and also informing him to report for duty. He has instead of complying with the said instructions CSO continued remain absence. Hence it is a very clear case of unauthorised absence. Accordingly I hold issue No: 1 is proved against CSO.

ISSUE NO: 2

It is evident from MEX No: 8 that even though leave had applied for to go to USA for medical checkup as per Doctor's advice and after applying leave (MEX-2) from 15/04/95 to 12/07/95 he has not returned to India till date of enquiry despite of repeated letters from the Chief Manager R.I., Delhi (Refer MEX 3, 4, 13, 16, 20). This clearly shows that he had overstayed at USA.

Further the reasons mentioned in his leave application while going to USA was "For medical check up as per Doctor's advice" (MEX -2) but the medical certificate issued by Dr. Rajwanth Singh, General Dentist, Manland and which certificates that CSO was undergoing "Dental Surgery". In this connection I would like to refer the medical certificate of Dr. Perra A. Calhanna dated 11/01/96 wherein the nature of sickness was not mentioned.

Under his letter dated 13/06/96 (Refer MEX-16) Chief Manager, RI, Delhi has instructed CSO to produce:

a) Passport with VISA details, b) Affidavit stating that CSO is not earning at USA, c) Source of income to meet his expenses (Medical as well as regular expense at USA). But the CSO failed to comply with the instructions and after studying the above facts I have no hesitation in reporting that issue No. 2 is proved against CSO.

ISSUE NO. 3

In this connection I would like to again refer Chief Manager's letter dated 26/09/95, 23/11/95, 01/12/95, 15/04/96 and 13/06/96 wherein he has advised CSO to report back for duty. (Refer MEX No. 3, 4, 13, 16 and by not reporting for duty as instructed by higher authority and it amounts to disobedience. Vide his letter dated 13/06/98 further CM, RI, Delhi has instructed CSO to submit certain particulars such as:

A) copy of Passport with Visa details B) Affidavit to the effect that CSO is not earning at USA, C) Source of Income to meet his medical expenses and other regular expenses. By not complying with the above instructions the CSO has

disobeyed the instructions of higher authorities. Hence the issue has been proved against the CSO.

ISSUE NO. 4

In this connection I would like to refer HO Codified Circular No. 65/93 dated 06/05/93 and 101/93 dated 24/09/93 wherein it is clearly stated that:

- a) If an employee's absents from duty without satisfying the provision of leave rules can be deemed as an unauthorized absence.
- b) If any staff member seeks leave on Medical grounds he/she should Invariably submit medical certificate along with the leave application or within 3 days from the date of application seeking leave on medical grounds. In case an application for sick leave is submitted after Inordinate delay without proper justification the delay cannot be condoned and the period should be treated as unauthorized absence and hence on loss of pay.
- c) If the employee is absent from duty for more than a day if there is no leave application from the employee her or his absence should be treated as unauthorized and hence on loss of pay.
- d) No leave or extension of leave shall be deemed to have been granted unless an order to that effect is passed and also communicated to the employee concerned.

From the above facts I have no other option but to report that CSO has acted in the manner unbecoming of a bank officer thereby contravened regulations 3(1), 13(1), and (2) of Vijaya Bank officer service regulation 1981. After going through the above I have no hesitation in reporting that the issue has again gone against the CSO Shri A.S. Achreja.

CONCLUSION:

On analyzing all aspects of the matter and giving a thoughtful consideration to oral as well as documentary evidence produced before the enquiry, I conclude that all the charges framed against CSO are proved and established.

K. SACHIDANANDA SHETTY

(ENQUIRY OFFICER)

DAO-Mumbai. 16/07/98

(Underlining is added)

6. Pursuant to the aforesaid report of the Enquiry Officer, the Disciplinary Authority vide order dated 9.10.1998 visited the petitioner with the major penalty of compulsory retirement.

7. Before adverting to the arguments addressed, I must state that law with respect to interference by a Court in the order passed by a Disciplinary Authority

and an Appellate Authority is well settled and which is that this Court does not sit as an Appellate Court over the findings of the Enquiry Officer and the punishment imposed by the Disciplinary Authority. Unless the orders passed by the authorities are illegal or violative of principles of natural justice or perverse or violative of the doctrine of proportionality, a Court does not interfere.

8. The first point urged on behalf of the petitioner was that if the respondent no. 1-bank was not satisfied about the medical condition of the petitioner, then the respondent no. 1, in terms of Rule 3.1.4 relating to sick leave was bound to ask the petitioner to report to a doctor for being examined and since the petitioner was not asked to report to a doctor, the petitioner is deemed to have been granted automatic leave till the entire period of unauthorized absence from duty, which in this case has continued not only till the passing of the orders by the Disciplinary Authority and the Appellate Authority, but even has continued till this petition has been heard by this Court.

9. In my opinion, the provision of Rule 3.1.4 cannot be invoked by the petitioner for various reasons. Firstly, the petitioner, by means of various letters, which have been stated above, was called upon to report back for duty inasmuch as the petitioner was not in India but was in USA. A direction to report back for duty surely would be the basis for the subsequent examination by a doctor, and it cannot be said that automatic medical leave is granted to an employee unless the employer fails to direct the appearing of the employee before the doctor of the employer. The provision relating to sick leave being Rule 3.1.4 is to apply in those circumstances when an employee is ready to come before the doctor of the employer in India. Rule 3.1.4 cannot mean that an employee can stay in USA and claim that he is automatically entitled to medical leave without any sanction merely because the employer has not specifically asked him to get himself examined by the doctor of the employer. Another reason for rejecting the argument with reference to Rule 3.1.4 urged on behalf of the petitioner is that at least there will have to be a proper application seeking leave and which has to be necessarily supported by a doctor's certificate for the relevant period for seeking leave. Admittedly, in the present case, there are three disjointed applications which do not cover the entire period of leave from 15.4.1995 till the date of giving of the report by the Enquiry Officer and the passing of the order by the Disciplinary Authority. At best, the leave as prayed for, if it can be said to have been prayed for, is till December, 1996, and whereafter there is not even an application for seeking leave on medical grounds. Not only that there are no adequate applications, the applications that were made were applications not made before sanctioning of the leave and the tenor in the applications is to be the effect that the petitioner/employee is automatically entitled to claim leave on medical grounds. There is no rule or law of automatic grant of leave and nor can there be, otherwise organization will not be able for function. Reference in this regard is specifically required to be made to paras 7(a) to (d) of the order of the Disciplinary Authority reproduced above, which deals with this aspect of unauthorised absence. Further, when we look at only certificates on record, we

find that so far as the first certificate dated 2.4.1995 of Dr. Sudhir Kumar is concerned, the said certificate in no manner states that there is a grave and immediate medical urgency for the petitioner to immediately report to the doctor in USA, and much less the certificate dated 2.4.1995 advises complete bed rest. On the contrary, this certificate shows that the petitioner with his physical disability is mobile within the limits of his physical condition, and all that he was advised was not to lift weights and climb stairs. At the risk of repetition it be noted that there is no medical requirement of the petitioner being confined to bed in the certificate dated 2.4.1995. Also the certificate gives no period of rest advised to the petitioner so that he could take medical leave for a specific period. Next is the certificate dated 11.1.1996 of one Dr. Pierre A. Calilhanna. Once again, all that this certificate states is that the petitioner has to restrict his activities and he has to be checked up on regular basis every three months in order to evaluate the status of his hip replacement. This certificate in no manner states that the petitioner is not fit to report for work and has to be confined to bed or to remain in USA. The expression of having to have a regular check up every 3 months cannot mean that the petitioner for any of the in-between periods of the three months can continue to remain absent from duty by remaining in USA. Once again, this certificate of Dr. Mr. Pierre A. Calilhanna dated 11.1.1996 does not support the case of the petitioner of his automatic entitlement to medical leave. The last certificate is not on record and which has been referred to in the findings of the Enquiry Officer and the chargesheet, but this certificate has nothing to do with the issue of hip replacement, and is of the petitioner undergoing dental surgery. Surely, medical facilities for post operative treatment of hip replacement and also for ordinary dental surgery are available in India and thus it was not possible for the petitioner to contend that automatic leave should be granted to him for staying in USA.

10. In my opinion, therefore, the argument made by the petitioner relying upon Rule 3.1.4 is wholly without merit and is accordingly rejected.

11. The second ground which is urged on behalf of the petitioner is that the Defence Assistant authorized by the petitioner was not allowed to attend the proceedings and it was wrongly insisted that the petitioner be present. In this regard, counsel for the petitioner has placed great reliance upon Rule 6(19) of the Rules and which rules provide the procedure for imposing of major penalty. This rule provides that an employee can appear through an Assisting Officer and may not appear personally. To counter the argument of the petitioner, the counsel for the respondent no. 1/bank has relied upon Rules 6(8) and (19) to argue that the issue of the chargesheeted officer appearing through a Defence Assistant arises only if firstly the chargesheeted officer personally appears and makes a statement denying the charges or at any rate at least files a written statement to deny the charges and only whereafter the chargesheeted officer can appear through a Defence Assistant. It is thus argued on behalf of the respondent that in the present case the issue of appearance of the Defence Assistant cannot arise because the chargesheeted officer/petitioner did not

appear personally even once before the Enquiry Officer to make his statement and neither did he file a written statement denying the charges.

12. In order to appreciate the arguments, Rules 6(7) (8) and (19) are required to be referred to and which read as under:-

6. PROCEDURE FOR IMPOSING MAJOR PENALTIES

XXXXXXX

(7) The officer employee may take the assistance of any other officer employee but may not engage a legal practitioner for the purpose, unless the Presenting Officer appointed by the Disciplinary Authority is a legal practitioner or the disciplinary authority, having regard to the circumstances of the case, so permits.

(8) (a) The inquiring authority shall by notice in writing specify the day on which the officer employees shall appear in person before the inquiring authority.

(b) On the date fixed by the inquiring authority, the officer employee shall appear before the inquiring authority at the time, place and date specified in the notice.

(c) The inquiring authority shall ask the officer employee whether he pleads guilty or has any defence to make and if he pleads guilty to any of the articles of charge, the inquiring authority shall record the plea, sign the record and obtain the signature of the officer employee concerned thereon.

(d) The inquiring authority shall return a finding of guilt in respect of those articles of charge to which the officer employee concerned pleads guilty.

(19) If the officer employee does not submit the written statement of defence referred to in sub-regulation (3) on or before the date specified for the purpose or does not appear in person or through the assisting officer or otherwise fails or refuses to comply with any of the provisions of these regulations, the inquiring authority may hold the inquiry ex-parte.

13. A reference to the aforesaid rules shows that the counsel for the respondents is justified in arguing that the issue of representation on behalf of the chargesheeted officer arises only after either a written statement is made by charged officer personally appearing before the Enquiry Officer or a written statement in writing signed by the chargesheeted officer is sent to the Enquiry Officer. In the present case, admittedly, the petitioner never personally appeared before the Enquiry Officer and nor did he send a written statement denying the charges against him. Therefore, in the peculiar facts of this case, and keeping in mind that the petitioner has since 1995 till date in 2013 not joined duties, it cannot be said that there is any violation of the principles of natural justice in the facts of the present case.

14. Principles of natural justice are not hide bound rules but are sufficiently flexible to see that no injustice is caused. I fail to understand any injustice to an employee such as the petitioner who has remained unauthorizedly absent from

duty for many years and has in fact settled in USA.

15. Therefore, the argument on behalf of the petitioner of violation of principles of natural justice on account of the Defence Assistant not being allowed to appear, is in the facts of the present case misconceived and is therefore rejected.

16. The third ground urged on behalf of the petitioner is that the petitioner should not have been visited with the punishment of compulsory retirement which is urged to be disproportionately high. I really fail to understand this argument because though the petitioner has tried his utmost through his counsel to make this Court take a sympathetic view because of the physical disability of the petitioner, however I do not think that any Court can ignore the fact that the employee has chosen most contemptuously to remain absent from duty, not for a few days and weeks; but for years altogether, and in fact has settled abroad in USA to allow the plea that the punishment of compulsory retirement is highly disproportionate. If the petitioner at some stage had joined his duties with the respondent no. 1 even after unauthorized absence, then, may be the Court as per the facts of such a case may have examined any issue of liberal approach, but, there does not arise the question of liberal approach with respect to an employee who remains unauthorisedly absent and seeks to emotionally use his physical disability as a ground of justifying continuous unauthorized absence. In the facts of the present case, I do not find that punishment of compulsory retirement is disproportionate, and accordingly this argument is also therefore rejected.

17. The next argument on behalf of the petitioner is that the petitioner ought to have been given TA/DA for attending the enquiry, and since this was not given the enquiry report gets vitiated. What the argument is urged to mean is that the petitioner claims that he should be paid TA/DA for travelling in question from USA to India, and unless such TA/DA is paid there would be violation of the relevant circular of the respondent no. 1. Firstly, there is no such circular filed and nor there would be any such circular that an employee is to be paid TA/DA charges from a foreign country to India merely because such employee chooses to be unauthorizedly absent from duty and stay in USA. Obviously, this argument is frivolous to say the least, and being without any merit is therefore rejected.

18. The last argument urged on behalf of the petitioner is with respect to the fact that Enquiry Officer himself is chargesheeted and criminal case is pending against him and therefore such an officer could not conduct an enquiry. When asked to say that as to how such grave charges are being made, the counsel for the petitioner expresses her inability to refer to any documents which have been filed to substantiate this argument. That being so, once again, this argument is without any basis and is rejected.

19. Finally, I must say that though no doubt there has to be balanced sympathy for a physically disabled person such as the petitioner, however, the question is should sympathy displace gross misconduct and continuous unauthorized

absence from duty for years altogether ending with the petitioner never joining his duty, and having settled abroad in USA. Also, it may be noted that the bank had asked the petitioner to file an affidavit with regard to whether the petitioner is or is not earning abroad and what are his sources of income for treatment, but, the petitioner has remained deliberately silent on this aspect, and which is not an attitude which should be appreciated by Courts, either in law or in equity.

20. In view of the above, considering the limited jurisdiction that this Court exercises under Article 226 of Constitution of India, wherein this Court does not act as an Appellate Court, and considering that the petitioner has contumaciously and unauthorisedly not joined his duties with the respondent no. 1 till date, and is using frivolous arguments, in my opinion, the present petition is wholly without merit and is liable to be and is accordingly dismissed.

21. Considering the facts of the present case of contumacious unauthorized absence of the petitioner, I was at one point of time thinking of imposing terms on the petitioner but considering that he is a disabled person (though of course he is settled in USA and means of income have been concealed by him), I refrain from imposing any terms on the petitioner. The writ petition is therefore dismissed leaving the parties to bear their own costs.