

(2018) 05 BOM CK 0053
In the Bombay High Court
Case No : Writ Petition No. 8129 Of 2017

Santoshkumar Singh S/O Jagnarayan Singh	APPELLANT
Vs	
Union Of India, Through Its Secretary, Home Department, New Delhi And Others	RESPONDENT

Date of Decision : 10-05-2018

Acts Referred:

Central Reserve Police Force Rules, 1955 — Rule 16, 17, 17A, 18

Citation : (2018) 05 BOM CK 0053

Hon'ble Judges : R. K. DESHPANDE, J; ARUN D. UPADHYE, J

Bench : Division Bench

Advocate : I.N.Chaudhari, V.A.Bramhe

Final Decision : Partly Allowed

Judgement

1. Aggrieved of the penalty order dated 06.05.2015 which has been approved by the appellate authority by an order dated 10.08.2016, the petitioner has approached this Court.

2. Briefly stated, the petitioner was appointed as Assistant Engineer in the Water Resources Department, Government of Bihar on 22.06.1987. After

bifurcation of the erstwhile State of Bihar he was allocated the Jharkhand cadre and lastly he was posted in the Minor Irrigation Sub-Division, Khunti

where he tendered his joining on 11.08.2003. The petitioner has asserted that after he was transferred to the Urban Development Department,

Government of Jharkhand by an order dated 14.10.2004, he tendered his joining on the transferred post on 19.10.2004, however, in the meantime

Model Code of Conduct on account of the forthcoming Assembly Elections, 2004 was enforced and therefore he was not given any posting. But, in

the mean-time he was taken back by the Water Resources Department by order

dated 17.12.2004 which was challenged by him in this Court in W.P.

(S) No. 328 of 2005. He was transferred to the Design Division No. 2, Medininagar on 03.03.2005 and, therefore, the petitioner filed an interlocutory

application being I.A. No. 969 of 2005 seeking amendment in the writ petition. The writ petition was dismissed by an order dated 28.07.2005 against

which he preferred Letters Patent Appeal being LPA No. 588 of 2005 which was also dismissed on 08.02.2006. This order was taken in appeal to the

Supreme Court in Special Leave to Appeal (Civil) No. 8042 of 2006 which was dismissed. However, the Special Leave Petition being Special Leave

to Appeal No. 7733 of 2007 preferred against the order dated 08.02.2007 passed in Civil Review No. 102 of 2006 was dismissed with the following

observations :Â

â?? Heard learned counsel for the petitioner. We do not find any merit in this Special Leave Petition. The Special Leave Petition is, accordingly,

dismissed. We have been informed that neither the petitioner has been paid salary since December, 2004 nor permitted to join the duty. This matter be

looked into by the Department and if the petitioner does not get any relief, it will be open for him to start afresh the proceedingsâ??.

3. Thereafter, the petitioner came to this Court in W.P.(S) No. 5702 of 2007 with the following prayers:

(i) For recall/setting aside the order dated 28.07.2005 (Annexure-12) passed in W.P.(S) No. 328 of 2005 by a Bench of this Hon'ble Court as the

aforesaid writ application filed by the petitioner was dismissed on the basis of the false affidavit filed by the State respondents by fraud before this

Hon'ble Court, following the settled principles of law laid down by Hon'ble Supreme Court of India in case of Indian Bank Vrs. M/s Satyam Fibres

(India) Pvt. Ltd. reported in 1997 (5) SUPREME 485.

(ii) For taking stern action against the respondents particularly Resp. Nos. 4 and 10 for filing false affidavit/statement in W.P.(S) No. 328 of 2005

before this Hon'ble Court following the settled principles of law laid down by Hon'ble Apex Court in case of Dhananjay Sharma Vrs. State of

Haryana reported in AIR 1995 SC 1795.

(iii) For quashing the Govt. Memo No. 2398 dated 17.12.2004 (Annexure-8) issued by Urban Development Department by which even after having

vacancy of more than 8 posts in the said department after retaining the services

of those who joined later on, the service of the petitioner was sent back to Water Resources Department on the ground of having no vacant post and also to quash the Government Memo No. 621Â dated 03.03.2005 (Annexure-11) issued by the Water Resources Department, Government of Jharkhand, by which the petitioner was transferred and posted as Assistant Engineer, Design Division No. 2, Medininagar without having any vacant post due to which the petitioner is still moving from pillar to post and is waiting for a proper and valid posting by the Government till date.

(iv) For quashing of the Government Memo No. 3790 dated 13.09.2007 (Annexure-21) by which the petitioner has been sent intimation that the petitioner has not submitted his joining on the vacancy created after transfer of Assistant Engineers vide antedated Letter No. 1489 dated 03.08.2005 issued by Sri Sunil Kumar Thakur, the then Chief Engineer, Water Resources Department, Medningar (Respondent no. 13) issued by him without any jurisdiction knowingly the Government provisions/circular that the Chief Engineers are not competent to transfer Assistant Engineers from their level and the power is vested in Departmental Establishment Committee headed by the Secretary of the Water Resources Department and that too after approval of Departmental Minister/Chief Minister as evident from the Government Letter No. 619 dated 28.07.2001 (Annexure-1/A).

(v) For direction to the respondents to make payment of salary w.e.f December, 2004 till date with interest at market rate along with other consequential benefits as the petitioner has been deprived from salary for no valid reason violating the provisions of Article 21 of the Constitution of India.

(vi) For direction to the respondents to make payment of adequate cost and compensation to the petitioner for mental agony, unnecessary harassment as well as suffering with great financial hardship to maintain the daily needs and proper education of the childrens due to illegal and unconstitutional acts of the respondents.

(vii) For grant of such other relief/reliefs for which the petitioner would be entitled in the facts and circumstances of the case set forth in the writ application.

4. The writ petition was partly allowed with a direction to the respondents to pay regular salary to him if he tenders joining on his place of posting,

however, if the respondents intend to initiate a departmental proceeding against the petitioner for his unauthorised absence from duty, they were at

liberty to do so within one month. It is stated that the petitioner tendered his joining on 16.08.2011 which was accepted by the respondents and he was

paid regular salary, however, without initiating a departmental proceeding he was denied regular salary for the period between 03.03.2005 to

15.08.2011.Â Aggrieved, the petitioner again came to this Court by filing the writ petition vide W.P.(S) No. 5127 of 2011. This writ petition stood

disposed of by an order dated 17.07.2014 in the following terms :

â??Considering aforesaid view, the order contained in memo no. 3913 dated 13.08.2011 (Annexure-7) is hereby set-aside and the matter is remanded

back to the respondents to initiate regular departmental proceeding within one month from today and the charges which the respondents may deem fit

against the petitioner must be communicated to him within a fortnight and after performing all the formalities, entire exercise must be completed within

a period of six months from today.â??

5. In purported compliance of the aforesaid direction of the writ Court, the disciplinary authority has passed the penalty order inflicting the following

punishment upon the petitioner :

(i) Nindan,

(ii) denial of salary for the period between 03.03.2005 till one day before the date of joining, and

(iii) the period of absence shall be treated as break inservice and it shall not be counted for grant of pension.

6. The order of punishment dated 06.05.2015 has been affirmed by the appellate authority which dismissed the appeal preferred by the petitioner by an

order dated 10.08.2016.

7. Contending that the penalty order dated 06.05.2015 as well as the appellate order dated 10.08.2016 have been passed in breach of the rules of

natural justice, Mr. Vikash Kumar, the learned counsel for the petitioner contends that the petitioner has suffered the aforesaid punishments in a

departmental proceeding in which his show-cause reply and specific stand taken by him in his reply to the second show-cause notice have not been

considered either by the disciplinary authority or by the appellate authority. An appeal being a statutory appeal, least the appellate authority was

required to record in the appellate order dated 10.08.2016 was the stand taken by the petitioner and its independent findings on the aforesaid issue, which has not been done and therefore the appellate order has been rendered unsustainable in law.

8. As against the above, Ms. Ruchi Rampuria, the learned State counsel submits that absence of the petitioner from duty stands admitted and while so, he has rightly been denied salary for the aforesaid period. It is further contended that once absence from duty stands proved the departmental

authority has rightly passed an order under which the period of absence from duty has been treated as break in service.

9. Normally the writ Court would not interfere with the orders passed by the departmental authorities, however, if it is found that the order of

punishment has been passed in breach of the rules of natural justice or contrary to the extant rules or if the order of punishment reflects complete non-

application of mind by the disciplinary authority, the writ Court in exercise of powers under Article 226 of the Constitution of India can interfere in the

matter [â??Syed Yakoob vs. K.S. Radhakrishnan & Ors.â?? reported in AIR 1964 SC 477].

10. Chequered history of litigation of this case would indicate that the initial grievance of the petitioner was towards non-payment of salary for the

period of the alleged unauthorised absence from duty. The petitioner has taken a stand that after the order of transfer was issued on 14.10.2004 he

tendered his joining on 19.10.2004, however, in view of the forthcoming Assembly Elections, 2004 he was not given posting, but he was again sent

back to the Water Resources Department. It is a matter of record that objecting to this order of repatriation dated 17.12.2004 the petitioner

approached this Court by filing W.P.(S) No. 328 of 2005. The matter was taken upto the Supreme Court in Special Leave Petitions and thereafter the

petitioner has again approached this Court on as many as three occasions. May be the petitioner has remained absent from duty, but the fact remains

that he has been pursuing legal remedy available to him.Â In the above facts, while no exception can be taken to denial of salary to the petitioner for

the period during which he remained absent from duty, no inference can be drawn that absence of the petitioner from duty was willful and intentional

and while so, the punishment of Nindan must be held unjustified and accordingly it is quashed.

11. Break in service for the period of unauthorised absence, which in my opinion is not willful and intentional, and the order holding the aforesaid

period being non-pensionable have visited the petitioner with civil consequences. This punishment admittedly does not find place under Rule 49 of the

Civil Services (Classification, Control & Appeal) Rules, 1930. This penalty thus must be held without jurisdiction. This aspect of the matter has not

been considered by the appellate authority.

12. Under the Jharkhand Service Code, 2001 a government servant can be granted leave under Chapter-VI of the Code which includes medical leave,

half pay-leave, maternity leave, extraordinary leave etc. Rule 236 of the Code provides that extraordinary leave may be granted to the government

servant when no other leave is admissible under these Rules and when other leave being admissible, the government servant concerned applies in

writing for the grant of extraordinary leave. The punishment by which the period of absence has been treated as break in service and non-pensionable,

would deprive the petitioner of the benefits to which he is entitled to under the Code, and for this reason also this part of the penalty must go.

13. Consequently, the appellate order dated 10.08.2016 stands modified to the above extent.

14. The writ petition stands partly allowed in the aforesaid terms.