
(2007) 04 GAU CK 0048
In the Gauhati High Court

Tapan Majumder

APPELLANT

Vs

State of Tripura and Others

RESPONDENT

Date of Decision : 03-04-2007

Acts Referred:

Citation : (2007) 3 GLT 434

Hon'ble Judges : R.B. Misra, J; Mutum B.K. Singh, J

Bench : Division Bench

Final Decision : Allowed

Judgement

R.B. Misra, J.—Heard Mr. this Court Talapatra, learned senior counsel, assisted by Mr. R. Dutta, learned Counsel for the appellant and Mr. T.D. Majumder, learned Additional Government Advocate for the State-respondents.

2. The order-dated 12.6.2001 passed by the learned Single Judge in W.P. (C) No. 382/2000 is under challenge in this writ appeal, whereby the learned Single Judge dismissed the writ petition filed by the petitioner-appellant herein.

3. On the basis of the records, pleadings, it appears that the petitioner was serving at Srinagar H.S. School as Assistant Teacher, he was absent from duty w.e.f. 1.8.1993 to 20.10.1993 (290 days), 5.11.1993 to 6.3.1995 (487 days) and 14.3.1995 to 28.12.1995 (290 days). The period of his absence from 1.8.1993 to 20.10.1993 (81 days) has been regularized by granting 27 days half-pay leave, 30 days Earned Leave and 24 days Extra Ordinary Leave by the Head of Office/ D.D.O. Gamaria H.S. School vide his memo No. F. 1(7)/HM/GHSS/93 dated 6.7.1998 and the leave salary has also been paid. The miscreants obstructed him to resume duty at school during the period from 5.11.1993 to 6.3.1995 and illness certificate covering the whole period with prayer for leave was submitted at a subsequent date on 17.3.1997, however, disbelieving the averments of writ petitioner (appellant herein), his forced absence was treated as fabricated and an attempt to mislead and confuse the Government. As per the provision of TSCS (Leave) Rules, 1986, it was indicated to the writ petitioner vide Memo No.

PFSRNH (34) DSE.93 dated 5.6.1998 that the period was treated as "Dies-Non" vide Memo No. PFSRNH (34) DSE/95 dated 10.8.1998, however, the period of service prior to the period of "Dies-Non" was not forfeited. According to the appellant, he was on Casual Leave on 14.3.1995 and 15.3.1995 and his name was struck off from the Attendance Register by the Headmaster, Srinagar H.S. School on and from 16.3.1995, and as such, he could not put his signature during the period from 16.3.1995 to 28.12.1995. But on examining the Attendance Register for the relevant period, it was found that his name was not struck off from the Attendance Register and it was very much existed there even in subsequent months and the allegations of the writ petitioner/appellant were not found correct and he was treated willfully, unauthorizedly absent from duty for the period from 16.3.1995 to 28.12.1995 prefixing two days" Casual Leave on 14.3.1995 and 15.3.1995. The writ petitioner accordingly was not treated as on duty during the period of his absence from 16.3.1995 to 28.12.1995 and the said period was not regularized by granting leave.

4. According to respondents, from 7.3.1995 to 13.3.1995 the writ petitioner came to the school at 10.30 a.m. and had put his signature in the Attendance Register but he did not work. He left school without any intimation to the Headmaster, as such, these days were treated as "Dies-Non", as merely putting signature in the Attendance Register does not establish that some one has done his duty, however, taking a sympathetic view Sri Majumder was treated to have been on duty during the said period from 7.3.95 to 13.3.1995. According to opposite parties as per explanation No. 1 below Rule 11 of TSCS (Leave) Rules, 1986 Casual Leave cannot be combined with any other kind of leave and therefore, in the case of writ petitioner/appellant two days" Casual Leave (for 14th & 15th March, 1995) was combined with a willful unauthorized continuous absence of 288 days from 16.3.1995 to 28.12.1995 making the total period of absence as 290 days. According to the opposite parties, the pay, arrears, increments as admissible to the writ petitioner have already been paid to him.

5. The learned senior counsel for the appellant has submitted that without undergoing disciplinary proceeding the monetary benefit of the writ petitioner/appellant cannot be curtailed and the period during which the writ petitioner was prevented to attend duties under the pressure of miscreants belonging to a political party was not to be declared "Dies-non" treating break in service. Such declaration of "Dies-non" without undergoing any disciplinary proceeding or without giving any opportunity of hearing to the appellant or in derogation to the principles of natural justice is illegal. According to the learned Counsel for the appellant, this Court in 2000 (3) GLT 446 (Arunangshu Roy v.State of Tripura) while relying on the decision of the Hon"ble Supreme Court in B.D. Gupta Vs. State of Haryana, has held that the order of "Dies-non" could not be passed without a disciplinary proceeding or without giving an opportunity of hearing to the affected person. In paragraph-16 of B.D. Gupta (supra) the Hon"ble Supreme Court has observed as follows:

Besides, the real ratio in *M. Gopala Krishna Naidu Vs. State of Madhya Pradesh*, was that if an order affects the employee financially, it must be passed after an objective consideration and assessment of all relevant facts and circumstances and after giving the person concerned full opportunity to make out his own case about that order?.

6. It was also observed by this Court in para-graph-6 of *Arunangshu Roy (supra)* as follows:

6. The word "Dies-non" does not occur anywhere in the Tripura State Civil Services (Leave) Rules, 1986. The C.C.S. (CCA) Rules which is applicable to the State Government employees provide for various penalties to be imposed. There is no mention of "Dies-non" anywhere in the Rules. The Government of India's instructions contained in D.G. P & T's letter No. 6/28/70-Disc. I (SPB-I), dated 5th October, 1975, however, made a reference to "dies-non" and detailed how, when and for what purpose "dies-non" may be ordered. The relevant part is quoted below:

(5) Action for unauthorized absence from duty of overstaval of leave--The following decisions have been taken in consultation with the Department of Personnel and the Ministry of Finance:

(i)?.

(ii)?.

(iii) If a Government servant absents himself abruptly or applies for leave which is refused in the exigencies of service and still he happens to absent himself from duty, he should be told of the consequences, viz., that the entire period of absence would be treated an unauthorized, entailing lose of pay for the period in question under proviso to Fundamental Rule 17, thereby resulting in break in service. If, however, he reports for duty before or after initiation of disciplinary proceedings, he may be taken back for duty because he has not been placed under suspension. The disciplinary action may be concluded and the period of absence treated as unauthorized resulting in loss in pay and allowances for the period of absence under proviso to FR 17 (1) and thus a break in service. The question whether the break should be condoned or not and treated as dies-non should be considered only after conclusion of the disciplinary proceedings and that too after the Government servant represents in this regard.

2. It is made clear that a Government servant who remains absent unauthorizedly without proper permission should be proceeded against immediately and this should not be put off till the absence exceeds the limit prescribed in Rule 32(2)(a) of the CCS (Leave) Rules, 1972. However, the disciplinary authority should consider the grounds adduced by the Government servant for his unauthorized absence before initiating disciplinary proceedings. If the disciplinary authority is satisfied that the grounds adduced for unauthorized absence are justified, the leave of the kind applied for and due admissible may

be granted to him.

7. Mr. T.D. Majumder, learned Government Advocate for the State-respondents has submitted that before taking decision on 21.1.1999, the Director of School Education had issued proper show cause notice to the appellant and only after receipt of explanation from the appellant the said decision was taken.

8. According to Mr. T.D. Majumder, learned Government Advocate the Rule 24 of the Tripura State Civil Services (Leave) Rules, 1986 deals with "absence after expiry of leave". For convenience Rule 24 is indicated as below:

24. Absence after leave, a Government servant who remains absent after the end of leave is entitled to no leave salary for the period of such absence and that period shall be debited against his leave account as though it were half pay leave, to the extent such leave is due, the period in excess of such leave due being treated as extraordinary leave.

(2) Willful absence from duty after the expiry of leave renders a Government servant liable to disciplinary action.

Note: Treatment of willful absence from duty not recognized--

Willful absence from duty, even though not covered by grant of leave does not entail loss of lien. The period of absence not covered by grant of leave shall have to be treated as "dies non" for all purposes, viz., increment, leave and pension. Such absence without leave where it stands singly and not in continuation of any authorized leave of absence will constitute an interruption of service for the purpose of pension and unless the pension sanctioning authority exercises its powers under Article 421, Civil Service Regulations [now Rule 27 of the Central Civil Services (Pension) Rules] to treat the period as leave without allowance, the entire past service will stand forfeited.

[C. & A. G., U.O. No. 1947-A/438-58, dated the 12th September 1958 in G.I., M.F. File No. 11 (52)-E, V/58.]

In our respectful consideration merely serving of show cause or notice to an employee in reference to some allegations or charges and obtaining his/her explanation before taking decision does not meet the legal requirement of disciplinary proceedings.

9. Upon hearing the learned Counsel for the parties, we are of the considered view that before declaring the period of absence of appellant as "Dies-non", a disciplinary proceeding has to be conducted in the facts and circumstances, more so, when the allegations of break in service are being refuted by the appellant. Therefore, the order-dated 21.1.1999 was to be passed only after resorting to proper course of disciplinary proceedings. Despite the fact that this aspect was not argued earlier before learned Single Judge of this Court, however, this legal aspect being vital on argument is being entertained by this Court at this stage, as such, the action of the Director of School Education for declaring the period

from 16.3.1995 to 28.12.1995 as "Dies-non" is taken as legally not sustainable.

10. In view of the facts and circumstances, we are of the considered view that the period from 16.3.1995 to 28.12.1995 which was declared as "Dies-non" by the Director of School Education and also upheld by the learned Single Judge cannot sustain in law and, therefore, the order dated 12.6.2001 passed by the learned Single Judge in W.P. (C) No. 382/2000 is set aside and also the order dated 21.1.1999 passed by the Director of School Education is quashed with observation that the authorities are to proceed with disciplinary proceedings against the appellant afresh. Since the controversy is mainly relatable to the documentary evidences, therefore, expeditious disposal of the disciplinary proceeding is expected after giving reasonable opportunity of hearing to the appellant to complete the same preferably within a period of six months after receipt of this order and decision of "Dies-non", if any, for the absence period from 16.3.1995 to 28.12.1995 of the appellant may be taken on the basis of the outcome of the disciplinary proceedings to be concluded in view of the prevailing provisions of law.

11. In view of the above observations, the present writ appeal is allowed. No order as to costs.