

(2002) 04 DEL CK 0179
In the Delhi High Court
Case No : CWP No. 6653 of 1999

The Manager, Govt. of India Press

APPELLANT

Vs

Mohender Kumar and Others

RESPONDENT

Date of Decision : 23-04-2002

Acts Referred:

Central Civil Services (Pension) Rules, 1972 — Rule 27(2)

Citation : (2002) 99 DLT 381 : (2003) 97 FLR 1091

Hon'ble Judges : S.B. Sinha, C.J.; A.K. Sikri, J

Bench : Division Bench

Advocate : Ashok Bhasin and Chetan Dutt, for the Appellant; Vinay Kumar Garg, for the Respondent

Final Decision : Partly Allowed

Judgement

S.B. Sinha, C.J.—This writ petition is directed against a judgment and order dated 21st July 1999 passed by the Central Administrative Tribunal, Principal Bench, New Delhi in OA No. 2389/93 whereby and whereunder the Original Application filed by the first respondent herein questioning an order of compulsory retirement, was allowed.

2. The first respondent was charge-sheeted on the ground that he had unauthorisedly absented himself from duty w.e.f. 22nd April 1991. The only contention raised in the disciplinary proceedings by the first respondent was that he could not attend to his duties owing to illness. A punishment of compulsory retirement was imposed on him by the disciplinary authority by order dated 28th October 1992 and an appeal preferred there against was also rejected. Before the learned Tribunal, the contention of the first respondent to the effect that as petitioner herein treated the period of absence as "dies non" which was converted into EOL in terms of Rule 27(2) of the CCS (Pension) Rules, 1972, the absence of the petitioner was regularized and as such, the order of punishment imposed upon him was illegal.

3. The said contention of the respondent found favor with the learned Tribunal. The learned counsel appearing on behalf of the petitioner would submit that the learned Tribunal acted illegally and without jurisdiction in passing the impugned judgment in so far as it failed to take into consideration that the said order dated 10th January 1992 having been passed under Rule 27(2) of the CCS (Pension) Rules, 1972, the question of regularizing his period of leave for a period of 259 days does not arise.

4. The learned counsel for the first respondent on the other hand, would submit that the case of the petitioner is squarely covered by a decision of the apex court in *The State of Punjab and Others Vs. Bakshish Singh*, .

5. In the disciplinary proceedings, the enquiry officer held as follows:

"In the enquiry held on 3-12-91 both Shri Tilak Raj Ahuja, Presenting Officer and Shri Mohinder Kumar were present. The charges framed against the D.G.S. Shri Mohinder Kumar, Compositor, Govt. of India Press, Faridabad, were read out to him by the Presenting Officer. Then the Enquiry Officer asked the D.G.S. Shri Mohinder Kumar, Compositor whether he admits the charges or not. The D.G.S. Shri Mohinder Kumar, Compositor admitted the charges leveled against him. In view of admission of charges no further enquiry is considered necessary in this case and thus he is guilty of the charges framed against him vide Manager, Government of India Press, Faridabad, Memo. No. Vig./12/91/318, dated 1-8-91."

6. Agreeing with the afore-mentioned findings of the enquiry officer, the disciplinary authority passed an order of punishment on 3rd January 1992 stating:

4. "...On going through his past service record it has been observed that he is in the habit of causing unauthorized absence and almost every year from 1975 till date his period of unauthorized absence for several days was treated as dias-non. All this shows that he is not devoted to duty, he is incorrigible and he has failed to show improvement. Rather day by day the position of his unauthorized absence from duty and non-devotion to duty is deteriorating.

5. I have come to the conclusion that there is no use of keeping such an undivided and incorrigible person in Govt. service and orders that Shri Mohinder Kumar, Compositor (T. No. 85) be retired compulsory with immediate effect. The period of his absence will be treated as dias-non."

7. Having regard to the fact that the period of absence was treated to be "dias non", the petitioner herein issued the afore-mentioned Office Memorandum on 10th January 1992:

Memorandum

"Shri Mohinder Kumar, Comp. Gr. II has been retired compulsorily vide order No. Vig/12/91/707-716 dated 3-1-1992 and it has been ordered that the period of his absence will be treated as dies non.

A period of 259 days as per enclosed list is marked absent and treated as dies-non which is converted into E.O.L. under Rule 27(2) of the CCS (Pensions) Rules, 1972."

8. However, in an appeal preferred by the petitioner, the appellate authority allowed the appeal inter alias on the ground that the disciplinary authority had taken into consideration the alleged past misconduct on the part of the first respondent set aside the order of punishment dated 3rd January 1992 and directed the petitioner to pass an appropriate order.

9. A further show cause notice was thereafter issued by the petitioner against the first respondent by an order dated 28th October 1992. The contention of the first respondent in the show cause notice was not accepted on the following grounds:

"13(c). It is on record that only on 30.12.1991 Shri Mohinder Kumar applied for 251 days leave in lump sum with medical certificates from various private medical practitioners which were not considered acceptable for his having been absenting unauthorisedly and later found guilty by the Inquiry officer.

14. In view of all stated above, the undersigned is satisfied that the charges leveled against Shri Mohinder Kumar were proved conclusively and that there was no compulsion on his part to make him fail to apply for leave from time to time or to intimate the office about his absence or sickness or to avail of the opportunities made available to him by issue of official memos, etc. to report for duty and thus the undersigned is of the opinion that there is no use of keeping such an undivided, irregular and irresponsible person in service and Therefore ORDERS THAT SHRI MOHINDER KUMAR BE RETIRED COMPULSORILY FORTHWITH.

15. It is further ordered that his absence period be treated as dies non."

10. An appeal preferred there against was dismissed.

Rule 27(2) of the CCS (Pension) Rules, 1972 reads thus:

"27. Effect of interruption in service.-

(1) An interruption in the service of a Government servant entails forfeiture of his past service, except in the following cases:-

(a) unauthorized leave of absence;

(b) unauthorized absence in continuation of authorized leave of absence so long as the post of absence is not filled substantively;

(c) suspension, where it is immediately followed by reinstatement, whether in the same or a different post, or where the Government servant dies or is permitted to retire or is retired on attaining the age of compulsory retirement while under suspension.

(d) Transfer to non-qualifying service in an establishment under the control of the Government if such transfer has been ordered by a competent authority in the public interest;

(e) Joining time while on transfer from one post to another.

(2) Notwithstanding anything contained in Sub-rule (1), the appointing authority may, by order, commute retrospectively the periods of absence without leave as extraordinary leave."

11. A bare perusal of the afore-mentioned rule would clearly show that in terms thereof, break in service is condoned so as to enable a person against whom an order of compulsory retirement has been passed or who has superannuated in normal course may receive the pensionary benefits. The order dated 10th January 1992, as referred to hereinbefore, was not passed so as to regularize the leave of the first respondent as has been held by the learned Tribunal.

12. In *State of Madhya Pradesh v. Harihar Gopal* 1969 SLR 274, the Apex Court observed as follows:-

"7. It was urged before the High Court on behalf of the State that the order granting leave was only for the purpose of regularizing the absence from duty and for maintaining a true account of absence from duty, and had not the effect of first sanctioning leave to the respondent to which he was entitled, and then removing him from service for absence from duty. The High Court rejected this contention observing:

"..... When the leave was granted even though belatedly, it had the effect of authorizing with retrospective effect the petitioner's (respondent's) absence from duty during the period for which it was sanctioned. Having thus authorized the petitioner's (respondent's) absence from duty, it was not open to the State Government to proceed on the basis that his absence was unauthorized."

These observations proceed upon a misconception of the sequence in the orders passed by the State Government and the true effect of the order granting leave. The order granting leave was made after the order terminating the employment and it was made only for the purpose of maintaining a correct record of the duration of service, and adjustment of leave due to the respondent and for regularizing his absence from duty. Our attention has not been invited to any rules governing the respondent's service conditions under which an order regularizing absence from duty subsequent to termination of employment has the effect of invalidating termination. Both the orders, one terminating the employment of the respondent and the other granting leave are made "by order and in the name of the Governor of Madhya Pradesh", and they are signed by L.B. Sarje, Deputy Secretary to the Government of Madhya Pradesh, General Administration Department. We are unable to hold that the authority after terminating the employment of the respondent intended to pass an order invalidating the earlier order by sanctioning leave so that the respondent was to

be deemed not to have remained absent from duty without leave duly granted.

8. There is another aspect of the case, which also does not appear to have been considered by the High Court. The charge against the respondent was that he had absented himself "without obtaining leave in advance". The Enquiry Officer characterized the conduct of the respondent as "irresponsible. The Enquiry Officer clearly intended that in failing to report for duty and remaining absent without obtaining leave, the respondent had acted in manner-irresponsible and unjustified. On the finding of the Enquiry Officer that charge was proved and the order, dated March 9, 1962, had no effect on the charge that the respondent had remained absent without obtaining leave in advance."

13. However, in Bakshish Singh's case (Supra), the Apex Court, without noticing Harihar Gopal (supra) held thus:-

"3. Having affirmed the findings of the trial court that the charge of absence from duty did not survive, the lower appellate court proceeded to consider the question whether absence from duty was misconduct of the gravest kind so as to warrant the maximum penalty of "dismissal from service" or it was a mere "misconduct" for which lesser punishment would be appropriate. Having found that it was not a case of misconduct of the gravest kind, the lower appellate court remanded the case back to the punishing authority for passing a fresh order of punishment. The appellant then filed a second appeal in the High Court, which was dismissed summarily.

4. It will thus be seen that the trial court as also the lower appellate court had both recorded the findings that the period of absence from duty having been regularized and converted into leave without pay, the charge of absence from duty did not survive. Once it was found as a fact that the charge of unauthorized absence from duty did not survive, we fail to understand how the lower appellate court could remand the matter back to the punishing authority for passing a fresh order of punishment. In the fact of these findings, specially the finding of the trial court that proper opportunity of hearing was not given and the signatures of the respondents were obtained under duress during departmental proceedings which have not been set aside by the lower appellate court, we are of the view that there was no occasion to remand the case to the punishing authority merely for passing a fresh order of punishment."

14. The conflicting views in the aforementioned two judgments came up for consideration before a Division Bench of this Court in C.W.P. No. 876 of 1999 titled Ex. Constable Maan Singh v. Union of India and Ors. disposed of on 18.04.2000.

15. In the aforementioned decision, this Court distinguished Bakshish Singh's case (Supra) and held that Harihar Gopal's case (Supra) still holds the field. It was observed that:-

"The Supreme Court in Harihar Gopal's case cannot be said to have laid down

the law to the effect that the dismissal order is protected only because it has been made on a different sheet of paper, although by the same authority and on the same date.

The judgment of the Supreme court in Bakshish Singh's case is per incuriam and does not overrule nor differentiate the judgment in Harihar Gopal's case. In this View of the matter, we are of the opinion that the order of termination does not suffer from any illegality and that the regularization of leave without pay is only for purposes of maintaining correct record of service which does not interfere with nor obliterate the order of dismissal from service."

16. We, Therefore, are of the opinion that the learned Tribunal committed an error in holding that having regard to the fact that the absence of the petitioner having been condoned, the charges against him also become non-est. The apex court even in Bakshish Singh's case (supra), did not lay down any such law. Reliance on the said decision by the learned counsel, Therefore, in our opinion is misplaced.

17. We may also notice that Mr. Bhasin had submitted that having regard to the fact that the appellant authority had set aside the order of punishment dated 3rd January 1992, the order passed on 10th January 1992 also perished therewith and as such, the learned Tribunal could not have relied thereupon.

18. Although the said submission may appear to be attractive on the first blush, having regard to the fact that ultimately the same punishment was imposed upon the first respondent and further in view of the fact that the said order dated 10th January 1992 having not been withdrawn, the learned Tribunal cannot be said to have committed any illegality in relying thereupon. However, as the learned Tribunal in its impugned judgment has not considered the other arguments raised by the first respondent we are of the opinion that the other contentions raised by him may be considered on their own merits.

19. For the reasons afore-mentioned, this writ petition is allowed to the extent mentioned hereinbefore. The impugned judgment is set aside and the matter is remitted to the learned Tribunal for consideration of the matter afresh on merits.