

(2024) 03 OHC CK 0179
In the Orissa High Court
Case No : Writ Appeal No 484 Of 2021

Union Of India And Others

APPELLANT

Vs

Siba Narayan Naik

RESPONDENT

Date of Decision : 20-03-2024

Acts Referred:

Code of Civil Procedure, 1908 — Order 41 Rule 33

Citation : (2024) 03 OHC CK 0179

Hon'ble Judges : Chakradhari Sharan Singh, CJ; Arindam Sinha J

Bench : Division Bench

Advocate : Gyanaloka Mohanty, S. Behera

Final Decision : Allowed

Judgement

Chakradhari Sharan Singh, CJ.

I.A. No.1188 of 2021

1. This application has been filed for condonation of delay of 109 days in preferring the present intra-Court appeal. There is a delay of 109 days. An objection has been filed on behalf of the respondent and relying on the Supreme Court decision in the case of State of Madhya Pradesh v. Bherulal (2020) 10 SCC 654, it has been submitted that as the appellants have not been able to explain each and every delay, this application seeking condonation of delay deserves to be dismissed.

2. It has been stated in the application seeking condonation of delay that after the impugned order was passed by the learned Single Judge on 09.02.2021, the same was sent to the Headquarters for necessary legal opinion of the higher authorities as well as the Law Ministry whereupon it was decided to file the present appeal.

3. In the present facts and circumstances, in our opinion, the delay deserves to be condoned in the interests of justice as the appellants have been able to

explain the period of delay and the justification put forth by the appellants is acceptable to the Court. The delay stands condoned, accordingly.

4. The application is, accordingly, allowed.

W.A. No.484 of 2021

5. The appellants-Union of India and its officials of the Central Industrial Security Force (in short, 'CISF') have put to challenge the judgment and order dated 09.02.2021 passed by a learned Single Judge of this Court in W.P.(C) No.19809 of 2008 whereby an order of dismissal passed by the Disciplinary Authority against the respondent has been set aside. The orders passed by the appellate authority, revisional authority and the reviewing authority have also been set aside by the learned Single Judge. After having set aside the aforesaid orders, the learned Single Judge remitted the matter back to the Disciplinary Authority for a fresh inquiry in relation to the charges which were framed against the respondent.

6. Paragraphs 4 and 5 of the impugned order passed by the learned Single Judge, read thus:

"4. On the claim of illegal orders being passed by the Appellate Authority, Revisional Authority and Reviewing Authority, Sri Mohanty, is, however, unable to resist the contention of the learned counsel for the petitioner that none of these Authorities have taken into account the medical supporting produced by the delinquent to at least have a de novo enquiry. For the admitted ex parte disposal of the Disciplinary Proceeding and for the material particulars disclosed in the writ petition through Annexure-2 series, this Court finds, the delinquent had a genuine reason in not appearing before the Disciplinary Authority at the relevant point of time.

5. It is in this view of the matter, this Court while disapproving the ex parte closure of the Disciplinary Proceeding further looking to the medical support with the petitioner completely preventing him attending the proceeding, interfering with the order at Annexure-6, sets aside the same. It is for the interference in Annexure-6 and setting aside the same, this Court directs for reopening of the Disciplinary Proceeding. As a consequence, this Court also interferes with the orders of the Appellate Authority, Revisional Authority as well as Reviewing Authority, which are all set aside.

As the Disciplinary Proceeding is required to be re-opened, this Court while remitting the matter to the Disciplinary Authority for fresh enquiry involving the charges against the petitioner herein, directs the petitioner to submit his explanation to the charges levelled against him by the Disciplinary Authority as expeditiously as possible, preferably within a period of four weeks. It is also open to the delinquent to refer to medical support preventing him to remain absent at particular time. Upon receipt of the explanation from the delinquent, the Disciplinary Authority shall fix the date and place of enquiry and intimate the

same to the petitioner for his appearance, evidence and submission etc. The Disciplinary Proceeding will be disposed of afresh providing fullest opportunity to the delinquent and other parties involved therein and also keeping in view the observation of the Disciplinary Authority at paragraph-4, vide Annexure-6. For remittance of the matter with fresh disposal of the Disciplinary Proceeding, this Court observes petitioner's service position prior to holding him ex parte in the Disciplinary Proceeding shall be maintained and the financial benefits, if any, in the meantime shall ultimately be subject to the ultimate outcome in the Disciplinary Proceeding."

7. Mr. Gyanaloka Mohanty, learned Senior Panel Counsel appearing on behalf of the appellants assailing the impugned order has submitted that the respondent, a constable in CISF, admittedly, remained unauthorizedly absent from 01.02.1997 till issuance of the charge sheet under the provisions of the CISF Rules vide memo dated 19.09.1997 without any intimation to his officers superior to him. He did not respond to several calls/notices sent to him asking him to report back. He also did not attend the departmental inquiry, though he was aware of it. In the aforesaid background, the decision to impose punishment of dismissal from service was taken by the Disciplinary Authority by an order dated 14.05.1998, agreeing with the report of the Enquiry Officer. The Enquiry Officer, during the course of enquiry had issued three notices to the respondent to attend the inquiry but he did not turn up nor did he send any representative. In case he was unable to attend the enquiry for any reason, he should have informed the authorities. Despite ample opportunities granted to the respondent, he did not participate in the departmental proceedings, which finally culminated into imposition of punishment of dismissal from service by an order dated 14.05.1998. More than 8 years thereafter on 01.06.2006, he preferred an appeal against the order of dismissal which was dismissed by the appellate authority by an order dated 06.12.2006. He submits that the learned Single Judge ought not to have set aside the orders of dismissal passed by the Disciplinary Authority and the orders passed by the appellate authority, revisional authority and the reviewing authority, in view of the admitted facts of the case. He submits that the learned Single Judge has wrongly recorded the finding that the respondent had a genuine reason in not appearing before the Disciplinary Authority at the relevant point of time.

8. Mr. S. Behera, learned counsel appearing on behalf of the respondent, on the other hand, has submitted that despite the fact that he had produced before the appellate authority, the medical documents/ prescriptions in respect of his mental ailment, which he was suffering from and which had prevented him from participating in the departmental inquiry, the appellate authority without looking into such documents dismissed the appeal, mainly on the ground of lapse of eight years from the date of order of dismissal. He has drawn the Court's attention to the order of dismissal dated 14.05.1998 whereby upon awarding penalty of dismissal from service, the Disciplinary Authority recorded that the entire leave period would be regularized separately and unauthorized absence

period from 01.02.1997 till date was regularized by granting him EOL (without pay), without medical certificate. He has placed heavy reliance on the Supreme Court's decision in case of *State of Punjab v. Bakshish Singh*, reported in (1998) 8 SCC 222 to contend that once the period of unauthorized absence stood regularized, the unauthorized absence would not be treated as misconduct. He has submitted that the learned Single Judge has rightly taken into account, the medical certificates submitted by the respondent along with his memo of appeal regarding his mental ailment.

9. Before dealing with the rival submissions advanced on behalf of the parties as noted above, we need to take note of the undisputed facts first. The respondent, at the relevant point of time was posted as a constable in the CISF Unit, ONGC Nazira, Dist-Sibsagar in the State of Assam. He had applied for 15 days leave on 13.01.1997 which was allowed by the Coy, Commander, CISF, ONGC(N), Nazira vide letter dated 10.01.1997 from 13.01.1997 to 31.01.1997. It was clearly mentioned in the leave certificate that the respondent had to join on duty after expiry of the leave period on 01.02.1997. Several calls/notices were sent to the respondent asking him to report back immediately, failing which departmental action would be taken. Finding no response from the respondent, departmental proceeding was initiated against him for overstaying the leave period, and thus, remaining absent unauthorizedly. He remained absent during the course of departmental inquiry because of which ex parte departmental inquiry was held by the enquiry officer, who submitted his report with the finding that the articles of charge against the respondent stood proved. From the order of the Disciplinary Authority, it transpires that in accordance with the extant rules, a copy of the inquiry report was supplied to the respondent on 16.03.1998. The Disciplinary Authority i.e. the Commandant, CISF, ONGC, Nazira passed the final order imposing penalty of dismissal from service on 14.05.1998 which is at Annexure-6 to the writ application. It is mentioned in the order of dismissal that the charge memo dated 08.12.1997 was received by the respondent, and that the enquiry officer had issued three enquiry notices to him to appear before the enquiry officer. First enquiry notice was returned back with the remarks that the addressee refused, hence redirected. The second enquiry notice was duly acknowledged by the respondent. The third inquiry notice was sent to him as well as to the local police station; despite that the respondent did not respond. Accordingly, agreeing with the finding of the enquiring officer, the Disciplinary Authority imposed punishment of dismissal from service. Nearly six years after the order of dismissal was passed, the respondent preferred an appeal by registered post to the Deputy Inspector General, General Industrial Security, CISF Unit, ONGC Nazira seeking quashing the order of dismissal from service. He took a plea in his memo of appeal that because of his mental illness from 1997 to 18.04.2006, he could not participate in the departmental inquiry nor could he prefer any appeal against the order of dismissal. The memo of appeal was brought on record by way of Annexure-9 to the writ application. From the said document, it does not appear that he had annexed the medical prescriptions in

support of his memo of appeal. Two months later, he sent a reminder to the appellate authority which has been brought on record by way of Annexure-10 to the writ application. The said letter dated 01.08.2006 of the respondent addressed to the appellate authority refers to enclosure of photostat copies of the medical certificates and fitness certificate. The appellate authority dismissed the appeal, mainly on the ground of delay. The revision application of respondent also stood dismissed as the revisional authority did not find any illegality in the order of the appellate authority dismissing the appeal on the ground of delay. The review application against the revisional order came to be dismissed by an order dated 25.09.2007 on the ground that since the appellant had exhausted statutory right of appeal and the rules did not permit for review.

10. It is the respondent's case, on the other hand, that because of mental disorder and financial crisis, he was unfit since 28.01.1997 and he was also absent from his native place as he had been to Ranchi for medical treatment. He was under the medical treatment with effect from 28.01.1997 to 18.04.2006. The medical prescriptions have been brought on record by way of Annexure-2 series. The medical prescriptions are of three dates i.e. 28.01.1997, 04.05.1997 and 09.01.2006. On 18.04.2006, according to the prescriptions, the doctor found the respondent fit for duty. There is pleading nor any material on record that he was never admitted in any hospital.

11. It is true that in the order of dismissal, it has been mentioned that the period of unauthorized absence from 01.02.1997 till passing of the order of dismissal is to be regularized by granting him EOL without pay. Such order was required to be passed by the Disciplinary Authority as to how the period, during which he remained absent from duty was to be treated. The period from 01.02.1997 till passing of the order on 14.05.1998 has been treated to be extraordinary leave period apparently, for finalizing the respondent's entitlements, consequent upon his dismissal from service. His misconduct of having remained absent unauthorizedly did not vanish because the period was regularized by granting his extraordinary leave.

12. The Supreme Court's decision in case of Bakshish(supra) has no application in the facts and circumstances of this case which is clearly distinguishable. In that case, after a regular departmental inquiry on the charge of unauthorized absence from duty, a police constable was dismissed from service. The order of dismissal was challenged by the delinquent in a suit. The trial Court decreed the suit, set aside the order of dismissal mainly on the ground that the disciplinary authority had regularized and treated the delinquent's absence as period of leave without pay and thus, it could not be legally said that he was guilty of misconduct of unauthorized absence from duty. Further in that case, the trial Court had recorded a finding that the delinquent's statements that he was not given an opportunity or personal hearing and his signatures were obtained under duress and the departmental proceeding were not controverted by the Disciplinary Authority.

13. After having affirmed the aforesaid finding of the trial Court, the first appellate Court proceeded to consider whether the absence of duty was a 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 first appellate court, in that case had remanded the case back to the disciplinary authority for passing an order afresh. The order of the first appellate Court was challenged in a second appeal in the High Court which was dismissed. When the matter came to the Supreme Court, the Supreme Court concluded that once it was found by the trial Court and also the first appellate Court that the charge of unauthorized absence from duty did not survive, the period of absence from duty having been regularized and converted into the leave without pay, the first appellate court could not have remanded the matter back to the punishing authority for passing a fresh order of punishment.

14. The question, whether an employee could be held guilty of misconduct of unauthorized absence despite regularization of his absence by grant of leave without pay, was not specifically in issue before the Supreme Court in case of Bakshish Singh (supra). In case of Bakshish Singh (supra), the Supreme Court noticed inconsistency in the approach of the first appellate court as on the hand it agreed with the trial court that the charge of misconduct did not survive after grant of leave, still the first appellate court remanded the case to the punishing authority for fresh consideration on the quantum of penalty. The order of the first appellate court remanding the matter to the disciplinary authority for passing fresh order on the quantum of punishment was not found to be fully inconsistent with Rule 33 of Order XLI of the CPC. The Supreme Court held in paragraphs 8 and 9 in Bakshish Singh (supra) as under:

“8. This provision gives very wide power to the appellate court to do complete justice between the parties and enables it to pass such decree or order as ought to have been passed or as the nature of the case may require notwithstanding that the party in whose favour the power is sought to be exercised has not filed any appeal or cross-objections.

9. The discretion, however, has to be exercised with care and caution and that too in rare cases where there have been inconsistent findings and an order or decree has been passed which is wholly uncalled for in the circumstances of the case. The appellate court cannot, in the garb of exercising power under Order XLI Rule 33, enlarge the scope of the appeal. Whether this power would be exercised or not would depend upon the nature and facts of each case.”

15. Further, the Supreme Court in case of Bakshish Singh (supra) held in paragraph-11 as under:

“11. Applying the above principles to the instant case, it will be noticed that the trial court recorded a categorical finding of fact that a proper opportunity of hearing was not afforded to the respondent in the departmental proceedings and

that his allegation that his signatures on certain papers during those proceedings were obtained under duress, was not controverted as the State of Punjab had led no evidence in defence. The trial court also recorded a finding that unauthorised absence from duty having been regularised by treating the period of absence as leave without pay, the charge of misconduct did not survive. It was with this finding that the suit was decreed. The lower appellate court confirmed the finding that since the period of unauthorised absence from duty was regularised, the charge did not survive but it did not say a word about the finding relating to the opportunity of hearing in the departmental proceedings. Since those findings were not specifically set aside and the lower appellate court was silent about them, the same shall be treated to have been affirmed. In the face of these findings, it was not open to the lower appellate court to remand the case to the punishing authority for passing a fresh order of punishment. The High Court before which the second appeal was filed by the State of Punjab, did not advert itself to this inconsistency as it dismissed the appeal summarily, which indirectly reflects that it allowed an inconsistent judgment to pass through its scrutiny.”

16. After having carefully gone through the Supreme Court’s decision in case of Bakshish Singh (supra), we are of the considered view that this case is clearly distinguishable on the facts and law both. As has been noted hereinabove, the facts are not in dispute that the respondent remained absent from service unauthorizedly with effect from 01.02.1997 till the initiation of Departmental Proceeding in February, 1998. He did not participate in the Departmental Proceeding despite service of notice upon him. The enquiry officer found the charge of misconduct of unauthorized absence proved. The Disciplinary Authority, agreeing with the finding of the enquiry officer imposed punishment of dismissal from service on 14.05.1998. More than 8 years thereafter, the respondent preferred an appeal on 01.06.2006 before the Appellate Authority taking a plea of his mental illness and treatment therefor under a psychiatrist at Ranchi. There is no pleading or any document to demonstrate that the respondent was ever hospitalized for treatment in any hospital during the period when he overstayed the leave period. He did not bother to intimate his whereabouts to his superiors during the intervening period, which stretched up to around more than a year till the order of dismissal was passed on 14.05.1998. More than 8 years thereafter, he preferred the appeal against the order of the Disciplinary Authority, which, in Court’s opinion, was rightly rejected by the Appellate Authority on the ground of delay. The overstayal of the respondent beyond leave and in the facts and circumstances of the case, as noted above, is a serious misconduct for a member of a disciplined force like CISF, which cannot be countenanced. The respondent was given adequate opportunity to participate in the departmental inquiry. It is difficult for this Court to accept the stand of the respondent that his ailment was of such nature that he could not even inform about it to his superior officials during the pendency of the Departmental Proceeding and for 8 years after the order of dismissal was passed.

17. In our view, thus, the impugned judgment of the learned Single Judge

requires interference. This appeal is accordingly allowed. The impugned judgment and order dated 09.02.2021 passed by the learned Single Judge in W.P. (C) No.19809 of 2008 is hereby set aside. The writ petition i.e. W.P.(C) No.19809 of 2008 is dismissed. There shall be no order as to the costs.

.....