

(1992) 01 AHC CK 0006

In the Allahabad High Court

Case No : Civil Misc. Writ Petition No. 22456 of 1990

Vinod Chandra Shukla

APPELLANT

Vs

Chief Medical Officer and Others

RESPONDENT

Date of Decision : 03-01-1992

Acts Referred:

Financial Handbook Volume II Rules — Rule 18

Citation : (1992) 1 AWC 470

Hon'ble Judges : K.K. Birla, J

Bench : Single Bench

Advocate : R.A. Misra, for the Appellant;

Judgement

K.K. Birla, J.—Counter and rejoinder affidavits have been exchanged in the case and the case is being disposed of finally at the admission stage itself.

2. Brief facts leading to this petition are that the Petitioner was appointed as a Ward Boy under the Chief Medical Officer, Hamirpur. From 14th July 1983, to 4th May, 1990 he remained absent. According to the Petitioner he had sent some leave applications which is denied by the Respondents. It appears that he remained absent without any proper leave for this period. By the order dated 21st May, 1990 the Chief Medical Officer, Hamirpur (the Appointing Authority) directed the Petitioner to take charge of the Ward Boy in Government Homeopathic Dispensary, Dariyapur Kundaura. He started working as such. According to the Petitioner as averred in para 12 of the writ petition he had obtained the salary for the period of May, 1990. This has not been specifically denied. Therefore, it is accepted that he has received the salary for this period. However, the objections were raised in the pay-bills of the Petitioner on the ground that he had been absent for more than 5 years and under Rule 18 of the Financial Handbook Volume II he had ceased to be in Government employ A letter in this regard was written by the District Magistrate, Hamirpur to the Chief Medical Officer, Hamirpur. In pursuance of the District Magistrate's letter dated 4th August, 1990 (Annexure 11) the Chief Medical Officer, Hamirpur, Respondent

No. 1 wrote a letter dated 10/13th August, 1990 (Annexure 13) asserting that the matter is being sent to the Government and till the orders are received he could not be permitted to discharge his duties nor could be paid his salary.

3. Being aggrieved by the orders of the District Magistrate, Hamirpur and the Chief Medical Officer, the Petitioner has filed this writ petition.

4. The stand of the state is that under the above mentioned Rule 18, if the servant is in continuous absence for more than 5 years the proper authority to make orders is the Government.

The aforesaid Rule 18 is as follows:

18. Unless the Government, in view of the special circumstances of the case, shall otherwise determine, after five years" continuous absence from duty elsewhere than on foreign service in India, whether with or without leave, a government servant ceases to be in Government employ.

5. It has been contended by the learned Counsel for the Petitioner that there can be no automatic termination of the service even if a government servant is absent for more than 5 years unless the opportunity is afforded to him or any disciplinary action is taken against him.

6. The contention of the learned Standing counsel is that no action has yet been taken by the government under the aforesaid Rule 18 and as such this writ petition is premature.

7. Admittedly no order of removal or termination of service has been passed by the Appointing authority. The Petitioner has also been permitted to join the service and did work for some time. It was after the letter of the District Magistrate and the consequent order passed by the Chief Medical Officer that he was not permitted to discharge his functions nor was paid the salary from August, 1990.

8. In the case of Deokinandan Prasad Vs. The State of Bihar and Others, the government servant remained absent for more than 5 years on 5th August, 1966. The Director of Public Instruction passed an order that the Petitioner "having not been on his duties for more than five years since March, 1, 1960. has ceased to be in Government employ since March, 2, 1965 under Rule 76 of the Bihar Service Code." The representations were made by the government servant but they were rejected and an order was passed disentitling the Petitioner from pension. Rule 76 of the Bihar Service Code is as follows:

Unless the State Government, in view of the special circumstances of the case shall otherwise determine, a Government servant after five years of continuous absence from duty elsewhere than on foreign service in India, whether with or without leave, ceases to be in Government employ. This Rule and the aforesaid Rule 18 of the U.P. Financial Handbook Volume II (hereinafter referred as the Rules) are similarly worded. In the cited case it has been held in para 23 that

even if it is a question of automatic termination of service for being continuously absent for over a period of five years, Article 311 applies to such cases. Reliance had also been placed on the case of *Jai Shanker Vs. State of Rajasthan*, . This case is sought to be distinguished on behalf of the Respondent on the ground that in that case an order of removal had been passed while in the case before me no such order has been passed and the matter has been referred to the State Government. In my opinion, this contention will be of no avail to the Respondents.

9. According to Rule 18 the government servant ceases to be in government employ after five years absence from duty unless the government shall otherwise determine. Therefore, if the government does not otherwise determine the government servant shall be deemed to cease to be in government employ under this rule. In the case before me the Government has not otherwise determined. Therefore after expiry of five years period, if this rule is given full effect, the government servant shall cease to be in government employ and nothing else is required to be done. This interpretation of this rule has been repelled by the Hon"ble Supreme Court in the above cited case of *Deokinandan Prasad v. State of Bihar* and in the case of *Jai Shankar v. State of Rajasthan* according to which there will be no automatic termination of service, if the government servant has been continuously absent even for more than 5 years. Therefore, if there has not to be automatic termination or rather ceasing of the employment, the government servant can not be asked legally not to work or discharge his functions. In the instant case the Petitioner has already been allowed to work and had been working but only on the basis of the impugned order he is not being permitted to work. This could have not been done in any case after he was permitted to work by the appointing authority and was not treated as to have ceased to be in the employment.

10. In view of the above discussions, the orders directing the Petitioner not to work merely because his matter has been referred to the Government can not be up held in the circumstances of this case.

11. The effect of the impugned order passed by the Respondent No. 1 is that even without any specific order of termination of service, he is not being permitted to work nor is being paid any salary. This too can not be permitted in law and the Petitioner is not premature.

12. As no orders have been passed by the government, it is not necessary to consider this aspect in this writ petition. In the facts and circumstances of the case this Court is of the opinion that the impugned order dated 10/13th August, 1990 is bad to the extent that the Petitioner will not be permitted to discharge his functions till any orders from the government are received or he will not be paid the salary. He will be entitled to work and consequently to get the salary unless his services are terminated in accordance with law. It is made clear that it will be open to the competent authority to take any action against him permissible in law for the long absence. The letter of the District Magistrate

(Annexure 11) merely contains a direction to the Chief Medical Officer and it is not necessary to pass any separate order regarding this letter.

13. In the result, the petition is partly allowed. The impugned order regarding not taking the Petitioner on duty and not paying his salary is quashed. Subject to the observations made in the earlier part of the order, the Petitioner will be permitted to discharge his duties from the date he reports which will not be later than a month from today and in that case he will also be paid salary from August, 1990 as admissible to him. No order as to costs.