

THE HIGH COURT OF DELHI AT NEW DELHI

% Judgment delivered on: 06.09.2012

+ **W.P.(C) 6892/2000**

BINU BALA

... Petitioner

versus

UOI & ORS

... Respondents

Advocates who appeared in this case:

For the Petitioner : Ms Beenashaw Soni, Adv. with the petitioner –in- person.

For the Respondent : Mr Ravi Sikri, Adv. with Mr Vaibhav Kalra, Adv.

CORAM:-

HON'BLE MR JUSTICE BADAR DURREZ AHMED

HON'BLE MR JUSTICE SIDDHARTH MRIDUL

JUDGMENT

BADAR DURREZ AHMED, J (ORAL)

1. This writ petition is directed against the order dated 16.11.1999 passed by the Central Administrative Tribunal, Principal Bench, New Delhi, in O.A. No. 150/96. By virtue of the impugned order, the petitioner's said Original Application had been rejected. The petitioner had filed the said Original Application being aggrieved by the order of removal from service passed by the Disciplinary Authority pursuant to the departmental proceedings.

2. The facts leading up to the filing of the present writ petition are as follows:-

2.1 The petitioner joined the Department of Telecommunication, Delhi, in 1982 as a Telephone Operator. The petitioner was initially sanctioned

maternity leave for the duration 02.08.1989 till 30.11.1989. This was further extended from time to time up to 30.11.1990. By a letter dated 05.12.1990 the petitioner applied for earned leave for the duration 01.12.1990 to 28.02.1991. The respondent, however, did not grant any sanction insofar as this period was concerned. On the contrary, it sent a letter dated 07.12.1990 to the petitioner stating that if the petitioner required more leave, she should send a medical certificate of a Government Hospital. It was also stated that if the petitioner was unable to send the medical certificate, her leave would be treated as *dies non*.

2.2 It is an admitted position that the petitioner did not send any medical certificate in response to the said letter dated 07.12.1990. As a result, her application for leave for the duration 01.12.1990 to 28.02.1991 was not allowed.

2.3 It is the case of the petitioner that she could not send any medical certificate inasmuch as she was not asking for leave on the basis of the illness of any individual in her family but on account of the fact that her son who had been born prematurely required special care and attention and there was nobody else to look after the small baby inasmuch as her husband was on a touring job. It is for this reason that she was seeking extension of her leave and not on account of any ailments on her part or on the part of her other family members. Consequently, she could not submit any medical certificate.

2.4 It is also the case of the petitioner that she sent further leave applications through her neighbor Smt. Rajni Kohli who had also deposed as DW-1 before the Inquiry Officer. However, there is no record of any such leave application available with the respondent, although, Smt Rajni Kohli in her deposition had clearly stated that on more than one occasion she had carried the leave applications of the petitioner and submitted the same to the respondent. The first application, that is, the one dated 05.12.1990 was also sent through Smt. Rajni Kohli and the same was admittedly on record. Thus, according to the learned counsel for the petitioner there was no reason as to why the other applications were not also submitted by Smt. Rajni Kohli. She also pointed out that Smt. Rajni Kohli was also working in the same office.

2.5 Thereafter, on 13.06.1991 a memorandum was issued to the petitioner informing the latter that the respondent (MTNL) had proposed to hold an inquiry against her under Rule 14 of the CCS (CCA) Rules, 1965. The substance of the imputation of misconduct/misbehavior in respect of which the inquiry was proposed to be held was set out in the enclosed statement of articles of charge (Annexure-I). A statement of the imputation of misconduct/misbehavior in support of the article of charge was also enclosed thereto (Annexure-II).

2.6 The Article of charge was as under:-

“Article-1

“Smt. Binu Bala T.O. No. 9690, S.No._____ while functioning in that capacity in CTX/ND has committed an act of gross misconduct in as much as she remained on unauthorized absence from 1.12.90 to 14.4.91 without prior

applications and proper sanction. She failed to cover her absence by proper applications or submitted them very late.

Smt. Binu Bala, has thus contravened the provisions contained in paras 62 & 162 of P&T Man. Vol.III.

As above, she has failed to maintain devotion to duty and has acted in a manner unbecoming of a Govt. Servant.

Smt. Binu Bala, is therefore, charged for violation of Rule 3 (1) (ii) & (iii) of CCS (Conduct) Rules, 1964”

It is clear from the above that the petitioner was charged for violation of Rule 3 (1) (ii) & (iii) of the CCS (Conduct) Rules, 1964. The relevant portion of the said rule 3 reads as under:-

“3. General

- (1) Every Government servant shall at all times –
 - (i) maintain absolute integrity;
 - (ii) maintain devotion to duty; and
 - (iii) do nothing which is unbecoming of a Government servant.
- (2) xxx xxx xxx xxx”

Essentially the charge against the petitioner was that she was unauthorisedly absent from duty for the period 01.12.1990 to 14.04.1991 as a result of which she failed to maintain devotion to duty and her conduct was unbecoming of a government servant.

2.7 On the first date of hearing before the Inquiry Officer i.e. on 23.09.1991, the Presenting Officer submitted two documents for being taken on record. Those two documents were as under:-

“Ext. S-1 P/File No. Q-2910/9690 in respect of Smt. Binu Bala Maintained by AEP (A) TMX.

Ext. S-2 PB-File No. PB-I/9690 in respect of Smt. Binu Bala maintained by AO (LD).”

The record of the hearing conducted on that date (i.e., 23.09.1991) also indicates that the prosecution did not produce any witnesses and that the prosecution had closed its case. On the other hand, the petitioner requested for examination of Smt. Rajni Kohli as a witness from her side and her examination was completed.

2.8 The inquiry proceedings culminated in the report of the Inquiry Officer dated 24.10.1991. It is interesting to note that in paragraph 6.3 of the Inquiry Report, the Inquiry Officer has observed that the reasons for the absence of the petitioner “may be genuine” but the purpose of the Inquiry was not to establish the reasons for unauthorized absence but to find out whether she was absent under the orders of the authority competent to sanction leave. The Inquiry Officer also noted that the justification for absence was a separate issue and was to be looked into by the competent authority. The exact words used by the Inquiry Officer in his report dated 24.10.1991 were as under:

“6.3 It is true that the SPS may have sent her leave application thro’ her neighbor DW-1 and the leave application for period from 1.12.90 to 28.2.91 is available on record. However there is no application for the period from 1.3.91 to 14.4.91. The SPS seems to have tried to lay emphasis on the reasons for

absence. The reasons may be genuine. But the purpose of this Inquiry is not to establish the reasons for unauthorized absence but to find out whether she was absent under the orders of the authority competent to sanction leave. The justification for absence is a separate issue and is to be looked into by the competent authority.”

(underlining added)

2.9 Thus, the Inquiry Officer came to the conclusion that the charge of unauthorized absence from 01.12.1990 to 14.04.1991 against the petitioner was fully established. The findings of the Inquiry Officer were confirmed by the disciplinary authority who then imposed a penalty of removal from service by virtue of his order dated 09.10.1992. While doing so the disciplinary authority had observed that the petitioner had failed to maintain devotion to duty and had acted in a manner unbecoming of a Govt. Servant on account of her absence without any sanction for the period 01.12.1990 to 28.04.1991. Consequently, the said disciplinary authority concluded as under:-

“ The undersigned has studied the case as well as Inquiry Report in detail and found that the charged official attended the enquiry proceedings but neither she submitted her leave documents in time nor she got her leave sanctioned. She also did not respond to the official correspondence. Thus, it appears that Smt. Binu Bala TO-9690 is not interested in serving the department.”

And, thereupon, passed the said order of “*Removal from Service*”.

2.10 The petitioner being aggrieved by the said order of removal from service filed an Original Application being O.A. No. 721/1994 before the

Tribunal. That Original Application was disposed of by an order dated 19.04.1994 by holding the same to be not maintainable. However, the petitioner was granted liberty to file an appeal. Thereafter, the petitioner filed an appeal before the Appellate Authority on 01.05.1994. Since the appeal was not being heard and disposed of, the petitioner once again approached the Tribunal by filing the said Original Application 150/1996 sometime in 1996. Subsequent to the filing of the said Original Application before the Tribunal, the Appellate Authority passed the order dated 01.03.1996 whereby the petitioner's said appeal was rejected. It is only in the course of the hearing of OA No. 150/1996 that the petitioner came to know that her appeal had been rejected.

2.11 In normal circumstances, the Tribunal ought to have directed the petitioner to amend the said OA No. 150/1996 so as to bring the order of the Appellate Authority dated 01.03.1996 within the ambit of challenge. However, neither did the petitioner amend the said Original Application nor did the Tribunal direct the petitioner to do so. In any event, the Tribunal examined the matter on merits and rejected the plea raised by the petitioner. We may also point out that the Tribunal also felt that the said Original Application No. 150/1996 was barred by limitation.

3. In the backdrop of the facts narrated above, we do not see as to why, when the Appellate Authority passed the order on 01.03.1996, the said Original Application could be barred by limitation when, in fact, it had been filed even prior to the order dated 01.03.1996. The proper course of action

for the Tribunal ought to have been to direct the petitioner to amend the Original Application or permit the petitioner to withdraw the Original Application with liberty to file a fresh Original Application impugning the Appellate Authority's order dated 01.03.1996 also. Unfortunately this course was not adopted by the Tribunal.

4. We had contemplated on setting aside the impugned order on this aspect alone and on directing the petitioner to file a fresh Original Application before the Tribunal by including a challenge to the order dated 01.03.1996 passed by the Appellate Authority. But, we feel that such a course of action would not be in the interest of justice inasmuch as this writ petition has been pending in this court for over 12 years and the petitioner's said Original Application was filed way back in 1996. In other words, the petitioner had been seeking redressal for over 16 years. We, therefore, felt that it would be proper if we dealt with the matter in totality and that is why we have undertaken to examine the merits of the matter and to dispose it of on the basis of the rival contentions of the learned counsel for the parties on the merits of the matter.

5. The learned counsel for the petitioner had raised two points before us. The first point was that the Inquiry Officer had committed a grave error in exhibiting the two files mentioned above as Ex. S-1 and Ex. S-2 without any witness tendering those files. She submitted that because of this modality the petitioner was prevented from cross examining any witness in order to challenge the authenticity of the said files. She further submitted that the

entire case of the respondent rests on these two files. If these two files were not admissible, as contended by her, then there would be no case against the petitioner.

6. The second point urged by the learned counsel for the petitioner was that neither the Inquiry Officer nor the disciplinary authority nor even the Appellate Authority have returned any finding with regard to the absence of the petitioner being 'willful'. She submitted that unless and until there was a clear cut finding that the absence was willful, the petitioner could not have been found to be in violation of Rule 3 (1) (ii) (iii) of the CCS (Conduct) Rules, 1964. In support of this contention, the learned counsel for the petitioner placed reliance on the recent Supreme Court decision in the case of **Krushnakant B. Parmar v. Union of India & Anr – Civil Appeal No. 2106 of 2012** decided on 15.02.2012.

7. On the other hand, the learned counsel appearing on behalf of the respondent submitted that the petitioner had no explanation with regard to the fact that she was absent between 01.12.90 and 28.04.1991 without any sanctioned leave. Once this is established, then the case of the respondent stands proved. In other words, once it is established that an employee is absent without authorization, this would be sufficient to invoke Rule 3 (1) (ii) & (iii) of the CCS (Conduct) Rules, 1964 and consequently the employee would be liable to penalty. He also submitted that the order of removal passed by the disciplinary authority which has been confirmed by the Appellate Authority, cannot be considered to be so disproportionate as to

shock the conscience of the court. The learned counsel for the respondent also urged that the Tribunal was right in taking the view that the petitioner's said Original Application was barred by time.

8. Insofar as the point of limitation is concerned, we have already observed above that it was not proper on the part of the Tribunal to have returned the finding on limitation particularly when the Appellate Authority had passed an order after the filing of the Original Application. The Tribunal should have adopted one of the two modalities indicated by us above. However, since it did not do so, we feel that the petitioner ought not to be non-suited merely on the ground of limitation. It is for this reason, as we have already observed above, that we have examined merits of the matter.

9. We feel that the second point urged by the learned counsel for the petitioner clinches the issue in her favour. This is so because of the clear law laid down by the Supreme Court in the **Krushnakant B. Parmar** (*supra*). That was also a case wherein the provisions of Rule 3 (1) (ii) & (iii) of the CCS (Conduct) Rules, 1964 had been invoked. The Supreme Court observed as under:-

“15. In the case of appellant referring to unauthorized absence the disciplinary authority alleged that he failed to maintain devotion of duty and his behaviour was unbecoming of a Government servant.

16. The question whether unauthorized absence from duty amounts to failure of devotion to duty or behaviour unbecoming

of a Government servant cannot be decided without deciding the question whether absence is willful or because of compelling circumstances.

17. If the absence is the result of compelling circumstances under which it was not possible to report or perform duty, such absence can not be held to be willful.

18. Absence from duty without any application or prior permission may amount to unauthorized absence, but it does not always mean willful. There may be different eventualities due to which an employee may abstain from duty, including compelling circumstances beyond his control like illness, accident, hospitalization etc., but in such case the employee cannot be held guilty of failure of devotion to duty or behaviour unbecoming of a Government servant.

19. In a Departmental proceeding, if allegation of unauthorized absence from duty is made, the disciplinary authority is required to prove that the absence is willful, in absence of such finding, the absence will not amount to misconduct.

20. In the present case the Inquiry Officer on appreciation of evidence though held that the appellant was unauthorisedly absent from duty but failed to hold the absence is willful; the disciplinary authority as also the Appellate Authority, failed to appreciate the same and wrongly held the appellant guilty.”

(underlining added)

In the said decision the Supreme Court also observed in paragraph 22 of the said decision that the disciplinary authority had failed to prove that the absence from duty was willful. The Supreme Court also observed that no such finding had been given by the Inquiry Officer or the Appellate

Authority. Consequently, in the absence of any such finding, the Supreme Court was of the view that the impugned order of dismissal passed by the disciplinary authority, affirmed by the Appellate Authority, Central Administrative Tribunal and the High court could not be sustained in law and was therefore set aside. The appellate in that case was reinstated and the Supreme Court directed that the appellant be paid 50% of the back wages.

10. In the present case admittedly there is no finding, by any of the authorities below, recording that the absence of the petitioner from duty was willful. On the contrary, as we have noted above, the Inquiry Officer was of the view that the reasons for the petitioner's absence "*may be genuine*". However, the Inquiry officer observed that the purpose of inquiry was not to establish reasons of unauthorized absence but to find out whether she was absent under the orders of the authority competent to sanction leave. It is obvious that these observations of the Inquiry officer are clearly contrary to what the Supreme Court has held in **Krushnakant B. Parmar** (*supra*). The Supreme Court, categorically held that absence from duty without any application or prior permission may amount to unauthorized absence, but it does not always mean willful absence. There may be different eventualities due to which an employee may abstain from duty, including compelling circumstances beyond his/her control like illness, accident, hospitalization etc, and in such a case the employee cannot be held guilty of failure of devotion to duty or behavior unbecoming of a government servant. The Supreme court categorically directed that in a departmental proceeding, if the allegation of unauthorized absence from duty is made, the disciplinary

authority is required to prove that the absence is willful and if there is no such finding, the absence would not amount to misconduct. In the wake of this clear and categorical statement of the law by the Supreme Court in the **Krushnakant B. Parmar** (*supra*), since there is no finding that the absence of the petitioner was willful, the petitioner cannot be held guilty of misconduct. The fact that there is no such finding of the willful absence clearly indicates that the orders of the disciplinary authority as well as of the Appellate Authority are perverse.

11. We are also of the view that this case is clearly amenable to judicial review. Such is the position in law as observed by the Supreme Court in the case of **Krushnakant B. Parmar** (*supra*) while noticing an earlier decision of the Supreme Court in the case of **M.B. Bijlani v. Union of India & Ors:** (2006) 5 SCC 88.

12. Consequently, the impugned orders are set aside and the petitioner is directed to be reinstated. As in the case of **Krushnakant B. Parmar** (*supra*), we direct that the petitioner be given 50% back wages. The writ petition is allowed. There shall be no orders as to costs.

BADAR DURREZ AHMED, J

SEPTEMBER 06, 2012
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SIDDHARTH MRIDUL, J