

HIGH COURT OF CHHATTISGARH, BILASPUR

Writ Petition (S) No.4922 of 2010

Dr. N.S. Patel, S/o H.S. Patel, aged about 56 years,
Assistant Veterinary Surgeon, Veterinary Hospital,
Dongargarh, Distt. Rajnandgaon.

---- Petitioner

Versus

1. State of Chhattisgarh, Through its Secretary, Department of Agriculture and Animal Husbandry, Mantralay, D.K.S. Bhawan, Raipur, Distt. Raipur (C.G.)
2. Under Secretary, Department of Agriculture and Animal Husbandry, Mantralay, D.K.S. Bhawan, Raipur, Distt. Raipur (C.G.)
3. Director, Department of Animal Husbandry, Mantralay, D.K.S. Bhawan, Raipur (C.G.)

---- Respondents

For Petitioner:	Ms. Astha Shukla and Mr. Vaibhav Shukla, Advocates.
-----------------	---

For Respondents/State:	Mr. Dilman Rati Minj, Deputy G.A.
------------------------	-----------------------------------

Hon'ble Shri Justice Sanjay K. Agrawal

Order On Board

03/11/2015

1. The short question that arises for consideration in this writ petition is whether respondent No.1 is justified in declaring the period of absence of the petitioner as dies non without affording opportunity of hearing to him or without holding departmental enquiry against him?

2. Imperative facts necessary to answer the aforesaid question are as under: -

3. The petitioner who is Assistant Veterinary Surgeon proceeded on leave for three days by submitting application, on account of ill-health of his mother and thereafter, on expiry of three days, he applied for extension of leave but his leave application remained undecided and pending, and thereafter, he remained absent from 23-12-2003 to 26-7-2004 on account of ill-health of his mother. The petitioner made an application / representation for approval of leave, but again that application remained undecided leading to passing of the order dated 7-5-2005 holding that unauthorized absence of the petitioner for the aforesaid period is in breach of Rule 7 of the Chhattisgarh Civil Services (Conduct) Rules, 1965 and the period from 23-12-2003 to 26-7-2004 is declared dies non, and the application for leave made on 23-12-2003 was rejected. Questioning the said order declaring the period from 23-12-2003 to 26-7-2004, this writ petition has been filed by the petitioner stating inter alia that such an order which is punitive in nature has been passed without affording opportunity of hearing to the petitioner and that too without holding departmental enquiry as such, the same is unsustainable and bad in law.

4. The respondents/State have filed return taking stand that the petition suffers from delay and laches and the order dated 7-5-2005 is not punitive in nature and, therefore, the petitioner is not entitled for any relief and leave cannot be claimed as a matter of right, in view of the provisions contained in Rule 6 of the Chhattisgarh Civil Services (Leave) Rules, 1977.
5. Rejoinder has also been filed by the petitioner controverting the return.
6. Ms. Astha Shukla, learned counsel appearing for the petitioner, would vehemently submit that the outcome and effect of the order dated 7-5-2005 declaring the period of absence of the petitioner from 23-12-2003 to 26-7-2004 as dies non is that it will have an adverse impact on the service career of the petitioner and is punitive in nature in addition to the fact that he would not be entitled for salary, increment and pension for the said period and, therefore, the impugned order deserves to be set aside.
7. Mr. Dilman Rati Minj, learned Deputy Govt. Advocate for the State/respondents, would submit that the petition suffers from delay and laches as there is delay of 5 years in approaching this Court and the order is non-punitive in nature and as such, the petition deserves to be dismissed.

8. I have heard learned counsel for the parties, perused the order impugned and copies of other documents and also gone through the relevant provisions of law with utmost circumspection.
9. It is not in dispute that the petitioner remained absent from 23-12-2003 to 26-7-2004 for a period of 216 days. It is also not in dispute that the State Government by the order impugned declared the period of absence of the petitioner dies non for which he would not be entitled for salary, increment and pension.
10. Rule 7 of the Chhattisgarh Civil Services (Conduct) Rules, 1965, provides that no Government servant shall proceed on leave before it has been sanctioned provided that in a case of emergency the authority competent to sanction leave may for reasons to be recorded in writing accord *ex post facto* sanction for leave already availed of.
11. Rules 22 and 24 of the Chhattisgarh Civil Services (Leave) Rules, 1977, which speak about recall to duty before expiry of leave and absence after expiry of leave, provide as under: -

“22. Recall to duty before expiry of leave.-A

Government servant while on leave if recalled to duty before expiry of the leave, he shall be entitled:-

(a) If the leave from which he is recalled is in India, to be treated as on duty from the date on which he starts for the station to which he is ordered, and to draw: -

- (i) travelling allowances under rules made in this behalf for the journey; and
- (ii) leave salary, until he joins his post, at the same rate at which he would have drawn it but for recall to duty.

(b) If the leave from which he is recalled is out of India, to count the time spent on the voyage to India as duty for purposes of calculating leave, and to receive-

- (i) leave salary, during the voyage to India and for the period from the date of landing in India to the date of joining his post, at the same rate at which he would have drawn it but for recall to duty;
- (ii) a free passage to India;
- (iii) refund of his passage from India if he has not completed half the period of his leave by the date of leaving for India on recall, or three months, whichever is shorter;
- (iv) travelling allowance, under the rules for the time being in force, for travel from the place of landing in India to the place of duty.

24. Absence after expiry of leave.-(1)

Unless the authority competent to grant leave

extends the leave, 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.”

12. In the matter of **Ali Hussain Asgar Ali v. State of M.P. and another**¹, the M.P. High Court while dealing with Rule 24 of the Madhya Pradesh Leave Rules, 1977, held as under: -

“It is clear that sub-rule (1) provides that when a Government servant remains absent after expiry of leave he is entitled to no leave salary but it has been further provided that such period shall be debited against his leave account as though it were half pay leave to the extent such leave is due and the period in excess of such leave due being treated as extra-ordinary leave. Sub-rule (2) further provides that willful absence from duty after the expiry of leave renders a Government servant liable to disciplinary action. It is, therefore, clear that on the facts as they stand that the petitioner remained absent without the

1 1984 J LJ 67

have being sanctioned to him, and the only course open to the Government was either to act under sub-rule (1) or under sub-rule (2) of Rule 24. It could not be contended that the orders which were passed could be passed under sub-rule (1) and the learned Government Advocate could not refer to any rule which could justify an order as has been passed in this case, i.e. the order dated 21-7-1979. It is also not in dispute that if the State Government has chosen to act under sub-rule (2) of Rule 24, then it was necessary to follow the procedure of inquiry, which admittedly has not been done in this case. If it was chosen to act under sub-rule (2) then disciplinary action could only be taken after following the proper procedure. Admittedly, before passing of this order dated 21-7-1979 even a notice was not issued to the petitioner to pass such an order. It is, therefore, plain that this order which was passed by the State Government against the petitioner could not be justified under any of the rules framed under Article 309 of the Constitution of India.”

13. Similarly, in a decision rendered in the matter of **Battilal v. Union of India and others**², which appears to have been taken into consideration in earlier decisions, the High Court of Madhya Pradesh while considering the meaning of dies non pertinently held as under: -

² 2005 (3) MPHT 32 (DB)

“3.....When the Authority directs that the period will be treated 'dies-non', it means that continuity of service is maintained, but the period treated as 'dies-non' will not count for leave, salary, increment and pension. In fact, F.R. 54 (1) casts such a duty on the authority. It provides that when a Government servant who has been dismissed, removed or compulsorily retired is reinstated as a result of appeal or review, the authority competent, to order reinstatement shall consider and make a specific order-

(a) regarding the pay and allowances to be paid to the government servant for the period of his absence from duty including the period of suspension preceding his dismissal, removal or compulsory retirement, as the case may be; and

(b) whether or not the said period shall be treated as a period spent on duty.”

14. Thus, from perusal of the Rules and the law laid down by the Madhya Pradesh High Court in **Battilal's** case (supra), it would appear that to declare the period of absence from duty of a public servant in violation of Rule 7 of the Conduct Rules, 1965 and further to declare the period of absence as dies non are punitive order and it cannot be passed without proceeding departmentally in view of the

procedure laid down under the provisions of the Chhattisgarh Civil Services (Classification, Control and Appeal) Rules, 1966. In the case in hand, the State Government straightway passed the order holding the petitioner guilty of Rule 7 of the Conduct Rules, 1965 and declaring the period of absence as dies non without affording opportunity of hearing to him. The consequence would be, the order of the State Government dated 7-5-2005 becomes vulnerable and it is hereby quashed. However, liberty is reserved in favour of the respondent authorities to initiate departmental enquiry against the petitioner and proceed to take appropriate action against him in accordance with law and on its own merits.

15. The writ petition is allowed to the extent indicated herein-above. No order as to costs.

Sd/-
(Sanjay K. Agrawal)
Judge