THE HON'BLE SRI JUSTICE G.CHANDRAIAH
and
THE HON'BLE SRI JUSTICE U.DURGA PRASAD RAO

Writ Petition No.24811 of 2009

ORDER: *(Per Hon'ble Sri Justice U.Durga Prasad Rao)*

The writ petitioner seeks a direction in the nature of writ of Mandamus declaring the action of the 3rd respondent in imposing the penalty of compulsory retirement from service vide order dated 31.05.2007 which was confirmed by the 2nd respondent being appellate authority in his order dated 17.09.2007 and which was upheld by the Honourable Central Administrative Tribunal (for short "Tribunal") in its judgment dated 14.07.2009 in O.A.No.337 of 2008 as arbitrary, unjust, without application of mind and illegal and set aside the same and consequently direct the respondents to reinstate the petitioner into service as Senior Auditor in the office of 3rd respondent with all consequential benefits and further necessary orders in the interests of justice.

2a) The petitioner herein filed O.A.No.337 of 2008 against the present respondents. His case in brief is that he was appointed as Clerk under sports quota on 31.12.1987 and promoted as Auditor in the year 1990 and later as Senior Auditor in the year 1993 and he was working as such in the office of Accountant General, Audit-I, Hyderabad. While so, due to sickness of his mother and wife he applied Earned Leave from 29.07.2002 to 16.08.2002 prefixing and suffixing two days each and submitted to Assistant Audit Officer who duly recommended it and thereafter only the petitioner proceeded on leave. Due to requirement of his presence for a further period, he sought for extension of Earned Leave from 17.08.2002 to 23.08.2002 and HPL (Half Pay Leave) from 24.08.2002 to 30.08.2002 suffixing 31.08.2002 and 01.09.2002. Due to further requirement of his presence he extended leave from 31.08.2002 to 25.09.2002 on EOL (Extra Ordinary Leave) and again he extended EOL from 26.09.2002 till 04.11.2002 and on all those occasions he submitted leave applications through telegrams to the Supervisor. The grievance of the petitioner is that though the Supervisor has duly recommended his leave application to the higher authorities, the Deputy Account General (Administration), Hyderabad—4th respondent has deliberately kept them pending without sanctioning. However, the petitioner was on duty from 03.03.2003 to 11.03.2003 after submitting joining report which was accepted by the authorities. The 4th respondent having kept his applications pending without sanctioning issued charge sheet No.CO-ORDN.CELL/DC1/8-189/2002-2003/63 dated 05.12.2002 with the allegation that petitioner was unauthorisedly absent for duty from 29.07.2002 to 05.12.2002. The petitioner strongly denied the charges and explained that he proceeded on leave after submitting leave applications from time to time to his Supervisor to take care of his ailing mother and the authorities deliberately kept his applications pending. Though the enquiry officer held that the charge of lack of devotion to duty was not proved, the disciplinary authority in its order dated 21.07.2004 however found all the charges are proved and imposed penalty of reversion to the next cadre for two years without notice to the petitioner and the said order was confirmed by the appellate authority on his appeal.

b) The further case of the petitioner is that the 4th respondent again issued Memo No.PAG (AU)5/CO-ORDNCELL-DC/1/8-192/2003 and 04/87 dated 04.11.2003 with a similar charge of petitioner absenting himself from duty without proper sanction from 06.12.2002 to 04.11.2003. The petitioner denied the charge and submitted his explanation stating that he submitted leave application to the Supervisor and left the office to attend his ailing mother to his native place which was essential. The 3rd respondent acting as disciplinary authority by order dated 25.11.2004 appointed Sri T.Deena Dayal Babu, an Audit Officer as enquiry officer. The enquiry officer submitted his report which was accepted by the 3rd respondent and imposed penalty of compulsory retirement from service vide his order No.PAG(CA)1/COC/DC-1/8-192/2007-2008 dt:31.05.2007. The enquiry report was not supplied to the petitioner and he was not provided an opportunity to submit his representation against the findings of the enquiry officer. The petitioner was relieved from duty on 31.05.2007 pursuant to the order of punishment. Then the petitioner filed appeal on 24.07.2007 to the appellate authority—1st respondent stating that he was unable to attend the office duties as his presence was very much necessary with his ailing mother and wife and he also submitted leave applications along with medical certificates which were not rejected by the concerned authorities and hence his absence from duty was not willful or deliberate. However, the 1st respondent in his order No. PAG(CA)/CO-ordn.cell/DC-1/8-192/Vol.II/2007-08/3 dt:17.09.2007 has confirmed the penalty imposed. Hence the OA.

3a) In the OA his main averments are that the authorities without passing orders on his leave applications have misused the power and also in abuse of process of law issued charge sheet dated 04.11.2003 and terminated his service even though the allegation of misconduct was not proved. His applications for different types of leave EL, HPL, EOL were admittedly not rejected by the Supervisor and in fact forwarded to the leave sanctioning authority and that being the case, the decision of the 4th respondent to initiate disciplinary action is *mala fide* and discriminatory. His further case was that he had to apply for leave to attend his ailing mother but the act of respondents was hostile and inhuman.

b) The respondents contended before the Tribunal that the petitioner did not apply for leave prior to his proceeding on leave. His application for grant of EL for the period from 29.07.2002 to 16.08.2002 was received in the office on 16.08.2002 and the leave was recommended by the

Assistant Audit Officer under whose control the petitioner worked. Mere endorsement of recommendation by the recommendatory authority is not the criteria for sanction of leave. As per Rule 7(1) of CCS (Leave) Rules, 1972, leave cannot be claimed as a matter of right. Under the said rules leave may be refused or revoked by the sanctioning authority in exigencies of public service. In the instant case the leave sanctioning authority after taking into account various administrative reasons and past behavior of the petitioner of remaining absent for long spells and also administrative inconvenience could not sanction the leave. The respondents further contended that petitioner was not in the habit of returning back to duty on culmination of sanctioned leave and hence the decision of the authorities in not sanctioning leave was valid in the prevailing circumstances. He was in the habit of staying away from duty and later sending the leave applications for sanction and hence mere recommending leave is not criteria for sanctioning leave. The respondents admitted that the petitioner attended office on few occasions during the period between 27.05.2003 and 05.11.2003.

c) The respondents further contended that as per Government of India decision No.3 (iii) below Rule 25 of CCS (Leave) Rules, Government servant who was absent unauthorizedly may be taken back to duty if he has not been placed under suspension as such, the petitioner was allowed to joint duty. But again he was absent from duty from 29.07.2002 to 05.12.2002 and later forwarded leave application for sanction. However, his leave was not sanctioned by the competent authority. Recall memos dated 19.08.2002, 28.08.2002 and 09.09.2002 were issued to the petitioner but he did not report to duty as such, a charge memo dated 05.12.2002 was issued. After acknowledging receipt of charge memo the petitioner reported to duty on 07.01.2003 and submitted written statement of defense wherein he again stated that he could not attend the office due to mother's ailment. For his earlier unauthorized absence he received penalty order vide office order No.20 dated 11.07.2002 imposing penalty of withholding next two increments for two years without cumulative effect. On another occasion, on the report of enquiry officer the petitioner was imposed penalty of reduction to the lower post of Auditor with immediate effect and restored to higher post of Senior Auditor after two years by office order No.58 dated 21.07.2004 and the period of his absence in the various spells treated as *dies non* for all purposes.

d) The respondents further contended that the present instance of his absence in various spells between 06.12.2002 and 04.11.2003 is concerned, the petitioner was issued charge sheet under Rule 14 of CCS (CCA) Rules vide memo dated 04.11.2003. Again he stayed away from duty during the period from 06.11.2003 to 12.12.2003; 24.12.2003 to 31.12.2003 and 04.04.2004 to 12.04.2004. As he did not submit written defense to the charge memo dated 04.11.2003, a memo dated 07.04.2003 was issued directing him to report duty and submit his explanation and accordingly he reported to duty on 13.04.2004 and submitted his statement of defense. The disciplinary authority having not convinced with his explanation, ordered for enquiry by appointing enquiry officer and presenting officer. The enquiry officer submitted his report on 01.09.2005 and forwarded copy to the petitioner on 12.09.2005 and he acknowledged the same. The disciplinary authority having considered the report and other record, imposed penalty of compulsory retirement from serve by order dated 31.05.2007. Aggrieved, he preferred appeal and appellate authority after perusing all the records pertaining to disciplinary case, held that penalty imposed by the disciplinary authority was adequate and accordingly rejected the appeal vide its order dated 17.09.2007.

e) The respondents vehemently contended that the petitioner could not establish the fact that he frequently moved his mother for treatment from Mangalagiri to Guntur and he thus failed to prove that his frequent absence was due to ill-health of his mother.

f) Learned Tribunal having considered the respective contentions of both parties and also considering the facts that the petitioner on earlier three occasions was penalized for his unauthorized absence for different spells and in the instant case except on two occasions the petitioner remained absent for 14 times for the reasons other than his mother’s illness, observed that his absence had to be treated as willful absence and further, he mostly applied for leave after availing the leave he went on unauthorized leave. The Tribunal held it was not a case where its interference was called for in any manner and accordingly dismissed the OA.

Hence the instant writ petition.

4) Heard arguments of Sri K.Venkateswara Rao—party-in-person and Sri B.Narasimha Sarma, learned Counsel for respondents.

5 a) Impugning the order, the petitioner argued that sofaras charged period of absence from 06.12.2002 to 31.10.2003 is concerned, he submitted leave applications in advance and the Supervisor also recommended for sanction of leave, but the 4th respondent without sanctioning them kept those applications pending and issued the charge sheet as if he was unauthorizedly absent for the relevant period without obtaining sanction of the leave, got conducted enquiry and obtained a report from the enquiry officer and thereafter, the 3rd respondent passed an order imposing punishment of compulsory retirement from service. He argued that while imposing punishment the authorities have taken the past absence of the petitioner but in fact for his past absence he was already imposed punishment and therefore, such past instances cannot be taken into consideration. The present instance is concerned, he already submitted leave applications and got recommended by Supervisor and

therefore the authorities should not have issued charge sheet for his absence as his absence cannot be treated as unauthorized absence.

b) Finally, he submitted that at any rate, punishment of compulsory retirement from service is a harsh one in view of the facts that he was appointed in sports quota and sometimes he participated in chess competitions and brought laurels to the department and his absence if any was only due to ill-health of his mother and also the ill-health of his wife as she has been suffering from failure of kidneys and in those circumstances he applied for leave in different spells and remained absent from duty which was not unauthorized absence and therefore the order of Tribunal confirming the punishment imposed by the respondent authorities may be set aside.

6) In oppugnation, while supporting the order in OA, learned counsel for respondents argued that the conduct of the petitioner is such that he is a habitual unauthorized absentee for which he was imposed different types of punishments previously on three occasions and the present one is the 4th instance in which he unauthorizedly absent from duty from 06.12.2002 to 31.10.2003. A charge memo was issued and enquiry officer was appointed who conducted enquiry and found that the charges levelled against the petitioner were substantiated and thereupon the disciplinary authority having regard to the unauthorized absence of the

petitioner and also having regard to his past conduct, imposed the penalty of compulsory retirement from service which was just and legal by all means and the appellate authority also confirmed the same and having found the legality of punishment, learned Tribunal dismissed the OA filed by the petitioner and therefore the writ petition may be dismissed. He vehemently argued that willful absence from duty amounts to misconduct and therefore, the penalty of removal from service cannot be interfered. On this aspect he relied upon the following decisions:

1. ***L & T Komatsu Ltd. vs. N. Udaya Kumar*** [1]
2. ***New India Assurance Co. Ltd. vs. Vipin Behari Lal Srivastava*** [2]

7) In the light of above rival arguments, the point for determination is:

"*Whether there are merits in the writ petition to allow*?"

8) **POINT**: A perusal of the order dated 31.05.2007 of Principal Accountant General, Andhra Pradesh, Hyderabad shows that the authorities have taken into consideration the past conduct of the petitioner i.e. his unauthorized absence in the past and imposing punishment and also his absence in the present instance between 06.12.2002 and 31.10.2003 (total 281 days) in different spells and imposed penalty of compulsory retirement from service. This order was confirmed by the appellate authority and upheld by learned Tribunal. We

have perused the record which would show that sofaras absence in the present instance between 06.12.2002 and 31.10.2003 in different spells is concerned, it appears, he submitted leave applications. On two occasions he mentioned the reason for leave was due to illness of his mother and on other occasions he submitted that the leave was for other reasons. The order dated 31.05.2007 shows that leaves applied by the petitioner were not sanctioned by the competent authority. So, in our view, it is not a case where in all instances of his absence, he absented from duty at first and then after joining duty only he applied for leave. The order dated 31.05.2007 does not read so. Therefore, it can be construed that he submitted leave applications which were recommended by the Supervisor and later they were refused. In that view of the matter and also in view of the fact that for his past absence, he was already sufficiently punished, the imposition of penalty of compulsory retirement from service, in our considered view, is disproportionate to the charges levelled and established against him. It is true in the cited decisions it was observed that unauthorized absenteeism would amount to misconduct and thereby the authorities can impose punishment of dismissal from service. There is no demur in the principle laid down by the Apex Court in the cited decisions. However, each case has to be viewed in the light of background facts. The record shows the petitioner was appointed under sports quota and sometimes he participated in chess competitions and brought laurels to the department.

His submission is that unfortunately his mother fell sick due to old age and his wife, who is a State Government employee also fell sick due to failure of kidneys and he has to look after them and for that reason he had to apply frequent leaves. Though the petitioner cannot claim impunity for his absenteeism on the above grounds, still in our considered view the authorities should have shown sympathy in the matter of imposing punishment.

9) In these circumstances, having found the punishment of compulsory retirement from service imposed by the authorities as harsh and disproportionate to the charge, we feel that ends of justice would be met if the petitioner is directed to make a representation to the concerned authorities to consider his case and upon his submitting such application, direct the authorities to pass suitable orders.

10) Accordingly, we direct the petitioner to make a representation to the concerned authorities to consider his case within eight (8) weeks from the date of this order and upon making such application the authorities shall pass suitable orders within eight (8) weeks thereafter.

11) In the result, this writ petition is accordingly disposed of. No costs.

As a sequel, miscellaneous petitions pending, if any, shall stand closed.

G.CHANDRAIAH, J

U.DURGA PRASAD RAO, J

Dt: 04.04.2016

Murthy

Note: Issue C.C by Monday

(b/o)

Murthy

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[1] (2008) 1 SCC 224

[2] (2008) 3 SCC 446