

**IN THE HIGH COURT OF PUNJAB AND HARYANA AT
CHANDIGARH**

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**RSA No. 4970 of 2010 (O&M)
Date of decision: 20.12.2016**

Prem Kumar

....Appellant

Versus

FCI and others

.... Respondents

CORAM: Hon'ble Mr. Justice P.B. Bajanthri

Present: Mr. Satyavir Singh Yadav, Advocate for the appellant.

Mr. K.K.Gupta, Advocate for the respondents.

P.B. Bajanthri, J. (Oral)

In the instant appeal, the appellant has questioned the validity of the orders of the trial court dated 14.11.2007 and appellate court dated 18.09.2010.

2. The appellant while working as an Assistant Grade II (Accounts) for remaining unauthorized absent and so also for disobeying the order of transfer, he was subjected to disciplinary proceeding. In the disciplinary proceeding, appellant failed to submit his reply to the charge memo. Consequently, the disciplinary authority proceeded to impose the penalty of termination from service while invoking Section 63(ii) of Food Corporation of India (Staff) Regulations, 1971 (for short Regulations, 1971) w.e.f.

11.03.1998.

3. Feeling aggrieved by the order of termination the appellant filed a suit for declaration to the effect of order dated 08.11.1999 relating to termination of his services. The trial court after examining the records and conduct of the appellant that he remained absent from time to time in the year 1996, 1997 and 1998 on several occasions' and his disobedience of transfer order. Thus, the trial court after examining the records as well as evidence upheld the order of termination. Still aggrieved by the trial court's order dated 14.11.2007 he preferred an appeal before the appellate court. The appellate court confirmed the order of the trial court on 18.09.2010. Thus, the present appeal has been presented.

4. Learned counsel for the appellant submitted that the appellant had been terminated from service without adhering to provisions of the Regulations, 1971. Appellant remained absent as he was suffering from illness. To that extent he had submitted leave application while enclosing the medical certificates. The same has not been taken note of by the disciplinary authority by holding enquiry as provided in the Regulations, 1971. It was further pointed out by learned counsel for the appellant that the disciplinary authority is required to follow the Regulation 58 (5)(b) that even an employee, if he does not submit his reply to the article of charges it was bounden duty of the disciplinary authority to inquire into the article of charges or appoint Inquiring Officer as per Sub-Regulation (2) of Regulation 58 for the purpose of holding the enquiry. The same has not been complied. It was further contended that Regulations 63(ii) and 58(20)

have not been complied. Therefore, order of termination, orders of trial court and appellate court are liable to be set aside.

5. On the other hand, learned counsel for the respondents vehemently contended that admittedly, appellant remained unauthorized absent as is evident from the first charge that he remained absent during the years 1996, 1997 and 1998 for about 1200 days. Further it was contended that having regard to the conduct of the appellant that he failed to submit his reply to the charge memo therefore, the disciplinary authority proceeded to pass order of termination on the score that appellant has abandoned services. The contention of the appellant that there is non-compliance of Regulations, 1971 may not be correct for the reasons that when the appellant has not coordinated in submitting his reply to the charge memo therefore, rightly, the disciplinary authority proceeded to impose the penalty of termination under the Regulations, 1971. The action of the disciplinary authority has been appreciated by both the courts below. Accordingly, they have rejected the suit and appeal filed by the appellant. Hence no interference is called for. In support of the order of termination learned counsel for the respondent relied on following decisions:-

- 1) 2000(2) CLR 472 titled as ***Syndicate Bank versus The General Secretary, Syndicate Bank Staff Association and another.***
- 2) 2001(1)CLR 468 titled as ***Punjab and Sind Bank versus Sakattar Singh.***

To highlight the conduct of the appellant that he remained absent and abandoned services in such circumstances, the disciplinary authority

can proceed for imposing penalty. Therefore, there is no infirmity in the impugned action of termination.

6. Heard learned counsel for the parties.

7. Before dealing with the contentions of the parties it is necessary to examine the relevant Regulations, 1971. For the purpose of deciding the present case, it is necessary to extract the relevant Regulations which reads as under:-

“58(1) No order imposing any of the penalties specified in clauses (v) to (ix) of Regulation 54 shall be made except after an inquiry held; as far as may be, in the manner provided in this regulation and Regulation 59, or in the manner provided by the Public Servants (Inquiries) Act, 1850 (37 of 1850), where such inquiry is held under that Act.”

58(5)(b) If no written statement of defense is submitted by the employee, the disciplinary authority may itself inquire into the articles of charge or may if it considers it necessary to do so, appoint under Sub-regulation (2), an inquiring authority for the purpose.

(20) *If the employee to whom a copy of the articles of charge has been delivered, does not submit the written statement of defence on or before the date specified for the purpose or does not appear in person before the inquiring authority or otherwise fails or refuses to comply with the provisions of this regulation, the inquiring authority may hold the inquiry ex-parte.*

63. *Special procedure in certain cases: Notwithstanding anything contained in Regulation 58 to Regulation 62:*

(ii) where the disciplinary authority is satisfied for reasons to be recorded by it in writing that it is

not reasonably practicable to hold an inquiry in the manner provided in these regulations”

Perusal of the above provisions of the Regulations it is evident that the disciplinary authority is required to follow the procedure for the purpose of imposing major penalty. No doubt the respondents have proceeded to initiate disciplinary proceedings by framing two charges for imposition of major penalty. The appellant failed to furnish his reply to charge memo. Consequently, it was bounden duty of the disciplinary authority to adopt Regulation 58(5)(b) which provides for even if an employee failed to submit his reply to the charge memo the disciplinary authority is required to hold inquiry himself or to appoint an Inquiring officer under sub Regulation (2) of Regulation 58. Whereas Sub-Regulation (20) is concerned is applicable where an employee failed to submit his reply and failed to appear before the inquiring authority. Aforesaid sub-regulation is not applicable to the present case for the reasons that no enquiry has been held. Insofar as Regulation 63(ii) is concerned, perusal of the termination order does not disclose satisfied reasons by the disciplinary authority so as to impracticability to hold the enquiry in the manner provided in the Regulations. When Regulation 58(5)(b) provides for holding of ex-parte inquiry Regulation 63(ii) is not relevant for the purpose of the present case. Having regard to the conduct of the appellant and the fact that charge memo has been issued learned counsel for the respondent submitted that the word used in 58(5)(b) that it is a discretion of the disciplinary authority either to hold an inquiry himself or to appoint Inquiring Officer for the purpose of

holding the inquiry is not mandatory as the word used is 'may' therefore, discretionary power has been exercised by the disciplinary authority to not to hold the inquiry and proceed to pass punishment order. If the word 'may' discretionary power is vested with the disciplinary authority, the same shall be reflected in the order of termination that disciplinary authority is dispensing inquiry. In the order of termination, no reasons have been assigned relating to impracticability of holding the enquiry. Therefore, it is necessary to reproduce the order of termination which reads as under:-

“No. A/1(2335)/76/5622

dated 08.11.1999

ORDER

Whereas Shri Prem Kumar, AG-II (A/Cs) (DOB 2.4.1955) s/o Sh. Hari Singh residence of village Raghunath Pura, P.O. Hamidpur, District Narnail, Haryana, while working as Assistant Garde-II(A/Cs) at Pay Office, Faridabad under District Office Gurgaon and transferred to Regional Office, Haryana, Chandigarh and relieved on 15.06.1998 from Pay Office, Faridabad for FCI RO Haryana, Chandigarh vide SRM, FCI Haryana order No. A/1(2335)/76/9242, dated 11.06.98, has been wilfully absenting from his duties since 11.3.98. In view of his prolonged unauthorized absence from duty, he was directed through various communication to resume duties immediately, but he was neither reported for duty nor has be intimated about his whereabouts.

He was further directed through “Press Notices” published on 20.9.99 and 21.9.99 to resume duties within 15 days from the dates of publication of “Press Notice”, it was mentioned in the notice that failing which it will be presumed that he is no longer interest to serve in the FCI

and has abandoned the same at his own will and his name will be struck off from the rolls of the FCI from the date of his unauthorized absence from duty in terms of Provision enshrined in Regulation 63(ii) of FCI (Staff) Regulations, 1971 and will have no claim or right whatsoever for service in the Corporation thereafter.

As the said Sh. Prem Kumar, Assistant Grade-II (A/Cs) did not report for duty in response to various communication of this office as well as the Press Notices dated 20.09.99 and 21.09.99 after careful consideration, I order "termination of the services of said Sh. Prem Kumar, A.G.II(A/Cs), by invoking Regulations 63(ii) of FCI (Staff) Regulations, 1971 with effect from 11.3.98 and order to strike off his name from the rolls of the Corporation.

(DHANPAT SINGH)
SENIOR REGIONAL MANR."

Perusal of the order of termination it is evident that order of termination has been passed without holding an inquiry and that too it has been given from the retrospective date i.e. w.e.f. 11.03.1998. Regulations, 1971 do not provides for imposing penalty with retrospective effect. Therefore, even on this count, the order of termination is liable to be set aside.

8. Respondents relied on Supreme Court's decision that if an employee remained unauthorized absent and abandoned from service the action of the termination by the disciplinary authority should not be interfered is very much acceptable principle. At the same time, when the disciplinary authority is dealing with misconduct of an employee and it is governed by the regulations in the present case Regulations 1971.

Disciplinary authority having regard to invoke Regulations, 1971 while framing charges is bound by the Regulation from the inception i.e. framing of charge till imposition of penalty. He cannot by-pass the regulation or choose short circuit method. Had the disciplinary authority not invoked any provision for the purpose of issuing charge memo and straightaway passed a termination order stating that the employee has abandoned services. In such circumstances, the Supreme Court case cited by the respondents would be applicable. Therefore, decisions cited by the respondents do not assist to the present case. Supreme Court in the case of ***Nair Service Society versus Dr. T. Bheermasthan and others*** reported in (2009) 5 SCC held as under:-

“47. *This Court in Nair Service Society v. Kerala Public Service Commission (SCC para 22) had the occasion to examine the Rules, the ranked merit list and the supplementary reserved list prepared by the Commission, and the principles followed by the Commission in making the appointments. This Court observed as follows:(SCC pp21-22, para 22)*

"22....Based on the procedure so prescribed, KPSC prescribes the ranked merit list in the order of merit. The candidates are arranged strictly according to merit and are not arranged according to community or caste or group or according to the cycle of rotation, in reservation. The number of candidates to be included in this rank list is filed with reference to some principles followed by them, which are explained in para 4 of KPSC's writ appeal before the High Court (pp. 102-103). The candidates are advised for appointment as and when vacancies are reported,

but following the rules of reservation and rotation prescribed in Rules 14 to 17 of KSSR".

9. Having regard to the Regulation No. 58(5)(b) of Regulation, 1971 the cited decisions of the Supreme Court by the respondents is distinguishable. In view of the above facts and circumstances, order of termination, orders of the trial and appellate court are set aside.

10. The disciplinary authority is directed to comply provisions of Regulations, 1971 from the defective stage and proceed to complete the inquiry within a period of 6 months from today in accordance with Regulations, 1971. The appellant has been terminated from service on 08.11.1999. Now order is being set aside on the technicalities that the respondents have not followed the Regulations, 1971 before order of termination. Therefore, the appellant is deemed to be under suspension from 08.11.1999 till passing of a fresh order in view of the Supreme Court decision titled as ***Managing Director ECIL versus B. Karunakar*** reported in 1994 SCC Supl. (2) 391, wherein it is held that if the order of termination or disciplinary authority is set aside on technical ground in such circumstances, employee is deemed to be under suspension. Thus for the purpose of completion of disciplinary proceedings the appellant is deemed to be under suspension till date of his retirement or till passing of fresh order in disciplinary proceedings.

11. In view of the legal position the respondents are directed to pay subsistence allowance from 08.11.1999 till the date of his retirement. Subsistence allowance shall be calculated and disbursed within a period of 4

months from today.

12. Appeal stands allowed.

20.12.2016

pooja saini

(P.B.BAJANTHRI)
JUDGE

Whether speaking/reasons

Yes/No

Whether Reportable:

Yes/No