

HIGH COURT OF CHHATTISGARH, BILASPURWrit Petition (Art. 227) No.2668 of 2008

Vijay Kumar Mali (died) through his legal heirs.

- i. Kevra Bai, W/o Late Vijay Kumar Mali, aged about 48 years, R/o Nayapara, Bemetara, District Bemetara (C.G.) at present R/o Sardar Patel Ward in front of Post Office Mungeli, District Mungeli (C.G.)
- ii. Ashish Kumar Mali, S/o Late Vijay Kumar Mali, aged about 24 years.
- iii. Avinash Mali, S/o Late Vijay Kumar Mali, aged about 20 years.

All R/o Nayapara, Bemetara, District Bemetara (C.G.) at present R/o Sardar Patel Ward in front of Post Office Mungeli, District Mungeli (C.G.)

---- Petitioners

Versus

1. State of Chhattisgarh, through the Additional Secretary, Department of Revenue and Aapda Prabandhan, D.K.S. Bhavan, Raipur (C.G.)
2. The Collector, District Durg (C.G.)
3. The Tahsildar, Tahsil Nawagarh, District Durg (C.G.)

---- Respondents

For Petitioner:	Mr. B.D. Badgayan, Advocate.
For Respondents/State:	Mr. Shashank Thakur, Govt. Advocate.

Hon'ble Shri Justice Sanjay K. Agrawal

Order On Board

18/07/2017

1. The original petitioner (Vijay Kumar) was working, at relevant point of time, as Assistant Grade-III in Tahsil Office, Nawagarh. He was charge-sheeted on 29-8-2000 on the charge that he remained absent from his duty from 1-11-1999 which is misconduct under

Rule 3 of the Madhya Pradesh Civil Services (Conduct) Rules, 1965, and which he replied suitably but upon ex parte enquiry, the competent authority by order dated 30-4-2002 terminated him under Rule 10 (8) of the Chhattisgarh Civil Services (Classification, Control and Appeal) Rules, 1966 (for short, 'the Rules of 1966') finding that he remained absent with effect from 1-11-1999 against which he preferred appeal and the appeal too was dismissed by the impugned order by the State Government against which this writ petition has been preferred.

2. Learned counsel for the petitioners would submit that the punishment imposed upon the original petitioner for remaining absent from 1-11-1999 till framing of charge is shockingly high and it is not commensurate with the misconduct alleged to have been proved.
3. On the other hand, learned State counsel would support the impugned order.
4. I have heard learned counsel for the parties and perused the material available on record with utmost circumspection.
5. It is not in dispute that the original petitioner was served with charge-sheet and enquiry was conducted in accordance with the Rules of 1966 only over the charge that he remained absent with effect from 1-11-1999 and no period of absence was specified as the charge-sheet was served on 29-8-2000. The original petitioner filed reply but thereafter remained ex parte, rather sought permission from the employer for remaining absent. By the order

of the Collector finding his misconduct of unauthorised absence having been proved, he was imposed with the penalty of termination from service and the period absent was declared as *dies non*. The appellate authority also in appeal held that the only charge against the original petitioner is for remaining unauthorised absence.

6. The question is whether the learned disciplinary authority is justified in imposing the punishment of removal from service for remaining unauthorised absence of one year from 1-11-1999 till the date of filing of charge i.e. 29-8-2000.
7. In above connection reference may be made to a decision of the Supreme Court in the matter of **Krushnakant B. Parmar v. Union of India & Anr.**¹ Their Lordships of the Supreme Court have held that in a departmental enquiry, 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. Their Lordships further held that absence from duty without any application or prior permission may amount to unauthorized absence, but it would not be willful. Paragraphs 17 and 18 of the report read as follows: -

“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

¹ 2012 AIR SCW 1633

beyond his control like illness, accident, hospitalisation, etc., but in such case the employee cannot be held guilty of failure of devotion to duty or behaviour unbecoming of a Government servant.”

8. Similarly, in the matter of **Chhel Singh v. M.G.B. Gramin Bank Pali, and Ors.**², the Supreme Court has held that in order to hold a person guilty for unauthorized absence from duty, the unauthorized absence from duty must be willful and deliberate. In paragraph 15 of the report, Their Lordships of the Supreme Court observed as under: -

“15. ... There was no allegation that the appellant’s unauthorized absence from duty was willful and deliberate. The Inquiry Officer has also not held that appellant’s absence from duty was willful and deliberate. It is neither case of the Disciplinary Authority nor the Inquiry Officer that the medical reports submitted by the appellant were forged or fabricated or obtained for any consideration though he was not ill during the said period. In absence of such evidence and finding, it was not open to the Inquiry Officer or the Disciplinary Authority to disbelieve the medical certificates issued by the doctors without any valid reason and on the ground of 24 days delay.”

9. In the matter of **Ahmedabad Municipal Transport Service v. Dashrathbhai Balubhai Brahmakshatriya**³, the Gujarat High Court has held that notwithstanding the past record of similar misconduct, once the Tribunal came to the conclusion that there was justifiable cause for the unauthorized absence for which charge-sheet was served and penalty was imposed, the post record of unauthorized absence would lose its significance.

10. If the facts of the present case are examined in the light of the judgments of the Supreme Court and the Gujarat High Court, it

2 2014 AIR SCW 6539

3 1996 II L.L.J. 544

would appear that even there was no charges levelled against the original petitioner that his unauthorized absence is deliberate and willful and no finding has been recorded by the disciplinary authority while passing the order dated 30-4-2002, whereas the petitioner has stated that in absence period he was critically ill and was suffering from schizophrenia but that has not been considered, though he had duly intimated the fact of his illness to his employer. In absence of charge having been framed that unauthorised absence of the petitioner is willful and deliberate and no finding having been recorded that absence of the petitioner from 1-11-1999 was willful and deliberate, particularly when explanation has been offered by the petitioner for his absence on account of his illness, the order of termination inflicted by the disciplinary authority is unsustainable and bad in law and is in teeth of the decisions rendered by the Supreme Court in the matters of **Krushnakant B. Parmar v. Union of India and another**⁴ and **Chhel Singh v. M.G.B. Gramin Bank Pali, and others**⁵, as the Supreme Court in **Chhel Singh** (supra) for absence of 10 and ½ months held that since there is no allegation that the workman's unauthorized absence from duty was willful and deliberate, Their Lordships were pleased to direct reinstatement by interfering with the order passed by the High Court.

11. As a fallout and consequence of the above discussion, the order of termination passed by the Collector and affirmed by the appellate authority are hereby set aside.

4 2012 AIR SCW 1633

5 2014 AIR SCW 6539

12. The original petitioner has also prayed for consequential benefits.

The impugned order was passed on 7-12-2007. The petitioner has neither averred in the writ petition nor brought any material on record to hold that during this period i.e. from 1-11-1999 to 29-8-2000, he was not gainfully employed anywhere. The normal rule is, a workman whose service has been illegally terminated would be entitled to full back-wages except to the extent during the enforced idleness. (See **M/s. Hindustan Tin Works Pvt. Ltd. v. The Employees of M/s. Hindustan Tin Works Pvt. Ltd. and others**⁶.)

Thereafter, in the matter of **M/s. Reetu Marbles v. Prabhakant Shukla**⁷, Their Lordships of the Supreme Court have emphasized the need for enquiry/material with regard to gainful employment before directing full back-wages particularly when the award is being modified and Their Lordships awarded only 50% of back-wages from the date of termination of service till reinstatement. Following the law laid down in this regard and considering the facts and circumstances of the case, I deem it appropriate to award only 50% back-wages to the original petitioner from the date of termination till the date of his retirement or till the date of his death whichever is earlier. Since the original petitioner has died, his legal representatives will be entitled for those back-wages.

13. The writ petition is allowed to the extent indicated herein-above.

No order as to cost(s).

Sd/-
(Sanjay K. Agrawal)
Judge

Soma

6 (1979) 2 SCC 80

7 (2010) 2 SCC 70