

* **IN THE HIGH COURT OF DELHI AT NEW DELHI**

+ **W.P.(C) No.1503/2017**

% **20th February, 2017**

SMT. MITALI CHAKRABARTY DUTTA Petitioner

Through: Ms. Madhusmita Bora,
Advocate with Ms. Archana
Singh, Advocate.

versus

CHAIRMAN, RAJYA SABHA & ORS. Respondents

Through: Ms. Zubeda Begum, Advocate
with Ms. Sana Ansari, Advocate
and Ms. Samia Malik, Advocate
for respondent Nos.1 to 3.
Mr. Abhishek Khanna,
Advocate for respondent No.4.

CORAM:
HON'BLE MR. JUSTICE VALMIKI J.MEHTA

To be referred to the Reporter or not? **YES**

VALMIKI J. MEHTA, J (ORAL)

**+W.P.(C) No.1503/2017 and C.M. Nos.6853/2017 (stay) &
6854/2017 (under Section 151 CPC)**

1. By this writ petition under Article 226 of the Constitution of India, the petitioner impugns the order dated 29.7.2016 passed by the disciplinary authority of the employer/Rajya Sabha Secretariat terminating the services of the petitioner on account of her

unauthorized absence i.e petitioner remaining absent from duty without any leave being sanctioned for the period not spent on duty.

2. The facts of the case are that petitioner had applied for maternity leave of 180 days from 11.11.2013. The maternity leave was granted to her with leave coming to an end on 16.5.2014. Since the petitioner claimed that her new born infant required maternity attention, she again applied for extraordinary leave for 180 days from 17.5.2014 to 12.11.2014. This extraordinary leave was also granted to the petitioner. Petitioner claims that petitioner had no family support in India, and therefore, petitioner after obtaining her leave right from 11.11.2013 had joined her husband in U.K. where he was working in private services. Petitioner pleads that thereafter she applied for further extraordinary leave for taking care of her two small children and which was denied by the competent authority. Therefore, the petitioner had to join back her duties w.e.f 19.12.2014. Petitioner however did not join her duties and in spite of her being sent Office Memorandums dated 24.12.2014 and 8.1.2015 to join duties. Petitioner was also warned by these Office Memorandums that in case she does not join for performing her duties, then this failure to report for duty will amount to violation of service rules. Since the petitioner did not report back for her duty after 19.12.2014, hence disciplinary proceedings were

initiated against the petitioner. Petitioner was served with the Memorandum dated 11.6.2015 containing the following Articles of Charges:-

“Statement of articles of charge framed against Smt. Mitali Chakrabarty Dutta, Assistant Director (LARRDIS)”

Article I

That Smt. Mitali Chakrabarty Dutta, Assistant Director (LARRDIS) is on unauthorized absence from duty with effect from 20.12.2014. By absenting herself from duty unauthorizedly since 20.12.2014, Smt. Mitali Chakrabarty Dutta has exhibited lack of devotion to duty and she thus violated Rule 3(1)(ii) of the CCS (Conduct) Rules, 1964.

Article II

That the said Smt. Mitali Chakrabarty Dutta failed to join her duties in the Secretariat after her sanctioned leave expired on 19.12.2014 and even after she was informed that her absence from duty beyond 19.12.2014 was being treated as unauthorized. By so failing to join her duties in the Secretariat, Smt. Mitali Chakrabarty Dutta has exhibited lack of devotion to duty and she thus violated Rule 3(1)(ii) of the CCS (Conduct) Rules, 1964.

Article-III

That the said Smt. Mitali Chakrabarty Dutta who is on unauthorized absence from duty since 20.12.2014, failed to comply with the official directions issued vide Office Memoranda dated 24.12.2014 and 08.01.2015 to join her duties. By failing to so comply with the directions, Smt. Mitali Chakrabarty Dutta has acted in a manner unbecoming of an employee of the Secretariat and she thus violated Rule 3(1)(iii) of the CCS (Conduct) Rules, 1964.”

3. Petitioner even in these enquiry proceedings failed to personally appear and contest the enquiry proceedings. Petitioner only claimed that she should be allowed to contest by means of video conferencing from U.K. The ground given by the petitioner was that petitioner had to take care of her children, with her elder son being of around seven years and younger son being born in January 2014.

Petitioner was set *ex-parte* and the Enquiry Officer has given his report dated 8.4.2016 holding the petitioner guilty of being unauthorizedly absent from duty. The competent authority has thereafter passed the impugned order dated 19.8.2016 terminating the services of the petitioner on account of unauthorized absence from duty.

4. Counsel for the petitioner has argued that merely because there is unauthorized absence the same cannot lead to automatic termination of services and reliance in this regard is placed upon the judgment of the Supreme Court in the case of ***Krushnakant B. Parmar Vs. Union of India and Another (2012) 3 SCC 178***. Paras 16 to 21 of this judgment are relied upon and which paras read as under:-

“16. In the case of appellant referring to unauthorized absence the disciplinary authority alleged that he failed to maintain devotion to duty and his behaviour was unbecoming of a government servant. 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 wilful 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 cannot be held to be wilful. Absence from duty without any application or prior permission may amount to unauthorized absence, but it does not always mean wilful. 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.

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

19. 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 wilful; the disciplinary authority as also the appellate authority, failed to appreciate the same and wrongly held the Appellant guilty.

20. The question relating to jurisdiction of the Court in judicial review in a Departmental proceeding fell for consideration before this Court in *M.V. Bijlani v. Union of India* wherein this Court held: (SCC p.95, para 25)

“25. It is true that the jurisdiction of the court in judicial review is limited. Disciplinary proceedings, however, being quasi- criminal in nature, there should be some evidence to prove the charge. Although the charges in a departmental proceeding are not required to be proved like a criminal trial i.e. beyond all reasonable doubt, we cannot lose sight of the fact that the enquiry officer performs a quasi-judicial function, who upon analyzing the documents must arrive at a conclusion that there had been a preponderance of probability to prove the charges on the basis of materials on record. While doing so, he cannot take into consideration any irrelevant fact. He cannot refuse to consider the relevant facts. He cannot shift the burden of proof. He cannot reject the relevant testimony of the witnesses only on the basis of surmises and conjectures. He cannot enquire into the allegations with which the delinquent officer had not been charged with.”

21. In the present case, the disciplinary authority failed to prove that the absence from duty was wilful, no such finding has been given by the inquiry officer or the Appellate Authority. Though the Appellant had taken a specific defense that he was prevented from attending duty by Shri P. Venkateswarlu, DCIO, Palanpur who prevented him to sign the attendance register and also brought on record 11 defence exhibits in support of his defence that he was prevented to sign the attendance register, this includes his letter dated 3rd October, 1995 addressed to Shri K.P. Jain, JD, SIB, Ahmedabad, receipts from STD/PCO office of Telephone calls dated 29-9-1995, etc. but such defence and evidence were ignored and on the basis of irrelevant fact and surmises the inquiry officer held the Appellant guilty.” (emphasis is mine)

5. Counsel for the employer/Rajya Sabha Secretariat (represented by respondent nos.1 to 3) has contested the pleas of the petitioner. It is argued on behalf of the employer that Enquiry Officer in this case has given a detailed report dated 8.4.2016 giving a finding that the petitioner has remained unauthorizedly absent from duty since

20.12.2014. The detailed report is from pages 151 to 209 of the paper book of the present writ petition. The detailed report discusses all aspects and evidence led to hold the petitioner guilty of unauthorized absence from duty and conduct unbecoming of a government servant. Accordingly, it is argued that petitioner cannot place reliance upon the ratio of the judgment of the Supreme Court in the case of ***Krushnakant B. Parmar (supra)*** because in that case there was no finding of the unauthorized absence of the employee. The said judgment holds that when there are compelling circumstances beyond control like illness, accident, hospitalization etc., then there are valid reasons for an employee not to report for duty but these circumstances of illness, accident, hospitalization or similar grounds completely disabling the employee from joining the duty and such factors beyond control of the petitioner are not found in the facts of the present case. Learned counsel for the employer has also filed before this Court a chart that since the petitioner joined the present employer being the Rajya Sabha Secretariat in September, 2004, she has availed as many as 1917 days of leave upto 19.12.2014. Accordingly, it is argued that petitioner is quite clearly a recalcitrant employee. On behalf of the employer, reliance is also placed upon a recent judgment of the Supreme Court in the case of ***Vijay S. Sathaye Vs. Indian Airlines Limited and Others***

(2013) 10 SCC 253 to argue that once there is unauthorized long absence from duty, such an employee is deemed to have abandoned his services, and if the employee in spite of notice does not join duty, such an employee is deemed to have abandoned his services and in fact in such a case there is no need of even disciplinary proceedings.

6. The facts of the present case show that claim of the petitioner at best is of petitioner being entitled to automatic extraordinary leave. Grant of extraordinary leave is not a matter of legal right and every employer before granting extraordinary leave has to balance various aspects including the working requirement of the employer not being affected on account of leaves which are being sought by an employee. This is all the more so in the present case where it is found that out of a total of approximately 10 years of services of the petitioner with the present employer till 19.12.2014, petitioner had been on leave for 1917 days i.e around 5½/6 years. Accordingly, in the opinion of this Court, such an employee as the petitioner who only wants to stay in U.K. with her husband who is doing private services, cannot contend in the facts of the present case that she is entitled to extraordinary leave on account of her children being small. Of course legal entitlement to leave is always as regards leave which is legally authorized i.e maternity leave or child care leave

etc, however extraordinary leave is not a matter of right, more so in the facts of the present case where as stated above showing that till 19.12.2014 when the petitioner had to rejoin her duties petitioner had availed of as many as 1917 days of leave. Not only the above facts, it is further seen that if petitioner had valid reasons on account of infancy of her child or tender age of her elder child to join till 19.12.2014, then, there was no reason why petitioner should not have joined from May, 2015 when the period for which she had applied for extraordinary leave had also expired. The petitioner in fact admittedly did not join the services of the employer even till 21.12.2015 when the subject Office Memorandum was served upon the petitioner. Therefore in the facts of the present case, petitioner cannot argue that she is entitled to the benefit of ratio of the judgment of the Supreme Court in the case of ***Krushnakant B. Parmar (supra)*** as no circumstances beyond the control of the petitioner are found to exist to remain absent from duty. The present is a case of an employee wanting to do her duties at her own convenience and which cannot be permitted to be done.

7. I may also note that, though this aspect is not relevant in the present case because enquiry proceedings have been conducted, that the Supreme Court in the case of ***Vijay S. Sathaye (supra)*** has held that unauthorized absence of long period would amount to

abandonment of services and therefore no order of termination of services thereafter has to be passed against the employee. The relevant paras of the judgment of the Supreme Court in the case of *Vijay S. Sathaye (supra)* are paras 12 to 16, and which paras read as under:-

“12. It is a settled law that an employee cannot be termed as a slave, he has a right to abandon the service any time voluntarily by submitting his resignation and alternatively, not joining the duty and remaining absent for long. Absence from duty in the beginning may be a misconduct but when absence is for a very long period, it may amount to voluntarily abandonment of service and in that eventuality, the bonds of service come to an end automatically without requiring any order to be passed by the employer.

13. In *Jeewanlal (1929) Ltd. v. Workmen* this Court held as under:

“6....there would be the class of cases where long unauthorised absence may reasonably give rise to an inference that such service is intended to be abandoned by the employee.”

14. For the purpose of termination, there has to be positive action on the part of the employer while abandonment of service is a consequence of unilateral action on behalf of the employee and the employer has no role in it. Such an act cannot be termed as “retrenchment” from service.

15. In *Buckingham and Carnatic Co. Ltd. v. Venkatiah*, while dealing with a similar case, this Court observed:

“5.....Abandonment or relinquishment of service is always a question of intention, and normally, such an intention cannot be attributed to an employee without adequate evidence in that behalf.”

A similar view has been reiterated in *G.T. Lad v. Chemicals and Fibres of India Ltd.*

16. In *Syndicate Bank v. Staff Assn. and Aligarh Muslim University. v. Mansoor Ali Khan*, this Court ruled that if a person is absent beyond the prescribed period for which leave of any kind can be granted, he *should be treated to have resigned and ceases* to be in service. In such a case, there is no need to hold an enquiry or to give any notice as it would amount to useless formalities. A similar view has been reiterated in *Banaras Hindu University v. Shrikant, Chief Engineer (Construction) v. Keshava Rao and Bank of Baroda v. Anita Nandrajog.*”

8. Finally, at the risk of repetition, it is required to be stated that in the enquiry proceedings when an employee does not appear and

accordingly is proceeded *ex-parte* and where the charges against the employee are proved, the scope of this Court for hearing of a writ petition under Article 226 of the Constitution of India to challenge such an Enquiry Report and the consequent order of the disciplinary authority is extremely constricted to examine whether there are such issues which are fundamental issues going to root of the matter, and only which issues have to be examined and not factual issues of merits which are decided as per the Enquiry Report. Therefore, this is another reason for this Court to accept the Enquiry Officer's Report as also the impugned order passed by the disciplinary authority.

9. To complete the narration of the claim of the petitioner for grant of extraordinary leave, it is noted that petitioner claimed that she suffered from hyper-tension and hence could not join duties, but, this plea is completely misconceived because to substantiate this plea petitioner has not filed any medical certificate of being medically unfit for performing duties, and all that the petitioner has filed is just one prescription of some medicines for hyper-tension.

10. Dismissed.

FEBRUARY 20, 2017
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VALMIKI J. MEHTA, J