

HIGH COURT OF CHHATTISGARH AT BILASPURWP No. 2745 of 2003

Smt. Roshan James W/o Shri L.T.Das, aged about 60 years, Working as nursing sister, Medical College Hospital, Raipur (C.G.), R/o Shanti Nagar, Raipur (C.G.).

---Petitioner

Versus

1. State of Chhattisgarh, Through Secretary, Health Education, D.K.Bhawan, Raipur.
2. The Director, Medical Education, Near D.K.Bhavan, Chhattisgarh, Raipur.
3. The Joint Director and Superintendent, Medical Education, Raipur (C.G.).

---Respondents

For petitioner	:	Shri N.K.Vyas, Advocate.
For State	:	Shri Anand Dadariya, Dy.G.A.

Hon'ble Shri Justice P. Sam Koshy

Order on Board

23/02/2018

1. The challenge in the present Writ Petition is to annexure-P/1 dated 06/11/2001.
2. Vide the said impugned award, the respondent No.2 – Director, Medical Education, Raipur has treated the period of 238 days with effect from 01/07/1996 to 23/02/1997 in respect of the service of the petitioner as dies non.
3. The brief facts relevant for adjudication of the present dispute is that, the petitioner was an employee working as Nursing Sister at the Medical College Hospital, Raipur. She was transferred to J.K.Hospital, Gwalior vide

order dated 13/06/1996. The petitioner did not join the transfer place. She made a representation to the concerned authority to reconsider the order of transfer. Finally, the authority i.e. the respondent No.2 vide annexure-P/2 dated 07/02/1997 cancelled the order of transfer dated 13/06/1996. The cancellation order did not reflect any reasons for cancellation. Subsequently, the petitioner has been permitted to resume her duties at the Medical College, Raipur and where she continued to work till attaining the age of superannuation i.e. 31/08/2003. Meanwhile the petitioner had moved an application for regularising the period of absence from duty by granting and adjusting the earn leave which was in her credit. The application for leave was forwarded by the Superintendent on 11/03/1997. The same was also recommended by the Joint Director and the Superintendent of the Medical College. However, the authority concerned i.e. the respondent No.3 vide annexure-P/5 had rejected the leave application and ordered for treating the said period i.e. between 01/07/1996 to 23/02/1997 as 'dies-non'. The said order of 'dies-non' was subjected to challenge before the State Administrative Tribunal, Raipur where the case was registered as original application No. 438/99. The said application finally stood allowed vide annexure-P/6 dated 06/09/2001. The Tribunal had set aside the order of 'dies-non' and had remitted the matter back to the authorities concerned for reconsideration of the order. The setting aside of the order by the Tribunal was on the ground that, the same was issued without granting an opportunity of hearing to the petitioner and thus it is to be treated as it has been issued in violation of the principles of natural justice. The matter again came up

before the authority concerned and the authority vide annexure-P/1 dated 06/11/2001 again have passed an order treating the said period as dies non.

4. The contention of the counsel for the petitioner is that, the order of dies non is a major punishment which has been inflicted upon the petitioner. That the order has an adverse effect on the retiral and pensionary benefits payable to the petitioner. He further submits that, before passing the order of major punishment, the authorities concerned ought to have held a detailed departmental enquiry as is envisaged under the recruitment rules which prescribes the procedure to be adopted before imposition of a major penalty. He further submits that, it is a case where admittedly, an order of transfer was issued against the petitioner, but after sometime the State Government has cancelled the order of transfer and the effect of cancellation of the order of transfer means the petitioner continues to be posted at her original place of posting i.e. at Medical College, Raipur. Therefore the intervening period i.e. between the date of issuance of the order of transfer and the date of cancellation of the order of transfer should be regularized and the petitioner for all practical purpose should have been treated as on duty. It is also the contention of the petitioner that, admittedly on the date when the transfer order got cancelled, she had sufficient leave in her credit and for which she had move an application before the competent authority for permitting the intervening period to be treated as leave spent as earned leave which was there to her credit on the said date. He submits that, infact the authorities concerned should have accepted the said application at the first instance itself. He further submits that, even otherwise, the authorities at best could

have treated the said period as extra ordinary leave or should have treated that period as leave without pay. As such there were other options available to the respondents other than treating the said period as dies non which has an adverse impact on the retiral dues and thus prayed for quashment of the same.

5. On the contrary, the State counsel opposing the petition submits that, it is a case where on an earlier occasion, the State Administrative Tribunal on 06/09/2001 had set aside the earlier order of dies non only on the ground of not having granted sufficient opportunity of hearing to the petitioner. He further submits that, this lacuna has been cured by the respondents in the second round when the authorities concerned have granted her an opportunity of hearing and after hearing the petitioner, the impugned order was passed and as such there was no scope of interference with the impugned award. It was further contended that, the petitioner admittedly was unauthorizedly absent during the intervening period i.e. from the date she was transferred from Raipur to Gwalior till the order of transfer was cancelled and therefore the order of dies non for the unauthorized absent cannot be said to be unjustified or erroneous in any manner and thus prayed for rejecting the petition.

6. Having heard the contentions put forth on either side and on perusal of record this Court need not delve into the issue as to whether the order of dies non has the effect of major penalty or not? This issue stands well settled by a couple of judicial pronouncements, wherein it has been held that, the issuance of order of dies non amounts to a major penalty. In the

event of the order which has effect of major penalty being passed, the State Government is duty bound to adopt the procedure which is otherwise stipulated under the service rules before passing the final order. The procedure prescribed is under rule 14 of the CENTRAL CIVIL SERVICES (CLASSIFICATION, CONTROL & APPEAL) RULES, 1966. In the instant case, admittedly, no such procedure has been adopted.

7. Further, what is also relevant to be taken note is of the fact that, as contended by the counsel for the petitioner, the moment the order of transfer has been suo-moto cancelled by the respondents themselves, the effect of it would be that the order of transfer earlier issued does not remain in existence any further.

8. Under the circumstances, even in a case if the petitioner might not have joined at the transfer place, the respondents should have taken a more liberal and pragmatic approach and should have considered the said period as leave without pay instead of passing an order of dies non.

9. What is more noteworthy is the fact that, the petitioner had sufficient leave to her credit. The respondents could have considered the petitioner's case in that aspect also and could have adjusted the leave in her credit towards leave for the intervening period. This also does not appear to have been considered by the respondents.

10. Another aspect which also needs consideration is the fact that, while filing an additional return, the State Government has enclosed the documents pertaining to the leave encashment made by the petitioner at the

time of her superannuation as the document Ex.R/2 which shows that, there has been a deduction of 240 days of Earned leave from the total leave which stood to the credit of the petitioner of 442 days while making the leave encashment. According to the petitioner, this 240 days deduction is the deduction for the intervening period i.e. from the date of transfer to the date of joining after cancellation of transfer order. If that be so, the action on part of the respondents would amount to double jeopardy in as much as on one hand, they have treated 240 days as dies non and at the same time they have also deducted 240 days of leave which was in her credit for the intervening period or else the petitioner could have got some more days of leave encashment. The impugned order of dies non would therefore also not be sustainable.

11. Under the circumstances, this Court is of the opinion that, the impugned order of dies non would not be sustainable and the same deserves to be and is accordingly set aside. However, the intervening period which is the period of absence from duty of the petitioner i.e. from 01/07/1996 to 23/02/1997 shall be treated as leave without pay.

12. The said intervening period shall be treated for all practical purpose as period spent on duty for the purpose of granting retiral and pensionary benefits to the petitioner.

13. The Writ Petition thus stands allowed to the aforesaid extent and disposed off.

Sd/-
(P. Sam Koshy)
JUDGE