

HIGH COURT OF CHHATTISGARH AT BILASPUR**WRIT PETITION (S) NO. 375 OF 2010**

Basanti Joshi, W/o S.P. Joshi, aged about 43 years, A.N.M., Community Health Centre, Tokapal, Jagdalpur, District Bastar (C.G.)

... Petitioner

versus

1. State of Chhattisgarh, through the Secretary, Health and Family Welfare Department, DKS Bhawan, Raipur (C.G.)
2. Director, Health Services, Raipur (C.G.)
3. Chief Medical and Health Officer, Bastar, District Bastar (C.G.)

... Respondents

For Petitioner	:	Mr. C.J.K. Rao, Advocate.
For Respondent-State	:	Mr. Chandresh Shrivastava, Panel Lawyer.

Hon'ble Shri Justice P. Sam Koshy

Order on Board

22/06/2018

1. Challenge to the present writ petition is to the order dated 21.7.2009, Annexure P-1, whereby the Respondents have ordered for treating the period between 6.12.2005 to 25.4.2007 as dies non.

2. Facts of the case leading to the filing of the present writ petition are that the Petitioner who is working as an Auxiliary Nursing Midwife (ANM, in short) was placed under suspension on 27.9.2005 vide Annexure P-2. Subsequently, the order of suspension stood revoked on 5.12.2005 vide Annexure P-3. Though the order of suspension stood revoked, it appears that the Petitioner did not join at the place of posting as per the revocation order and ultimately joined her services only on 26.4.2007. The Respondents therefore treated the intervening period from the date on which the suspension order was revoked, i.e., 6.12.2005, till the Petitioner had resumed her duties on 26.4.2007, i.e., till 25.4.2007, as unauthorized absence from the duties and have ordered for treating the said period as dies non.

3. The solitary contention which the Petitioner raises is that the order of dies non issued by the Respondents is not sustainable as the same has been issued without conducting any enquiry whatsoever neither was the Petitioner given an opportunity of hearing to defend the action proposed by the Respondents nor has she been given an opportunity of hearing of any nature, as such the impugned order is prima facie bad in law and is in violation of principles of natural justice. He refers to a

decision of this Court in the case of **Bal Krishna Tamrakar v. State of Chhattisgarh & Ors.**, decided on 31.3.2010 in W.P. No. 4328/2004.

4. Learned Counsel for the State on the contrary opposing the petition submits that it is a case where admittedly the Petitioner was placed under suspension on 27.9.2005 and that she remained under suspension till 5.12.2005. The Petitioner was required to report on duty on 6.12.2005 which she did not do and remained continuously absent till 25.4.2007 and thereafter resumed her duties on 26.4.2007. Thus there was an unauthorized illegal absence on the part of the Petitioner between 6.12.2005 to 25.4.2007. Since there was an admitted absence from duties by the Petitioner and the absence being without sanction or approval from the higher authorities the same had to be treated as absence from duties. Therefore the order of dies non issued cannot be said to be bad in law in any manner. He thus prayed for the rejection of the writ petition.

5. The issue which appears to be is in respect of place of posting of the Petitioner after revocation of the suspension order. According to the Petitioner she was not informed of the place of posting after suspension order stood revoked and therefore she could not report for duties. On the contrary, learned State Counsel submits that the Petitioner was intimated vide the revocation order for reporting for duties at the place where she was attached immediately after placing her under suspension where she did not assume her duties and therefore it is a clear case of the Petitioner's unauthorized absence. However, the contention of the Petitioner is that the Petitioner on revocation of the suspension ought to have been posted at the place from where she was placed under suspension. These are disputes factual in nature which can only be thrashed out by an enquiry of either Preliminary nature or Disciplinary Enquiry wherein the Petitioner also would have been given an opportunity of hearing to explain and defend her case. In the instant case it is not in dispute that before issuance of the impugned order of dies non the Petitioner was not given any opportunity of hearing.

6. So far as the issue of dies non is concerned the same by now is well settled. At this juncture, it would be relevant to refer to a Division Bench decision of the Madhya Pradesh High Court in the case of **Battilal v. Union of India & Ors.**, 2005 (3) M.P.H.T. 32 (DB), where in paragraph 3 it has been held as follows:-

“3. The petitioner contends that when an order of compulsory retirement or termination is set aside in pursuance of the order of the Court and the delinquent employee is reinstated, the period between the date of termination to the date of reinstatement should be regularised and he should be paid pay and allowances in accordance with the relevant rules. In that behalf, the petitioner relied on FR 54-A (1), which reads as under :--

"F.R. 54-A. (1) Where the dismissal, removal or compulsory retirement of a Government servant is set aside by a Court of Law and such Government servant is reinstated without holding any further inquiry, the period of absence from duty shall be regularised and the Government servant shall be paid pay and allowance in accordance with the provisions of Sub-rule (2) or (3) subject to the directions, if any, of the Court."

A careful reading of the said clause would show that it applies only where the order of dismissal, removal or compulsory retirement is set aside unconditionally by a Court of Law and the Government servant is reinstated without holding any further inquiry and without any further consideration relating to punishment. It does not apply where the punishment imposed is set aside by a Court or a Tribunal with a direction to impose a lesser punishment. Where the Tribunal directs the authority to consider and impose a lesser punishment than what is imposed, the matter is wholly within the discretion of the authority who decides on the punishment, subject only to the condition that the punishment should be lesser than the earlier punishment. Therefore, FR 54-A would have no application. The authority imposing the punishment can direct how the period when the employee was out of service shall be treated. When the Authority directs that the period will be treated 'dies-non', it means that continuity of service is maintained, but the period treated as 'dies-non' will not count for leave, salary, increment and pension. In fact, F.R. 54 (1) casts such a duty on the authority. It provides that when a Government servant who has been dismissed, removed or compulsorily retired is reinstated as a result of appeal or review, the authority competent, to order reinstatement shall consider and make a specific order--

(a) regarding the pay and allowances to be paid to the government servant for the period of his absence from duty including the period of suspension preceding his dismissal, removal or compulsory retirement, as the case may be; and

(b) whether or not the said period shall be treated as a period spent on duty."

7. A similar view has also been taken by this Court in the case of **Bal Krishna Tamrakar** (supra) referred to by the Petitioner so also in the case of **Smt. Mrudula Rishi v. State of Chhattisgarh & Ors.**, decided on 30.10.2013 in W.P. No. 101/2006.

8. In view of the afore cited authoritative decisions of this Court so also the Division Bench decision of the Madhya Pradesh High Court, in the opinion of this Court the order of dies non which has an effect of major punishment and also

adversely affects the pensionary benefits so also the retiral benefits payable to the Petitioner on her retirement. The least that is expected from the Government is that on an order of such nature which has an adverse civil consequence on the Government employee, an opportunity of hearing ought to have been provided to the employee. In the absence of any such proceeding being drawn the impugned order of the Government treating the period between 6.12.2005 to 25.4.2007 as dies non is not sustainable and the same deserves to be accordingly set aside/quashed.

9. The Respondents, if they desire so, would be at liberty to initiate appropriate proceeding against the Petitioner so far as her alleged absence from duties between 6.12.2005 to 25.4.2007 is concerned and thereafter to pass a suitable order.

10. The writ petition stands allowed. The impugned action stands set aside with consequences to follow reserving the right of the Government as observed in the earlier paragraphs.

Sd/-
(P. Sam Koshy)
Judge