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

+ **W.P.(C) 2625/2017**

DAYA RAM

..... Petitioner

Through: Mr.M.M.Singh, Advocate.

versus

UNION OF INDIA AND ANR

..... Respondents

Through: Ms.Barkha Babbar, Advocate.

CORAM:

JUSTICE S.MURALIDHAR

JUSTICE SANJEEV NARULA

ORDER

11.12.2018

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1. The Petitioner is aggrieved by an order dated 4th July, 2016 passed by the Officiating Commandant, 131 Battalion, BSF pursuant to an order passed by this Court on 3rd January, 2014 in W.P. (C) No. 7205/2000.
2. The Petitioner succeeded in the aforementioned writ petition with this Court setting aside the penalty of dismissal from service and directing the Respondents to reinstate him in service. The Court further directed the Respondents to pass an order in terms of Fundamental Rule (FR) 54, as regards treating the extra-ordinary leave between the intervening period of dismissal from service to his reinstatement in service.
3. In the impugned order dated 4th July 2016, the Respondents have treated

the intervening period as under:

“4. In the light of above, the intervening absence period w.e.f 24.4.1999 to 3.3.2014 (total 14 years, 10 months & 11 days) is regularized by granting leave as under, without any prejudice to individual.

(a) Earned Leave for 39 days w.e.f 24.4.1999 to 1.6.1999.

(b) HPL for 99 days w.e.f 2.6.1999 to 8.9.1999.

(c) EOL for rest of the absence period w.e.f 9.9.1999 to 3.3.2014”.

4. It may also be mentioned that by the same order dated 3rd January, 2014, this Court had permitted the respondents, while reinstating the Petitioner, to pass an appropriate order as regards penalty. On this aspect, by a separate order dated 23rd March, 2015, the Respondents commuted the earlier sentence of dismissal from service to rigorous imprisonment (RI) for 89 days in force custody with notional effect.

5. The grievance of the Petitioner is that as regards the period from 9th September, 1999 to 3rd March 2014, which has been treated as extra ordinary leave (EOL), since the Respondents are not prepared to treat it as period on duty, the Petitioner is effectively deprived of any effective benefit of the commutation of the penalty.

6. Learned counsel for the Petitioner clarifies that the Petitioner is not seeking any arrears of salary for the aforesaid EOL period. His prayer is that for the purposes of any other benefit including assured career progression (ACP) scheme benefit or entitlement to pension, the aforementioned EOL should be treated as having been spent on duty.

7. The contention of the Respondents, on the other hand, is that having carefully examined the case of the Petitioner, the competent authority has found his case to be covered under the provisions of FR 54 (4) read with FR 54(5) and not FR (2) & (3) and, therefore, has declined to treat the EOL as a period spent on duty.

8. The relevant FR reads as under:

“F R54 (1) When a Government servant who has been dismissed, removed or compulsorily retired is re-instated as a result of appeal review or would have been so re-instated but for his retirement on superannuation, while under suspension or not, the authority competent to order re-instatement 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.

(2) Where the authority competent to order re-instatement is of the opinion that the Government servant' who had been dismissed, removed or compulsorily retired' has been fully exonerated, the Government servant shall, subject to the provisions of sub -rule (6), be paid full pay and allowances to which he would have been entitled, had he not been dismissed, removed or compulsorily retired or suspended prior to such dismissal, removal or compulsory retirement, as the case may be:

Provided that where such authority is of opinion that the termination of the proceedings instituted against the Government servant had been delayed due to reasons directly attributable to the Government servant, it may, after giving him an opportunity to make his representations [within 60 days from the date on which the communication in this regard is served on him] and after considering the representation, if any submitted by him, direct for reasons to be recorded in writing, that the Government servant shall, subject to the provisions of sub-rule (7),

be paid for the period of such delay, only such amount not being the whole of such pay and allowances as it may determine.

(3) In a case falling under sub-rule (2), the period of absence from duty including the period of suspension preceding dismissal, removal or compulsory retirement, as the case may be shall be treated as a period spent on duty for all purposes.

(4) In the cases other than those covered by sub-rule (2) including the cases where the order of dismissal, removal or compulsory retirement from service is set aside by the Appellate or Reviewing Authority solely on the ground of non-compliance with the requirements of Clause (2) of Article 311 of the Constitution and no further enquiry is proposed to be held, the Government servant shall subject to the provision of sub-rules (6) and (7), be paid such amount (not being the whole) of the pay and allowances to which he would have been entitled had he not been dismissed, removed or compulsorily retired or suspended prior to such dismissal, removal or compulsory retirement, as the case may be, as the competent authority may determine, after giving notice to the Government servant of the quantum proposed and after considering the representation, if any, submitted by him in that connection within such period which in no case shall exceed sixty days from the date on which the notice has been served as may be specified in the notice:

Provided that any payment under this sub-rule to a Government servant {other than a Government servant who is governed by the provisions of the Payment of Wages Act 1936 (4) of 1936} shall be restricted to a period of three years immediately preceding the date on which orders for re-instatement of such Government servant are passed by the Appellate Authority or Reviewing Authority, of immediately preceding the date of retirement on superannuation of such Government servant, as the case may be.

(5) In a case falling under sub-rule (4), the period of absence from duty including the period of suspension preceding his dismissal, removal or compulsory retirement, as the case may be, shall not be treated as a period spent on duty, unless the competent authority specifically directs that it shall be so treated for any specified purpose:

Provided that if the Government servant so desires, such authority may direct that the period of absence from duty including the period of

suspension preceding his dismissal, removal or compulsory retirement, as the case may be, shall be converted into leave of any kind due and admissible to the Government servant.

Note- The order of the competent authority under the preceding proviso shall be absolute and no higher sanction shall be necessary to the grant of-

(a) extraordinary leave in excess of three months in the case of temporary Government servant, and

(b) leave of any kind in excess of five years in the case of permanent or quasi-permanent Government servant.

(6) The payment of allowances under sub-rule (2) or sub-rule (4) shall be subject to all other conditions under which such allowances are admissible under sub-rule (4) shall not be less than the subsistence allowance and other allowances admissible under rule 53.

(8) Any payment made under this rule to a Government servant on his re-instatement shall be subject to adjustment of the amount, if any, earned by him through an employment during the period between the date of removal, dismissal or compulsory retirement, as the case may be, and the date of re-instatement. Where the emoluments admissible under the rule are equal to or less than the emoluments earned during the employment elsewhere nothing shall be paid to the Government servant”.

9. In the present case, FR 54 (2) does not apply since it concerns a government servant “who has been fully exonerated”. As noticed earlier, this Court only interfered with the penalty awarded to the Petitioner. It directed that his dismissal should be withdrawn and he should be reinstated in service, while leaving it to the Respondents to pass appropriate penalty order. In other words, there was no exoneration of the Petitioner as such.

10. In that view of the matter, with FR 54 (2) & (3) not applying, it is FR 54 (4) read with FR 54 (5) that would apply. Under FR 54 (5), there is

discretion with the competent authority to treat the period as spent on duty “for any specified purpose”. Even the proviso permits the competent authority to treat the period of leave into leave of any kind, due and admissible to a government servant. In other words, under FR 54 (4) read with FR 54 (5), it is open to the competent authority, for valid reasons, to treat the period of absence as period spent on duty, notwithstanding that the person concerned may not have been fully exonerated as envisaged in the FR 54 (5).

11. As rightly pointed out by learned counsel for the Petitioner, he filed the writ petition in this Court on 25th November 2000 just nine days after the DG (BSF) on 16th November, 2000 upheld the dismissal order of the Petitioner. For no fault of the Petitioner, his writ petition was pending in this Court for over 13 years and it was on 3rd January, 2014 that this Court passed an order reinstating him in service. This period of delay is, therefore, not attributable to the Petitioner. In fact, learned counsel for the Petitioner pointed out that due to the pendency of the petition, the Petitioner had kept on filing applications for early hearing, but ultimately the petition could be heard finally only on 3rd January, 2014.

12. The question that arises is if the Petitioner should be made to suffer for a delay caused in the disposal of the writ petition for reasons not attributable to him? The answer is obviously no. The Petitioner was diligent and filed the writ petition questioning the order of dismissal within nine days of it being passed. Had the writ petition been allowed in good time, say within one year of its filing, then the Petitioner would not have to lose the long

period of absence from duty. Even if the Respondents had passed the very same order, within a few months of the disposal of the writ petition, had it been disposed of in the year 2000 itself, no serious prejudice would have been caused to the Petitioner in treating his EOL period as a period of absence from duty. However, due to the long pendency of the writ petition in this Court, for reasons not attributable to the Petitioner, the impugned order does prejudice the Petitioner, inasmuch as it treats the period of as long as 14 years and 10 months as a period not spent on duty. This was perhaps not intended or envisaged when this Court passed its impugned judgment on 3rd January, 2014, requiring the Respondents to pass a fresh order of penalty and also pass a separate order on the treating of the intervening period.

13. This is perhaps one instance where the discretion that is available with the Respondents in terms of FR 54 (4) read with FR 54 (5) ought to have been exercised in favour of the Petitioner.

14. The Court accordingly modifies the impugned order dated 4th July, 2016 and directs that the EOL period i.e. from 9th September, 1999 to 3rd March, 2014 in the case of the Petitioner will be treated as a period during which the Petitioner was on duty. However, it is clarified that the Petitioner will not be entitled to arrears of pay and allowances for the said period.

15. It is further clarified that this order is being passed in the special facts and circumstances as outlined hereinbefore and will not be treated as precedent.

16. The other consequential benefits available to the Petitioner as a result of the above modification will not be denied to him. The consequential orders shall be issued by the Respondents within a period of eight weeks from today.

17. The petition is disposed of in the above terms.

S. MURALIDHAR, J.

SANJEEV NARULA, J.

DECEMBER 11, 2018
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