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

+ **W.P.(C) 1557/2019**

CHANDAN SINGH

..... Petitioner

Through: Mr. Ankur Chibber, Advocate.

versus

UNION OF INDIA AND ORS.

..... Respondents

Through: Mr. Bhagwan Swaroop Shukla,
CGSC with Mr. Syed Husain Adil
Taqvi, G.P., Mr. Gokul Sharma, Mr.
Shravan and Ms. Naghma Siddiqui,
Advocates for UOI.

CORAM:

JUSTICE S.MURALIDHAR

JUSTICE TALWANT SINGH

ORDER

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13.02.2020

Dr. S. Muralidhar, J.:

1. This petition challenges an order dated 16th January, 2012 passed by the Commandant, 151st Battalion of the Border Security Force ('BSF') which, while reinstating the Petitioner in service, treats the period of his absence between 15th October, 1997 and 24th November, 2011 i.e. a total of 5154 days as "dies-non". The Petitioner has also challenged the orders dated 21st May, 2014 and 30th May, 2014, which declined his prayer for grant of first financial upgradation under MACP Scheme due to non-completion of 10 years of regular service.

2. This is the second round of litigation involving the Petitioner. The background facts are that the Petitioner enrolled as a Constable in the BSF in the year 1991. On 10th July, 1997 he was charge-sheeted along with Nk. Raj Kumar in respect of the complaint made by Ex. HC Puran Singh. Both the Petitioner and Nk. Raj Kumar were subjected to a Security Force Court Trial and both were found guilty of the charges levelled against them on 12th July, 1997. This has resulted in both of them being dismissed from service.

3. Aggrieved by the dismissal order, the Petitioner filed W.P.(C) No. 1600/1998. The said writ petition came up for hearing finally more than 12 years thereafter on 22nd September, 2011. This Court noted that the incident in respect of which a charge-sheet was served was one in which the role of Nk. Raj Kumar was the primary one. This is evident from para 12 of the order which reads as under:-

“12. Briefly noted, with respect to the testimony of Ex.HC Puran Singh who had superannuated as a Head Constable from BSF, the petitioner and Nk. Raj Kumar became friendly with him and started visiting his house in spite of the i.e. Ex.HC Puran Singh cautioning them that being out of bound area, the two should not visit his house. On 30.6.1997 when he i.e. Ex. HC Puran Singh, his wife and children were sleeping, his wife heard sound from the adjoining room where-from business of selling tea was being carried out by him and as he entered the room he saw a man lying on the floor, who he struck with a stick and as the person screamed, from the voice he could recognize that it was Nk. Raj Kumar. At that very moment somebody poked a bamboo from the door and called out the name of Nk. Raj Kumar, he could recognize from the voice that the said person calling for Nk. Raj Kumar was Chandan Singh, the petitioner.”

4. The Court also observed that there was no evidence in support of the charges. It was noted that in respect of Nk. Raj Kumar, the penalty had been set aside and he was directed to be reinstated by the Appellate Authority, which found there to be a technical error at the trial. The Appellate Authority also directed against proceeding with a fresh trial in his case.

5. The Court then proceeded to dispose of the aforesaid W.P.(C) No.1600/1998 by directing as under:

“18. Accordingly, we dispose of the writ petition declaring that petitioner would be entitled to parity with Nk.Raj Kumar, whose role in the episode was graver than that of the petitioner. The technical error in the trial as determined by the Appellate Authority which has resulted in Nk.Raj Kumar being reinstated without being subjected to a re-trial, must enure to the benefit of the petitioner as well. We quash the impugned order dated 12.7.1997 and direct that petitioner should be reinstated in service, but without any back-wages. We deny back-wages for the reason the pleadings in the writ petition are useless, as conceded to by learned counsel for the petitioner. The petitioner never took the plea in the writ petition on which he is succeeding. He never availed the remedy of appeal. He has contributed to the mess.”

6. Subsequent to the direction of this Court, the Commandant 151st Battalion BSF passed the impugned order dated 16th January, 2012, para 2 of which reads as under:

“2. Further as per Court order, the above individual is required to be reinstated in service, but without any back wages during the intervening period from 12/07/1997(AN) to 24/11/2011(AN) i.e. for a period of 5,248 days. Hence, the intervening absence period of 5248 days in respect of the petitioner is hereby regularized in terms of FR-54 as under and his re-instatement

will be subject to verification of character/antecedent from' concerned civil authorities: -

i) 13/07/97 to 09/08/97 (28 days) by granting 28 days E/L due to him.

ii) 10/08/97 to 14/10/97 (66 days) by granting 133 days HPL due to him.

iii) Remaining period of absence w.e.f. 15/10/1997 to 24/11/2011 (total 5154 days) shall be treated as 'Dies-non'."

7. The effect of treating the 5154 days between 15th October, 1997 and 24th November, 2011, as "dies-non" meant that the Petitioner would lose the entire period for the purposes of fixation of his pension and other benefits including the grant of MACP, seniority, promotions, etc. As the Petitioner had not received the benefits under the MACP scheme, he made a representation dated 6th May, 2014 as regards his pay fixation. The Deputy Commandant by a letter dated 21st May, 2014 communicated the following to the Petitioner:

"(i) His seniority retrospective from 10/10/1997 hence he will be entitled for financial benefits from said date. However, clarification regarding grant of MACP to him sought from Comn & IT Dte and necessary action will be taken on due course.

(ii) Regarding previous GPF and other financial benefits/arrear etc, direct indvl to approach his previous unit i.e. 151 Bn BSF by giving application through proper channel because indvl was on the posted strength of 151 Bn that time.

(iii) Indvl promotion case considered by DPC but rejected due to bad entry in year 2012."

8. By another communication dated 30th May, 2014 from the Office of the

Deputy Commandant, BSF, the Petitioner was informed that he “is not eligible for the grant of the first financial upgradation under MACP Scheme due to non-completion of 10 years of regular service”. The said communication attributed this to a period of his service having been treated as “dies non”, which as per the Department of Personnel and Training could not count towards the required period of “regular service”, for the purpose of grant of benefits under the ACP or MACP scheme. Aggrieved by the communications dated 21st and 30th May, 2014, as also the order dated 16th January, 2012, the Petitioner filed the present petition.

9. Learned counsel for the Respondents has raised a preliminary objection that the petition cannot be entertained as it is barred by delay and laches. The Court notes that in matters concerning pay fixation, grant of financial benefits, etc., which do not have the effect of adversely impacting the seniority of any other person in service, the approach of the Court is required to be liberal. This has been explained by the Supreme Court in its judgment in *Union of India v. Tarsem Singh (2008) 8 SCC 648* as under:

“7. To summarise, normally, a belated service related claim will be rejected on the ground of delay and laches (where remedy is sought by filing a writ petition) or limitation (where remedy is sought by an application to the Administrative Tribunal). One of the exceptions to the said rule is cases relating to a continuing wrong. Where a service related claim is based on a continuing wrong, relief can be granted even if there is a long delay in seeking remedy, with reference to the date on which the continuing wrong commenced, if such continuing wrong creates a continuing source of injury. But there is an exception to the exception. If the grievance is in respect of any order or administrative decision which related to or affected several others also, and if the reopening of the issue would affect the

settled rights of third parties, then the claim will not be entertained. For example, if the issue relates to payment or refixation of pay or pension, relief may be granted in spite of delay as it does not affect the rights of third parties. But if the claim involved issues relating to seniority or promotion, etc., affecting others, delay would render the claim stale and doctrine of laches/limitation will be applied. Insofar as the consequential relief of recovery of arrears for a past period is concerned, the principles relating to recurring/successive wrongs will apply. As a consequence, the High Courts will restrict the consequential relief relating to arrears normally to a period of three years prior to the date of filing of the writ petition.”

10. The case at hand is such that entertaining the Petitioner’s plea regarding his period of absence being wrongly treated as ‘dies-non’, if accepted, is not going to adversely impact any other employee. It must be noted here that while the Petitioner does not question the denial to him of back-wages for the entire period, the Respondents’ treatment of his period of absence as “dies-non” virtually disqualifies him from receiving any pension as, by the date of his superannuation in 2024, he would have not completed the qualifying period of service for the purpose of pension if the impugned order dated 16th January, 2012, were to remain.

11. A perusal of the counter affidavit of the Respondents reveals that no particular reasons have been given by them for treating the intervening period i.e. the period between the date of his dismissal and date of his reinstatement as “dies-non”. All that is stated is that the Petitioner has been reinstated in service, but without any back-wages for the intervening period. Hence the intervening period of 5248 days was regularized in terms of the

Fundamental Rules ('FRs') 54 (5).

12. The Court has perused not only FR 54 and its sub-clauses but also FR 54-A (2), which reads as under:

“(2) (i) Where the dismissal, removal or compulsory retirement of a Government servant is set aside by the Court solely on the ground of noncompliance with the requirements of Clause (1) or Clause (2) of Article 311 of the Constitution, and where he is not exonerated on merits, the Government servant shall, subject, to the provisions of sub-rule (7) of Rule 54, 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:

(ii) The period intervening between the date of dismissal, removal or compulsory retirement including the period of suspension preceding such dismissal, removal or compulsory retirement, as the case may be, and the date of judgment of the Court shall be regularized in accordance with the provisions contained in sub-rule (5) of Rule 54.”

13. The reliance placed by the Respondents on FR 54 (5) and FR 54-A (2) appears to be entirely misplaced, since the said provisions are relatable to instances of dismissal, removal or compulsory retirement from service, solely on the ground of non-compliance with the requirement of Clause (1) or Clause (2) of Article 311 of the Constitution. In the present case,

however, Article 311 of the Constitution has not been invoked to terminate the services of the Petitioner.

14. On the other hand, the FR 54 (2) and the proviso thereto appear to be more relevant in dealing with the cases like the one at hand. The provision reads as under:-

“(2) Where the authority competent to order reinstatement 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 the 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 the 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 representation within sixty 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.”

15. A plain reading of FR 54 (2) and the proviso thereto, makes it clear that an employee who has been reinstated would be entitled to pay and allowances otherwise admissible to such employee, except in cases where the “authority is of an opinion” that the proceedings in respect of the

employee were delayed “due to reasons, directly attributable to the Government servant”. There can be no manner of doubt that the present case is not an instance where the proviso to FR 54 (2) would be attracted.

16. Therefore, viewed from any angle, the Court does not find any justifiable reasons for the Respondent to treat the intervening period between the date of dismissal of the Petitioner and his reinstatement as “dies-non”.

17. It may be noted that in similar circumstances in *Union of India v. Ex. SI Jeewan Lal (2009) 112 DRT 589 (DB)*, this Court while setting aside an order of removal, directed that the intervening period between the dates of removal and reinstatement of the Petitioner, had to be treated as on duty for all purposes.

18. Likewise, this Court by an order dated 13th April, 2015 in W.P.(C) No.2993/2014 (*L/NK Nirmal Lakra v. Union of India*), was of the view that the competent authority, in accordance with the FRs, was “obliged to pass an order concerning the period interregnum the Government servant being dismissed from service till he is reinstated.”

19. In that view of the matter, the Court quashes the impugned order dated 16th January, 2012 to the extent that para 2 (3) thereof treats the period of absence of the Petitioner between 15th October, 1997 and 24th November, 2011 as “dies-non”. In other words, said period shall not be treated as “dies-non”. The consequential orders dated 21st and 30th May 2014 are also quashed.

20. The Respondents are directed to now re-fix the Petitioner's pay and grant him the benefits under the MACP on the above basis by issuing an appropriate order within 12 weeks from today. It is clarified that this order will not be construed as entitling the Petitioner to any back-wages for the aforementioned period of absence. However, the said period will be counted for the purposes of notional fixation of pay and all other consequential benefits.

21. The petition is allowed in the above terms.

S. MURALIDHAR, J.

TALWANT SINGH, J.

FEBRUARY 13, 2020

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