

IN THE HIGH COURT OF JUDICATURE AT PATNA
Civil Writ Jurisdiction Case No.7724 of 2007

RAMESHWAR PRASAD

... .. Petitioner/s

Versus

1. The Union Of India through the Secretary, Ministry of Home Affairs, New Delhi.
2. The Directorate General, Border Security Force, Government of India, Ministry of Home Affairs, New Delhi.
3. The Additional Deputy Inspector General, (Establishment), Border Security Force, Block No. 10, 5th Floor, C.G.O. Complex, Lodhi Road, New Delhi-110003.
4. The Commandant, 193 Bettalion, Border Security Force/56 A.P.O.

... .. Respondent/s

Appearance :

For the Petitioner/s	:	Mr. Pandit Jee Pandey, Advocate
	:	Mr. Navneet Tiwari, Advocate
	:	Mr. R.P. Tripathi, Advocate
For the Respondent/s	:	Dr. Krishna Nandan Singh, Sr. Advocate, ASG
	:	Ms. Prakritita Sharma, JC to ASG
	:	Mr. Sujeet Kumar Sinha, CGC

CORAM: HONOURABLE MR. JUSTICE P. B. BAJANTHRI
ORAL JUDGMENT

Date : 16-12-2021

In the instant petition, petitioner has prayed for the following relief/reliefs:

“That this application is being filed before this Hon’ble Court for issuance of a writ in the nature of Certiorari for quashing the order as contained in Clause-3 of the order dated 13.1.2005 Annexure-13 to this writ petition) passed by the Appellate Authority (Respondent No. 2) in the Departmental Appeal under which while setting-aside the order of dismissal of the petitioner from his service passed by Respondent No. 4, Respondent No. 2 has not treated the period between the dates of dismissal and re-instatement of the petitioner in his service as spent on duty and further for issuance of a writ in the nature of mandamus commanding the Respondents to pay petitioner his full salary and allowances alongwith other benefits for the period of his absence in the



facts and circumstances of this case and also for grant of other relief/reliefs for which petitioner may be deemed entitled to.”

2. Petitioner was appointed as a cook in Border Security Force (for short “BSF”) on 13.06.1989. For availing leave and remaining absent for few days on various occasions, he was subjected to disciplinary proceedings and it was concluded in imposition of penalty of dismissal from service. It was subject matter of litigation in C.W.J.C. No. 2365 of 2000 and it was dismissed on 28.01.2002. Feeling aggrieved and dissatisfied with the order of the Learned Single Judge, petitioner preferred L.P.A. No. 334 of 2002. L.P.A. which was allowed on 22.01.2003 while setting aside the order of the Learned Single Judge and remanded the matter to the authority. Appellate Authority passed the order on 13.01.2005 while setting aside the order of dismissal dated 20th May, 1998 and ordered for reinstatement subject to medical fitness. Further it is ordered that from the date of dismissal to the date of rejoining service is to be regularized as a leave of kind due in terms of FR 54(5). Thus, the petitioner feeling aggrieved by the later portion relating to regularization of the intervening period from the date of dismissal to reinstatement as a leave of kind is under challenge in the present petition. FR 54 (5) Rules Reads as under:

“(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 treated so 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 for 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.”

3. The aforesaid rules is not empowered Appellate Authority to decide the intervening period. In other words without authority of law the Appellate Authority has invoked FR 54(5). That apart FR 54(5) is not appreciable in the present case. The appellate authority in its order dated 13.01.2005 has not remanded the matter to the Disciplinary Authority to commence the inquiry from the defective stage with reference to violation of BSF Rule 22 so as to treat the intervening period from the date of dismissal to that of reinstatement as a leave of kind. The learned counsel for the respondent pointed out from paragraph No. 27 of the counter statement which reads as under:

“That so far statements made in paragraphs nos. 29 to 34 are concerned it is once again stated that the petitioner has been a habitual offender and had overstayed for so many times, in the post.

They are:

(i) 83 days OSL. Period regularized by granting him E.L. w.e.f. 08.07.92 to 29.09.92.



- (ii) 27 days OSL. Period regularized by granting him E.O.L. w.e.f. 23.06.94 to 26.07.94.
- (iii) 15 days OSL. Period regularized by granting him E.L. w.e.f. 28.07.95 to 11.08.95
- (iv) 38 days OSL. Period regularized by granting him H.P.L. w.e.f. 12.08.95 to 15.09.95
- (v) 57 days OSL. Period regularized by granting him 30 days E.L. w.e.f. 08.02.96 to 09.03.96 and 27 days H.P.L w.e.f. 10.03.96 to 04.04.96.”

Evidently in the case of petitioner Rule 54(5) of the Fundamental Rules are applicable instead of Rule 54(2). The petitioner is not entitled to any and allowances for the intervening period a total 2463 days as the said period cannot be converted into any kind of due leave admissible to a Govt. Servant. But at the time of re-instatement no kind of leave was due. The intervening, period of 2463 days was regularized by granting him “Extra ordinary leave” on medical ground in which no salary is admissible to a Govt. Servant. As a Rule “Extra ordinary leave” is granted to a Govt. Servant when no other leave is admissible.”

4. Perusal of the aforesaid statement of the counter affidavit. The aforesaid issue could be taken into consideration provided that if the Appellate Authority set aside the order of dismissal and remanded the matter to the Disciplinary Authority to continue the inquiry from the defective stage and depending upon the outcome of the Disciplinary Authority’s order, the intervening period should have been regulated in accordance with the provisions of law. In the light of the order dated 13.01.2005 that the Appellate Authority has set aside the order of dismissal dated 20th May, 1998 passed by the Commandant, effect of quashing/set aside of order is required to be taken note of.

5. Apex Court in the case of ***SHREE CHAMUNDI MOPEDS LTD. VS. CHURCH OF SOUTH INDIA TRUST***



ASSOCIATION CSI CINOD SECRETARIAT, MADRAS

reported in **(1992) 3 SCC 1** interpreted of what is the effect of quashing and grant of stay. Quashing of an order means restoration of original position. Paragraph 10 of the judgement reads as under:

“In the instant case, the proceedings before the Board under Sections 15 and 16 of the Act had been terminated by order of the Board dated April 26, 1990 whereby the Board, upon consideration of the facts and material before it, found that the appellant-company had become economically and commercially non-viable due to its huge accumulated losses and liabilities and should be wound up. The appeal filed by the appellant-company under Section 25 of the Act against said order of the Board was dismissed by the Appellate Authority by order dated January 7, 1991. As a result of these orders, no proceedings under the Act were pending either before the Board or before the Appellate Authority on February 21, 1991 when the Delhi High Court passed the interim order staying the operation of the order of the Appellate Authority dated January 7, 1991. The said stay order of the High Court cannot have the effect of reviving the proceedings which had been disposed of by the Appellate Authority by its order dated January 7, 1991. While considering the effect of an interim order staying the operation of the order under challenge, a distinction has to be made between quashing of an order and stay of operation of an order. Quashing of an order results in the restoration of the position as it stood on the date of the passing of the order which has been quashed. The stay of operation of an order does not, however, lead to such a result. It only means that the order which has been stayed would not be operative from the date of the passing of the stay order and it does not mean that the said order has been wiped out from existence. This means that if an order passed by the Appellate Authority is quashed and the matter is remanded, the result would be that the appeal which had been disposed of by the said order of the Appellate Authority would be restored and it can be said to be pending before the Appellate Authority after the quashing of the order of the Appellate Authority. The same cannot be said with regard to an order staying the operation of the order of the Appellate Authority because in spite of the said order, the order of the Appellate Authority



continues to exist in law and so long as it exists, it cannot be said that the appeal which has been disposed of by the said order has not been disposed of and is still pending. We are, therefore, of the opinion that the passing of the interim order dated February 21, 1991 by the Delhi High Court staying the operation of the order of the Appellate Authority dated January 7, 1991 does not have the effect of reviving the appeal which had been dismissed by the Appellate Authority by its order dated January 7, 1991 and it cannot be said that after February 21, 1991, the said appeal stood revived and was pending before the Appellate Authority. In that view of the matter, it cannot be said that any proceedings under the Act were pending before the Board or the Appellate Authority on the date of the passing of the order dated August 14, 1991 by the learned Single Judge of the Karnataka High Court for winding up of the company or on November 6, 1991 when the Division Bench passed the order dismissing O.S.A. No. 16 of 1991 filed by the appellant-company against the order of the learned Single Judge dated August 14, 1991. Section 22 (1) of the Act could not, therefore, be invoked and there was no impediment in the High Court dealing with the winding up petition filed by the respondents. This is the only question that has been canvassed in Civil Appeal No. 126 of 1992, directed against the order for winding up of the appellant-company. The said appeal, therefore, fails and is liable to be dismissed.”

6. In the present case by order dated 13.01.2005 (Annexure 13), the Appellate Authority has set aside the order of dismissal in effect it would be restoration of the petitioner's position as on the date of dismissal that is 20th May, 1998. Therefore, the petitioner is entitled to a monetary benefits as if he has not been dismissed from service as on 20th May, 1998. Thus, the petitioner has made out a case so as to interfere with the paragraph 3 of the order dated 13.01.2005 which reads as under:

“The intervening period from the date of dismissal to the date of rejoining be regularized as a leave of kind due in



terms of FR 54 (5).” The aforementioned portion is set aside.

7. The concerned respondent is hereby directed to calculate the monetary benefits for the intervening period from the date of dismissal to reinstatement as a duty for all purpose and to extend all monetary benefits while calculating. Monetary benefits shall be disbursed in favour of the petitioner within a period of two months from the date of receipt of this order.

8. With the above observations, writ petition is allowed.

(P. B. Bajanthri, J)

GAURAV S./-

AFR/NAFR	
CAV DATE	
Uploading Date	04.01.2022
Transmission Date	

