

NAFR

HIGH COURT OF CHHATTISGARH, BILASPUR**WPS No.3706 of 2013**

1. Smt. Vijay Laxmi Jaiswal, Wd/o Late Shri Virendra Jaiswal, Aged About 56 Years
2. Smt. Seeta Jaiswal, W/o Shri Kamal Kishore Jaiswal, Aged About 34 Years (Bhatgaon)
3. Smt. Geeta Jaiswal, W/o Shri Ajay Jaiswal, Aged About 34 Years (Jashpur)
4. Jai Prakash Jaiswal, S/o Late Shri Virendra Jaiswal, Aged About 29 Years
5. Shashi Prakash Jaiswal, S/o Late Shri Virendra Jaiswal, Aged About 25 Years

All R/o Through Prakash Medical Store, Shop No.8, In Front Of District Court, Ambikapur, PS Ambikapur, Civil And Revenue Distt Surguja (C.G.),

(Earlier it was Through Prakash Photo Copier, Shop No.5, Ambikapur, Distt. Surguja, Chhattisgarh

----- **Petitioners**

Versus

1. State Of Chhattisgarh Through Secretary, Public Works Department, Mantralaya, Capital Complex, Mahanadi Bhawan, New Raipur, PS New Raipur, Civil and Revenue Distt Raipur, Chhattisgarh
2. Engineer-In-Chief, Public Works Department, Raipur, Civil and Revenue Distt. Raipur, Chhattisgarh
3. The Joint Director, Treasury, Accounts and Pension, Ambikapur, Police Station Ambikapur, Police and Revenue Distt. Surguja, Chhattisgarh
4. Chief Engineer, Public Works Department,

Ambikapur, Police Station Ambikapur, Civil And
Revenue Distt. Surguja, Chhattisgarh

5. Executive Engineer, Public Works Department,
Division No.1, Ambikapur, Police Station
Ambikapur, Civil and Revenue Distt. Surguja,
Chhattisgarh

6. Sub Divisional Officer, Public Works
Department, Ambikapur, Police Station
Ambikapur, Civil and Revenue Distt. Surguja,
Chhattisgarh

----- Respondents

For Petitioners	Mr. Manoj Paranjpe, Advocate
For Respondent-State	Mr. Animesh Tiwari, Dy. AG

Hon'ble Justice Shri Sanjay K. Agrawal

Order On Board

13/09/2021

1. The petitioners herein call in question the legality, validity and the correctness of the order dated 23.09.2009 (Annexure-P/1) passed by the respondent No.1, whereby the service period of Shri Virendra Kumar Jaiswal/deceased government servant from 12.10.1981 to 10.10.1983 and from 22.02.1993 to 12.01.2003, total 11 years, 10 months and 19 days, has been declared as dies non.
2. Mr. Manoj Paranjpe, learned counsel for the petitioners, would submit that the impugned

order (Annexure-P/1) has been passed after the death of Shri Virendra Kumar Jaiswal, who died on 12.01.2003, declaring the service period from 12.10.1981 to 10.10.1983 and from 22.02.1993 to 12.01.2003, total 11 years, 10 months and 19 days, as dies non and thereby no opportunity of hearing has been afforded to him, as such the impugned order passed after the death of the original petitioner deserves to be set aside.

3. Mr. Tiwari, learned State counsel, would submit that the order impugned has been passed in accordance with law and no interference is required in the said order, as such the writ petition deserves to be dismissed.
4. I have heard learned counsel for the parties, considered their rival submissions made herein-above and went through the records with utmost circumspection.
5. Rule 7 of the Chhattisgarh Civil Services (Conduct) Rules, 1965, provides that no Government servant shall proceed on leave before it has been sanctioned provided that in

a case of emergency the authority competent to sanction leave may for reasons to be recorded in writing accord *ex post facto* sanction for leave already availed of.

6. Rules 22 and 24 of the Chhattisgarh Civil Services (Leave) Rules, 1977, which speak about recall to duty before expiry of leave and absence after expiry of leave, provide as under: -

"22. Recall to duty before expiry of leave.-A
Government servant while on leave if recalled to duty before expiry of the leave, he shall be entitled:-

(a) If the leave from which he is recalled is in India, to be treated as on duty from the date on which he starts for the station to which he is ordered, and to draw: -

(i) travelling allowances under rules made in this behalf for the journey; and

(ii) leave salary, until he joins his post, at the same rate at which he would have drawn it but for recall to duty.

(b) If the leave from which he is recalled is out of India, to count the time spent on the voyage to India as duty for purposes of calculating leave, and to receive-

(i) leave salary, during the voyage to India and for the

period from the date of landing in India to the date of joining his post, at the same rate at which he would have drawn it but for recall to duty;¹³

(ii) a free passage to India;

(iii) refund of his passage from India if he has not completed half the period of his leave by the date of leaving for India on recall, or three months, whichever is shorter;

(iv) travelling allowance, under the rules for the time being in force, for travel from the place of landing in India to the place of duty.

24. Absence after expiry of leave.-

(1) Unless the authority competent to grant leave extends the leave, Government servant who remains absent after the end of leave is entitled to no leave salary for the period of such absence and that period shall be debited against his leave account as though it were half pay leave to the extent such leave is due, the period in excess of such leave due being treated as extraordinary leave.

(2) Willful absence from duty after the expiry of leave renders a Government servant liable to disciplinary action."

7. In the matter of Ali Hussain Asgar Ali v.

State of M.P. and another¹, the M.P. High Court

while dealing with Rule 24 of the Madhya

Pradesh Leave Rules, 1977 held as under: -

¹ 1984 J.L.J. 67

"It is clear that sub-rule (1) provides that when a Government servant remains absent after expiry of leave he is entitled to no leave salary but it has been further provided that such period shall be debited against his leave account as though it were half pay leave to the extent such leave is due and the period in excess of such leave due being treated as extra-ordinary leave. Sub-rule (2) further provides that willful absence from duty after the expiry of leave renders a Government servant liable to disciplinary action. It is, therefore, clear that on the facts as they stand that the petitioner remained absent without the leave being sanctioned to him, and the only course open to the Government was either to act under sub-rule (1) or under sub-rule (2) of Rule 24. It could not be contended that the orders which were passed could be passed under sub-rule (1) and the learned Government Advocate could not refer to any rule which could justify an order as has been passed in this case, i.e. the order dated 21-7-1979. It is also not in dispute that if the State Government has chosen to act under sub-rule (2) of Rule 24, then it was necessary to follow the procedure of inquiry, which admittedly has not been done in this case. If it was chosen to act under sub-rule (2) then disciplinary action could only be taken after following the proper procedure. Admittedly, before passing of this order dated 21-7-1979 even a notice was not issued to the petitioner to pass such an order. It is, therefore, plain that this order which was passed by the State Government against the petitioner could not be justified under any of the rules framed under Article 309 of the Constitution of India."

8. Similarly, in a decision rendered in the matter of **Battilal v. Union of India and others**², which appears to have been taken into consideration in earlier decisions, the High Court of Madhya Pradesh while considering the meaning of dies non pertinently held as under:-

"3.....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."

9. Reverting to the facts of the case in light of the principles laid down by the High Court of

Madhya Pradesh in the matter of **Battilal** (supra), it would appear that to declare the period of absence from duty of a public servant in violation of Rule 7 of the Conduct Rules, 1965 and further to declare the period of absence as *dies non* is punitive order without affording opportunity of hearing to the petitioner. In the case in hand, the impugned order has been passed after the death of the deceased government servant/Shri Virendra Kumar Jaiswal and thereby no opportunity of hearing has been afforded to him or the present petitioners. Consequently, the impugned order dated 23.09.2009 (Annexure-P/1) is hereby set aside. However, the respondents are at liberty to proceed in accordance with law.

10. The writ petition is allowed to the extent indicated herein-above. No order as to cost (s).

Sd/-
Sanjay K. Agrawal
Judge