

IN THE HIGH COURT AT CALCUTTA
CONSTITUTIONAL WRIT JURISDICTION
APPELLATE SIDE

PRESENT:

THE HON'BLE JUSTICE ARINDAM MUKHEREJEE.

WPA 16949 of 2009

HIRENDRA NATH HALDER

VS.

UNION OF INDIA & OTHERS.

For the Petitioner : Mr. Achin Kumar Majumder
.....Advocate

For the Respondents : Mr. Arijit Majumdar
.....Advocate

Heard on : 27.09.2018, 09.10.2018, 28.08.2019,
20.09.2019, 08.11.2019, 15.11.2019 &
23.08.2022

Judgment on : 2nd September, 2022

Arindam Mukherjee, J.:

- 1) The petitioner while serving as a Constable in the Central Industrial Security Forces (CISF) and posted at the CISF unit Farakka Barrage Project, Farakka was placed under suspension with effect from 11th September, 2000 in contemplation of a disciplinary proceedings to be initiated against him. The petitioner was thereafter served with a charge-sheet dated 31st October, 2000. The disciplinary proceedings initiated by issuance of the said charge sheet culminated into a final order dated 10th October, 2002 by which the petitioner was removed from service. The petitioner preferred a departmental appeal

which was dismissed by an order dated 13th May, 2003 upholding the order of the Disciplinary Authority. The petitioner challenged the inquiry report, the final order of the disciplinary proceedings as also the final order of the Appellate Authority before this Court by filing a writ petition being WP No.9718 (W) of 2003. The writ petition was allowed by a judgment and order dated 12th December, 2006. The operative portion of the said judgment and order dated 12th December, 2006 is as follows:-

“In view of the above the charge sheet dated October 31, 2002, report of the Enquiry Officer dated September 7, 2002 the final order of punishment dated October 10, 2002 and the order passed by the appellate authority dated May 13, 2003 are quashed and set aside.”

- 2) The respondent-employer preferred an appeal against the said judgment and order dated 12th December, 2006. The said appeal was numbered as MAT 1742 of 2007. In the said appeal an interim order was passed on 19th December, 2007 directing the appellants to allow the petitioner to join his duties and pay admissible salary and allowances from the date of re-joining. The petitioner was reinstated in service in terms of such interim order on and from 17th January, 2008 and was posted at the CISF unit, ONGC, Jorhat, Assam. The appeal was ultimately disposed of by an order dated 5th May, 2008. The operative portion of the said judgment and order dated 5th May, 2008 is as follows:-

“We however, observe that since the issue is prolonged for a considerable period, in case the appellants wish to proceed afresh, they must initiate such proceeding within a period of six weeks from the date of communication of this order and must conclude the same within a period of four months from the date of issuance of the charge-sheet.”

In terms of the order dated 5th May, 2008, the respondent-employer initiated a fresh departmental proceedings (hereinafter for the sake of convenience referred as 'second departmental proceedings') by issuing a charge sheet dated 27th June, 2008. The second disciplinary proceedings came to an end by passing an order dated 20th October, 2008. The operative portion of the said order dated 20th October, 2008 is set out hereunder for the convenience:

"The disciplinary authority, therefore, in exercise of powers conferred upon him vide Rule-32 (1) of Schedule- 1 read in conjunction with rule 34 (IX) of CISF Rules, 2001 award the penalty of "WITHHOLDING OF ONE INCREMENT FOR A PERIOD OF ONE YEAR WHICH WILL HAVE THE EFFECT OF POSTPONING HIS FUTURE INCREMENTS OF PAY" to No. 844300070 Constable H.N. Halder with immediate effect."

- 3) The petitioner did not challenge the said order dated 20th October, 2008 by filing a departmental proceedings. The petitioner, therefor, accepted the said order dated 20th October, 2008. The petitioner subsequently prayed that the period from the date of his suspension i.e., 11th September, 2000 till he was permitted to join his duties on 17th January, 2008 in terms of the interim order passed by this Court on 19th December, 2007 should be treated to have been spent on duty for all purposes and to release the arrears salary for the said period. There is, however a discrepancy as the date of petitioner's joining as per the interim order. The petitioner in the writ petition has stated that he joined on 17th January, 2008 but in the order impugned as also in the prayer the date of joining is 31st January, 2008. After considering such prayer of the petitioner, CISF issued a show-cause notice dated 30 January, 2009 calling upon the petitioner to show-cause as to why the period between 11th October, 2002 and 31st January, 2008 should not be treated as "Dies-

non” under the provisions of Rule 55 of the Central Industrial Security Forces, 2001 (hereinafter referred to as said Rules). The petitioner replied to the said show-cause notice by a letter dated 13th February, 2009. After considering such show-cause, the Senior Commandant, CISF passed an order dated 20th May, 2009 rejecting the petitioner’s prayer for treating him to be on duty. The operative portion of the said order is set out hereunder:-

“Under these circumstances, the proposal to regularise the intervening period of absence from the date of REMOVAL FROM SERVICE to till Re-instatement in service i.e. from 11/10/2002 (FN) to 31/01/2008 (AN) as “Dies-non” for all purposes issued vide letter No. V-15014/09/ONGC(J)/DISC/HNH/2008/40 dated 30/01/2009 is hereby confirmed in terms of Rule 55 of CISF Rules 2001. Further the period of suspension from 11/09/2000 to 10/10/2002 is treated as such for all purpose and he will not get any pay and allowances from the above period, more than what he has already drawn as subsistence allowance during the period of suspension.”

- 4) The petitioner has challenged the show-cause notice dated 30th January, 2009 and the order dated 20th May, 2009 in the instant writ petition and has further prayed that the period between 11th October, 2002 and 31st January, 2008 should be treated to be on-duty and arrears of salary for such period be released. The petitioner has also prayed that for the period of suspension between 11th September, 2002 and 10th October, 2002, the petitioner shall be paid full pay and allowances. The petitioner says that under the Rule 54 (1) (b) of the fundamental Rule relating to dismissal, removal and suspension which is applicable to the petitioner, the petitioner is entitled to be treated as on-duty for the period 11th September, 2000 and 10th October, 2002 and from 11th October, 2002 till 31st January, 2008. The petitioner also says that Rule

55 of the CISF Rules, 2001 is not applicable in the case of the writ petitioner and as such the authority erred while rejecting the petitioner's prayer for treating him to be on duty and for release of all his pay and allowances for the said period. The petitioner says that he was suspended in contemplation of a disciplinary proceedings. The disciplinary proceedings culminated into an order of his dismissal which was upheld by the Appellate Authority in a disciplinary appeal preferred by the petitioner. The said order of termination along with the enquiry report has been set aside by this Court vide the judgment and order dated 12th December, 2006. The respondents preferred an appeal but suffered an interim order dated 19th December, 2007 permitting the petitioner to join the duties and also directing the respondents to pay all arrears.

- 5) The petitioner has relied upon two judgements in support of his contention. By relying upon the judgment reported in **1987 (supp) SCC 71 : AIR 1988 SC 344 [Union of India vs. Babu Ram Lalla]**, the petitioner says that since the order of termination of service of the petitioner was held to be a nullity, the petitioner was entitled to be paid the salary on the footing that he had always continued in service and the void order was never in existence in the eye of law.

Relying upon the judgement reported in **1997 1 CLJ 411 [Union of India & Others vs. Madan Lal Ram]** the petitioner submits that he is entitled to be treated to be in regular service between the period of his suspension and reinstatement on equitable grounds and should be paid the salary and also emoluments for the said period.

- 6) On behalf of the respondents by filing the affidavit-in-opposition it is contended that the Articles of Charge in the first departmental proceedings were proved and as such the petitioner was terminated from service. Once such finding was arrived at the period between suspension and the order of the Disciplinary Authority cannot be treated to be on duty. After the order of the Disciplinary Authority till the petitioner was reinstated in terms of the interim order passed in the appeal preferred by the respondents, the petitioner did not work and as such he is not entitled to any salary. According to the respondents, employer cannot be blamed for having proceeded against the petitioner due to the loss of confidence in the petitioner arising out of negligence and dereliction of duty. Overlooking the conduct of the petitioner, the respondent-employer could not have allowed the petitioner to perform his normal duties between the period of his suspension till the order of the Disciplinary Authority which was upheld in Departmental Appeal. Even after the orders of the disciplinary authority and the appellate authority were set aside, petitioner could not be given any salary and emoluments as there was no direction for the same in the order dated 12th December, 2006 and the respondent bona fide proceeded with the appeal. The reinstatement was allowed only in terms of the direction given by the Appeal Court as the direction of reinstatement was not there in the order dated 12th December, 2006. The petitioner, therefor, cannot be given the salary for the subject period as he did not work.
- 7) After hearing the parties and considering the materials on record, I find that the order of the Disciplinary Authority which had been set aside by this Court by the order dated 12th December, 2006 cannot be either relied upon or

pressed in support of the contention of the respondent-employer. By the order dated 12th December, 2006 the entire proceedings including the enquiry report, the order of the Disciplinary Authority and the order of the Appellate Authority was quashed and/or set aside. The learned Single Judge, therefor, while passing the said judgment and order disbelieved the findings of the Enquiry Officer as also the conclusion of the Disciplinary Authority which had been upheld by the Appellate Authority. It is also clear from the discussion in the said order that the respondent-employer first formed an opinion as to the nature and conduct of the petitioner and then proceeded to hold the disciplinary proceedings. The charges levelled against the petitioner were not accepted by the learned Single Judge. The learned Single Judge also did not form an opinion to deprive the petitioner of his salary and emoluments from the date of suspension till the date of termination from service as per the order of the Disciplinary Authority. Had the learned Judge thought of depriving the petitioner of the salary and emoluments for the said period, reasons for the same would have been apparent from the order dated 12th December, 2006. Even though there was no specific direction for reinstatement in the judgement and order dated 12th December, 2006 but the same read with the interim order dated 19th December, 2007 and the final order in the appeal dated 5th May, 2008, there is no scope to deprive the petitioner of the benefits treating him to be on duty. In the second disciplinary proceedings, the petitioner has not been removed from service but his one increment has been denied. The petitioner therefor, was prevented from performing his duties from the period of his suspension till

his reinstatement not for any fault of the petitioner but in view of the orders passed and direction given by the employer-CISF.

- 8) In Madan Lal (supra) the Division Bench of this Court after relying on the judgments of the Hon'ble Supreme Court has categorically held that consequent upon setting aside of the order of dismissal, the order by which the employee had been dismissed is not in existence. By virtue of such non-existent order if the employee had been prevented from attending his duties the employer cannot deprive the employee of the remuneration which he would have earned if the non-existent order had been passed or used against the employee by preventing from attending his duties.
- 9) It is also well-settled that by suspending the employee in contemplation of a disciplinary proceedings, the employee is prevented from attending his duties. The suspension may be for various reasons but the basic thing imbedded therein is the employer's lack of confidence in permitting the employee to work during this period. The employee concerned cannot take up an alternative job as the same would go against him and ultimately if the employee is found to be not guilty he can be again proceeded with for the offence of taking up a job during the suspension period. The order of the Disciplinary Authority dated 10th October, 2002 directed the period of suspension of the petitioner to be treated as suspension only. The petitioner, therefor, during this period only received the suspension allowance. The Appellate Authority upheld the order of the Disciplinary Authority. After passing of the order dated 12th December, 2006, this finding that the petitioner will be located to be in suspension also did not remain. The order of the Appellate Court dated 5th May, 2008 also did not provide for any direction

in this regard. The petitioner during the pendency of the appeal was reinstated by an interim order dated 19th December, 2007. The period during which the petitioner was prevented from joining his duties cannot therefor, be treated to be absent from duty to deprive the petitioner of his salary and emoluments. The Hon'ble Supreme Court in its judgment reported in **2019 (7) SCC 564 [Chief Regional Manager United India Insurance Company Limited vs. Siraj Uddin Khan]** has drawn a clear distinction between the act of an employee in not joining the work and where the employee is prevented from working following the judgment reported in **2016 (16) SCC 663 [Shobha Ram Raturi vs. Haryana Vidyut Prasaran Nigam Ltd.]** following the ratio laid down in Shobha Ram (supra) I have no hesitation in holding that after the order of termination being set aside the fault lies in the employer (respondents) in not having utilised the services of the writ petitioner.

- 10) The Appeal Court in its final judgment and order dated 5th May, 2008 did not upset the judgment of the learned Single Judge. The Appeal Court on the contrary found that the charge-sheet had been illegally issued against the petitioner. This only means that the order passed by the Disciplinary Authority and the Appellate Authority is illegal and void on having proceeded on the basis of an illegally issued charge-sheet. The Appeal Court also refrained from commenting on any of the finds of the learned Single Judge regarding the enquiry report, the order of the Disciplinary Authority and the Appellate Authority. The petitioner, therefor, cannot be deprived of his salary and emoluments on the basis of an illegal order. That apart and in any event at the time of the admission of the appeal, the Appeal Court was prima facie of the view that the petitioner should be reinstated and as such had passed

the order dated 19th December, 2007 pursuant to which the petitioner was reinstated. The interim order was accepted and acted upon by the respondents. After being unsuccessful in the appeal, the employer cannot fall back and contend that the petitioner was not on-duty for the period between his suspension and reinstatement.

- 11) The second disciplinary proceedings took place pursuant to the leave granted by the Appeal Court in its judgment and order dated 5th May, 2008. In the second disciplinary proceedings, the petitioner's service was not terminated but was denied of an increment after having passed such order. The same logic applies that the petitioner's services was not utilized by the respondents. The respondent-employer cannot fall back and so at a subsequent stage that the period between suspension and reinstatement be treated as "Dies non" under the provisions of Rule 55 of the CISF Rules, 2001 particularly after the petitioner had demanded regularization.
- 12) In the facts and circumstances as aforesaid the show-cause notice dated 30th January, 2009 and the order dated 20th May, 2009 are set aside and/or quashed. The respondent-employer shall pay the petitioner the full salary and emoluments for the period between 10th October, 2002 and 30th January, 2008 to the petitioner. The respondent-employer shall also pay the difference between the petitioner's actual salary and emoluments and the subsistence allowance already paid to the petitioner for the period between 11th September, 2000 i.e., the date of suspension and till 9th October, 2002. The petitioner will not, however, get the benefit of any increment or promotion that may have fallen due during this period except those which have been already paid. The entire payment shall be made within a period of 2 (two)

months from date. The petitioner was of about 55 years at the time when the first writ petition was affirmed on 11th September, 2000. The petitioner will be of about 68 years at the present date. The petitioner has been deprived of the money which he was required to be paid in the year 2009. On the other hand, the money which was required to be paid to the petitioner remained with the employer for over the years. The employer, therefor, is liable to compensate the petitioner by paying interest on the money to which the petitioner is entitled in terms of this order from 20th October, 2008 when the final order in the second disciplinary proceedings was passed at the rate of 6 per cent per annum until actual payment of the entire amount. The rate of interest is reasonable and fair considering the judgment of the Hon'ble Supreme Court passed in **(2021) 11 SCC 543 [State of Andhra Pradesh and Another v. Dinavahi Lakshmi Kameswari]**. The writ petition is accordingly disposed of without any order as to costs.

Urgent photostat certified copy of this judgment and order, if applied for, be supplied to the parties on priority basis after compliance with all necessary formalities.

(ARINDAM MUKHERJEE, J.)