

IN THE HIGH COURT OF ORISSA AT CUTTACK

W.P.(C) No.2658 of 2010

Arun Kumar Jena

.... Petitioner

Mr. S.K. Rath, Advocate

-versus-

Union of India and others

.... Opp. Parties

Mr. B.S. Rayaguru, CGC

**CORAM:
THE CHIEF JUSTICE
JUSTICE R.K.PATTANAİK**

**ORDER
08.03.2022**

Order No.

- 07.
1. The challenge in the present petition is to an order dated 5th January, 2010 passed by the Central Administrative Tribunal, Cuttack Bench, Cuttack (CAT) dismissing the Petitioner's O.A. No.524 of 2006. By the impugned order, the CAT rejected the contention of the Petitioner that disciplinary proceedings could not have been initiated against him for unauthorized absence after the department itself had treated such absence as Extra Ordinary Leave (EOL) thereby regularizing the period of absence.
 2. This is the second round of litigation concerning the above disciplinary proceedings. The Petitioner while working as Scientific Assistant (D) in the Heavy Water Plant at Mumbai was absent from duty with effect from 2nd November, 1993. He

joined back on 7th February, 1995 and submitted a leave application with a medical certificate. On the same date that he joined back, he was served a charge sheet dated 5/18th January, 1995 for alleged misconduct on the same ground of unauthorized absence.

3. On 15th February, 1995 the Petitioner submitted his statement of defence enclosing the necessary documents and prayed for dropping the enquiry. Nevertheless, an Inquiry Officer (IO) was appointed who submitted a report in April/May 1st 1997 holding the charge unauthorized absence against the Petitioner proved. The Disciplinary Authority (DA) by order dated 3/12th September, 1997 after considering the report of the IO and the written submission of the Petitioner, in exercise of powers under Rule 12(2)(b) of the CCS (CCA) Rules, 1965 read with Department of Atomic Energy (DAE) Order dated 3rd May, 1993 imposed the punishment of reduction of the Petitioner to the lower post of Scientific Assistant (C) till such time he was found fit by the competent authority to be restored to the higher post of Scientific Assistant (D) after a period of five years from the date of the order.

4. The Petitioner challenged the said order dated 3rd/12th September, 1997 before the Appellate Authority ('AA').

5. While the appeal was pending, the DA issued an order dated 20th October, 1997 treating the period of unauthorized absence of the Petitioner as 'dies non' with the direction that the above period should not be treated as duty for any purpose. It was further directed that during the period of reduction to the lower post of Scientific Assistant (C), the Petitioner would draw pay at such rates as would have drawn from time to time had he not been promoted from Scientific Assistant (C) to Scientific Assistant (D).

6. After the appeal was rejected by the AA by an order dated 8th July, 1998 the Petitioner filed O.A. No.403 of 1998 before the CAT seeking quashing of the order of the DA as well as the AA. While the said OA was pending, the Petitioner also filed M.A. No.1057 of 2002 challenging the order passed by the DA on 20th October, 1997 treating the period of unauthorized absence as 'dies non'.

7. In the first round, the CAT by the order dated 12th April, 2004 quashed the order of punishment of the DA as well as the order of the AA confirming the said order. It also quashed the order dated 20th October, 1997 passed by the DA treating the period of unauthorized absence as 'dies non'. The matter was remitted to the DA to reconsider the order of punishment commensurate with the gravity of allegation.

8. The department then filed W.P.(C) No.18 of 2005 in this Court challenging the order of the CAT. The writ petition was disposed of by an order dated 22nd February, 2005 with a direction to the DA “to conclude the proceeding as expeditiously as possible, but not beyond three months from today.”

9. The DA then passed an order dated 20th May, 2005 holding that the Petitioner had committed gross misconduct by absenting from duty for an unduly long period of one year three months and four days without giving proper intimation to his section in charge. The DA held that there was no need to revise the penalty already imposed. This time the DA treated the period of absence as EOL and thereby regularized the absence.

10. Against the above order of the DA dated 20th May, 2005, the Petitioner preferred an appeal. After dismissal of the appeal, O.A. No.524 of 2006 was filed before the CAT questioning the above orders.

11. The CAT has in the impugned order come to the conclusion that “mere treatment of the period of unauthorized absence by granting EOL does not wipe out the charge of unauthorized absence from duty or the punishment imposed for such proved misconduct on the part of the applicant”. The CAT

has not indicated the source for the proposition that granting of EOL will not erase the charge of unauthorized absence.

12. Learned counsel for the Petitioner has in support of proposition that the enquiry ought not to have been held after regularization of such absence, relied on the decision of the Andhra Pradesh High Court in the case of ***G. Papaiah v. Assistant Director, Medical Services AIR 1976 AP 75***. There is similar circumstances after the period of absence was treated as EOL the High Court accepted the plea of the employee that “once leave is granted to a public servant, in respect of a particular period, it must be considered that he is permitted to absence himself from duty for that period. In such a case, it is not permissible or open to the employer or any other authority to proceed against the public servant for absents from duty for the same period and punish him. The employer, either private or public cannot below hot and cold. The authorities should have refused to grant leave of any kind to the petitioner and then proceeded to punish him after due and proper enquiry and after affording reasonable opportunity to him. When once leave has been granted, it cannot be said that the petitioner had absented himself from duty and thereby made himself liable to be punished.”

13. In the present case to the DA on his own had passed an order treating the period of leave as ‘dies non’. That was

interfered with by the CAT and the matter was remitted back to the DA. On remand, the DA again regularized the leave period of absence and this time chose to treat the absence as EOL. The CAT has in the impugned order failed to consider the effect that the regularization of the period of absence has on the disciplinary proceedings initiated on the same ground. Once the DA consciously applied his mind and decided that notwithstanding the disciplinary enquiry which is pending, the period of leave of the Petitioner should be regularized, the question of continuing with the disciplinary enquiry on the same charge did not arise. As pointed out by the Andhra Pradesh High Court, the department cannot be allowed to blow 'hot and cold'. Once it has been decided to regularize the absence of the Petitioner then further proceeding in disciplinary enquiry ought to have been discontinued.

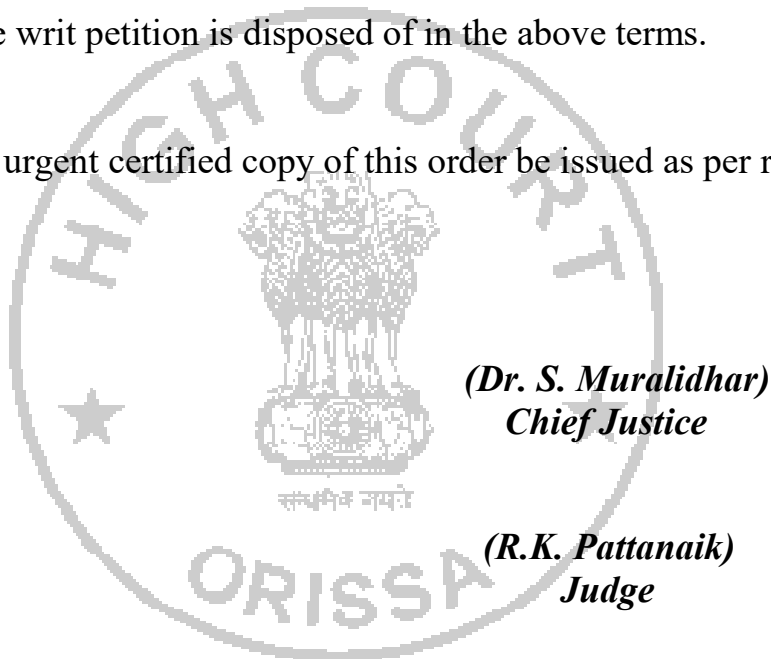
14. For the aforesaid reasons, the Court is unable to agree with the conclusion reached by the CAT and sets aside the impugned order dated 5th January, 2010 in OA No.524 of 2006. With the period of absence of the Petitioner having been regularized, the impugned punishment imposed by the DA as confirmed by the AA is hereby set aside.

15. The Petitioner has superannuated in the meanwhile. By treating the Petitioner has not having suffered any punishment, the pension payable to the Petitioner will be reworked and

necessary orders will be issued not later than within eight weeks from today. The arrears of pension be paid within twelve weeks from the date of such order being issued. If the above time schedule not adhered to, the amount of arrear pension as well as revised pension will be payable to the Petitioner with simple interest @ 6% per annum on the said sum for the period of delay.

16. The writ petition is disposed of in the above terms.

17. An urgent certified copy of this order be issued as per rules.



(Dr. S. Muralidhar)
Chief Justice

(R.K. Pattanaik)
Judge