

1.
24-03-2023
debajyoti
(Ct. no.23)

**IN THE HIGH COURT AT CALCUTTA
Special Civil Jurisdiction
Appellate Side**

**CPAN 1178 of 2022
in
WPA 7134 of 2022
+
IA NO:CAN/1/2022**

**Anil Kumar Upadhyay
Vs.
Amit Banerjee & Anr.**

Mr. Sardar Amjad Ali, Sr. Adv.,
Mr. Debnarayan Banerjee
... For the Petitioner.

Mr. Soumya Majumdar,
Mr. Dhilan Sengupta,
Mr. Ayan Chakraborty,
Ms. Sohini Mukherjee
... For Respondent Nos.2 to 9 and
the Applicant in CAN/1/2022.

In the writ petition being WPA 7134 of 2022, an order was passed on 05th July, 2022. The operative portion of the said order dated 05th July, 2022 is set out hereunder:

“ The respondents are directed to pay the sum equivalent to 75 per cent of the petitioner's salary without prejudice to their rights and contentions in the writ petition as also in the disciplinary proceedings.

The petitioner shall also be entitled to receive the same without prejudice to his rights and contentions in the writ petition as also in the disciplinary proceedings initiated against him.

This payment has to be made by 28th July, 2022 with interest at the rate of

six per cent per annum on the principal sum. The interest is allowed as the petitioner was deprived of his salary without any order of suspension.

The payment of sum equivalent to 75 per cent of the salary shall not, in any manner, be construed as subsistence allowance awarded to the petitioner.

The disciplinary proceedings which has been initiated against the petitioner is required to be brought to a logical conclusion. There are allegations and counter-assertion as to the reasons for which the disciplinary proceedings could not be proceeded with after a particular point.

Without going into the allegations and counter-assertion, I direct the disciplinary proceedings to be concluded by 31st August, 2022 but the final order should not be given effect until further orders. ”

The order dated 05th July, 2022, therefore, has three parts. The first part is the direction for payment of sum equivalent to 75 per cent of the writ petitioner's salary, which was to be paid by 28th July, 2022 and accepted without prejudice to the rights and contentions of the parties to the writ petition as also with regard to the disciplinary proceedings initiated against the petitioner which was the subject matter of the writ petition. The second part is a direction for payment of interest @ 6% per annum on the principal sum. This would mean payment of sum equivalent to the petitioner's salary from the date from which salary has not been paid to the petitioner till 28th July, 2022 with interest @ 6% on such sum. The third part is a direction to bring the disciplinary proceedings to a logical conclusion.

A final order in the disciplinary proceedings has been passed on 26th July, 2020. The petitioner has been reduced by one scale. At the present, this Court is not concerned with such final order as the contempt jurisdiction has been invoked and the modification of the order dated 5th July, 2022 is sought for.

The respondent no.2 in the writ petition, namely, the Executive Director (EDR) and Disciplinary Authority, BEML Factory, Bangalore Complex, on 24th August, 2022, has made an application being CAN 1 of 2022 for modification of the order dated 05th July, 2022, passed in WPA 7134 of 2022 and to give effect to the final order dated 26th July, 2022.

On 16th November, 2022, the writ petitioner filed a contempt application being CPAN 1178 of 2022, alleging that the alleged contemnors therein being the CMD, BEML Limited and General Manager (HR) of BEML Limited, have violated the order dated 05th July, 2022 to the extent it directed payment of sum equivalent to 75 per cent of the writ petitioner's salary with interest.

Since the statements made in the modification application would be the defence of the alleged contemnors in the contempt application, direction for filing affidavits in the modification application was only given. No direction in the contempt application for filing of affidavits was given.

The modification application being CAN 1 of 2022 and the contempt application being CPAN 1178 of 2022 are taken up together for hearing.

The employer, that is BEML Limited, alleges that the writ petitioner was absent in an unauthorized manner on and from 04th May, 2020. The leave which was to the credit of the writ petitioner, was adjusted against the unauthorized absence of the writ petitioner, which squared off the alleged unauthorized absence of the writ petitioner upto June, 2020. The final order in the disciplinary proceedings was passed thereafter on 26th July, 2022. The petitioner was, therefore, requested by BEML Limited (the employer) by a letter dated 15th September, 2020 to report to duty immediately. The employer also says that prior to passing of the order dated 05th July, 2022, the writ petitioner was transferred from Kolkata to Bangalore by a transfer order dated 18th November, 2020. The petitioner, according to the employer, did not join at the transferred place.

There is a dispute with regard to the alleged unauthorized absence. The employer alleges that the writ petitioner was absent without an approved leave which is controverted by the writ petitioner in the writ petition itself by stating that he had been working from home and had an approved leave. These facts were not brought to the notice of the Court though the employer had filed its affidavit. These issues including no joining at the transferred place are the subject matter of the writ petition and could not have been gone into at the ad interim stage when the order dated 05th July, 2022 was passed even if these facts were specifically brought to the notice of the Court in course of submission by the employer. The final order dated 26th July, 2022 is annexed to the modification application. Even on a cursory glance to the said order, nothing in details appears to have been recorded or reflected in the said order as to the alleged

unauthorized absence of the petitioner on and from 04th May, 2020 and adjustment of leave to the credit of the petitioner against the alleged unauthorized absence. In the aforesaid facts and circumstances, this Court while exercising jurisdiction in respect of a modification application is not in a position to give a conclusive view as to the correctness of the alleged unauthorized absence urged by the employer to modify the order dated 05th July, 2022. That apart in any event, any clarification on the basis of the submission made by the employer that the petitioner was absent in an unauthorized manner, would amount to a conclusive finding as against the petitioner on this issue which will ultimately jeopardize the right of the petitioner in respect of any future challenge to the final order dated 26th July, 2022 or the issue of alleged unauthorized absence.

The modification application being CAN 1 of 2022 filed in WPA 7134 of 2022, therefore, fails and is, accordingly, dismissed.

The fact remains that despite there being a direction for payment of a sum equivalent to 75 per cent of the petitioner's salary with interest thereon, the same has not been paid even today, save and except upto a period of June, 2020, as submitted by the employer (BEML Limited). The employer says that the petitioner had not worked after 04th May, 2020 and as such, by adjusting the leave to his credit with the unauthorized absence the employer has paid all dues of the petitioner and has thereby complied with the order by paying upto June 2020, being the petitioner's entitlement. Since the petitioner is not entitled to any further money, the payment in terms of the order dated 05th July, 2022 is not required to be made for

the period post June, 2022. On having been discarded this objection at this stage for the reasons stated hereinabove, the only conclusion remains is that there has been no payment as per the direction given in the order dated 5th July, 2022. Although, there is an apparent violation of the order dated 05th July, 2022, however, I am not inclined to pass any punitive order at this stage as there has been assertion and counter-assertion with regard to the unauthorized absence being one of the reasons for non-payment, which is yet to be decided conclusively.

In that view of the matter, I grant the alleged contemnors being the officers of the employer (BEML Limited) time upto 30th April, 2023, to pay sum equivalent to 75 per cent of the petitioner's salary payable from time to time from the date from which the petitioner's salary has been stopped with interest at the rate of 6 per cent per annum, as directed earlier. This opportunity to comply with the order dated 05th July, 2022 is also given keeping in mind that the writ petitioner is still in the service of BEML Limited and any payment and acceptance made in terms of the order dated 05th July, 2022, shall be without prejudice to the rights and contentions of the parties in the writ petition as also in the disciplinary proceedings. BEML Limited, the employer, if it is ultimately found that the petitioner was absent in an unauthorized manner, will be in a position to deduct the excess payment, if any, from the entitlement of the writ petitioner. On the other hand, if this payment is not made, the writ petitioner will suffer greater prejudice on being unable to sustain himself and his families.

The contempt application being CPAN 1178 of 2022 is, accordingly, disposed of.

All parties shall act on the server copies of this order duly downloaded from the official *website* of this Court.

Urgent photostat certified copies of this order, if applied for, be supplied to the parties on compliance of all necessary formalities.

(Arindam Mukherjee, J.)