

**IN THE HIGH COURT AT CALCUTTA
Constitutional Writ Jurisdiction
ORIGINAL SIDE**

BEFORE:

The Hon'ble Justice RAJA BASU CHOWDHURY

**WPO 242 of 2016
ASHOK KUMAR MISHRA
VERSUS
STATE OF WEST BENGAL & ORS.**

For the Petitioner : Mr. Debdutta Basu, Advocate.
For the Respondents : Ms. Debolina Chattaraj, Advocate.
Heard on : 11.04.2023.
Judgment on : 11.04.2023.

RAJA BASU CHOWDHURY, J.:

1. The present writ application has been filed, inter alia, praying for a direction upon the respondent no.4 to release the full salary of the petitioner from 2nd May, 2012, to 24th September, 2014.
2. The writ petitioner joined the service of the respondent no.2 in the year 1988. The terms and conditions of service of the petitioner would appear from the letter of appointment dated 26th July, 1988. It is the petitioner's case that while in service, by reasons of illness, the petitioner could not perform his normal duties from 5th March, 2012, to 1st May, 2012. Subsequently, on 2nd May, 2012, when he went to the head office,

Traffic Department, for obtaining resume-duty order as per the existing system of the organisation, the Junior Traffic Officer upon going through his file requested him to report back after 2/3 days and meet the dealing clerk. Accordingly, the petitioner reported back on 7th May, 2012 and met the dealing clerk. Unfortunately, the petitioner was neither sent to the company's Medical Officer for medical examination, nor was he issued the resume-duty order.

3. Faced with the aforesaid situation, the petitioner by a written communication dated 11th May, 2012, had lodged a complaint with the Managing Director as also the Chief Operating Manager of the respondent no.2. Upon receipt of the aforesaid communication, the respondents instead of issuing resume-duty order issued a show-cause dated 29th May, 2012, recording therein that the petitioner had absented from his duties since 5th March, 2012, without any intimation and he had also not appeared before the authority, nor had he submitted any kind of leave application. As such, he was called upon to explain why action should not be taken against him for his continuous unauthorised absence for 58 days till 2nd May, 2012.
4. The petitioner had duly responded to the aforesaid show-cause by a communication dated 18th June, 2012, and had explained the circumstances for his absence. According to the petitioner, since the

respondents were satisfied with his explanation, no further steps were taken by them in furtherance of the show-cause.

5. Unfortunately, despite the aforesaid, since, the respondents did not permit the petitioner to join his duties, the petitioner was constrained to file a writ application before this Hon'ble Court which was registered as WP No.555 of 2012. Pursuant to the direction passed by a Coordinate Bench of this Court on 17th September, 2014, the petitioner was permitted to join his duties. The resumption order is dated 24th September, 2014.
6. Although liberty was reserved for him to apply for back wages and despite applying before the respondents, for disbursal of back wages in terms of the liberty given by the order dated 17th September, 2014, since the respondents did not take any steps in the matter, the present writ application has been filed.
7. Mr. Basu, learned Advocate representing the petitioner, by referring to two diary entries dated 23rd March, 2012, and 8th April, 2012, submits that it is on the basis of the aforesaid diary entries that the show-cause notice dated 29th May, 2012, had been issued. He says that since the petitioner had reported to the office on 2nd May, 2012, the aforesaid show-cause records the absence of the petitioner from 5th March, 2012 till 2nd May, 2012. It is still further submitted that the aforesaid show-cause was not proceeded with by the respondents inasmuch as they were

satisfied with the explanation given by the petitioner. According to Mr. Basu, the respondents prevented the petitioner from discharging his duties and did not permit him to join, for which the previous writ application had been filed. It is only on the basis of the order dated 17th September, 2014, that the petitioner was permitted to join. Although the Hon'ble Court had granted liberty to the petitioner to approach the respondents for back wages, despite the petitioner applying in terms of such liberty, the respondents are sitting tight over the matter. He says that the respondents were under an obligation to consider the petitioner's application for back wages. The same, however, has not been disposed of till date. The petitioner cannot be made to suffer on account of faults not committed by the petitioner.

8. By referring to an order dated 8th October, 2013, passed in connection with the previous writ application, he says that this Hon'ble Court has already returned a finding that the petitioner had not been suspended from service and was an employee of respondent no.2 and, as such, was entitled to salary for survival. There was no challenge to the aforesaid order or the finding returned by this Hon'ble Court. Reliance has been placed by Mr. Basu, learned Advocate for the petitioner, on the judgments delivered by the Hon'ble Supreme Court in the case of ***State of Uttar Pradesh vs. Dayanand Chakrawarty and Others.***, reported in **(2013) 7 SCC 595** and ***Shobha Ram Raturi vs. Haryana Vidyut***

Prasaran Nigam Limited and Others., reported in **(2016) 16 SCC 663**, in support of his contention that once it is concluded that the employee had been prevented from discharging his duties, payment of back wages cannot be denied. In the given facts it is submitted that the respondents should forthwith release full back wages in favour of the petitioner, for the period for which they had prevented the petitioner from joining his duty.

9. *Per contra*, Ms. Chattaraj, learned Advocate representing the respondent-Corporation submits that the petitioner had remained absent unauthorisedly between 5th March, 2012, till the date of his joining. Pursuant to the order passed by this Hon'ble Court on 17th September, 2014, the petitioner was permitted to join the service. She says that the petitioner cannot be entitled to salary in the form of back wages for the period for which the petitioner did not render any service. By placing reliance on the document captioned "Guidelines for different kinds of leave and its applications in respect of different kinds of operational staff of CTC", which is annexed and appearing at page 52 of the writ application, she submits that in terms of clause 3 of the said guidelines, the petitioner is not entitled to the salary for the period for which he did not render any service. That the petitioner did not make any application for leave and without of any intimation, had remained absent for more

than 7 days, in such a case, he cannot be allowed to resume duties without specific order from the departmental head.

10. By referring to the affidavit-in-opposition, it is submitted that by communication written dated 11th July, 2012, the petitioner was called upon to report before the Chief Medical Officer, Head Office at 14:30 hours for medical examination. The petitioner did not comply with such requisition. The aforesaid letter was forwarded to the petitioner's residential address, by registered post. By referring to page 21 of the said affidavit, it is submitted that the petitioner not only refused to accept the said letter but refused to report before the Chief Medical Officer for medical examination.

11. It is still further submitted that the petitioner was re-employed pursuant to the order passed by this Court on 17th September, 2014, and it was also provided in such order that the petitioner was entitled to salary from the date of re-employment. As such, even in terms of the aforesaid order dated 17th September, 2014, the petitioner cannot be entitled to any back wages. The petitioner can only be entitled to salary from the date the petitioner had joined his duties. The petitioner having not worked cannot enjoy the benefit of back-wages.

12. In reply, Mr. Basu submitted that there had been no break in service in the petitioner's case. Although in the order dated 17th September, 2014, the petitioner had been directed to be re-employed, however, the

respondents had not re-employed the petitioner but had permitted the petitioner to continue his service. The service record of the petitioner does not show break in service.

13. Heard learned Advocates appearing for the respective parties and considered the materials on record. In the instant case, the petitioner claims that he had reported for duty on 2nd May, 2012. Unfortunately, he was not issued the resume-duty order for him to join. Such fact is also recorded in the letter dated 11th May, 2012. Incidentally, the show-cause issued by the respondents on 29th May, 2012, records that the petitioner had absented himself from duties, unauthorisedly from 5th March, 2012, till 2nd May, 2012. The petitioner had duly responded to the show-cause where upon no further steps were taken against him. It is not the case of the respondents that any disciplinary proceedings had been initiated or continued against the petitioner, for his unauthorised absence.

14. Although, Ms. Chattaraj has strenuously argued that the petitioner did not come forward and report for duty despite being called upon by the respondents vide their letter dated 11th July, 2012, there is nothing on record to demonstrate that the respondents had taken any action for the failure on the part of the petitioner to report for duty. It has been fairly submitted by the learned Advocate for the respondents that since the respondents had taken the petitioner back in service, no disciplinary proceedings were initiated against the petitioner. Be that as it may, the

petitioner's right to make an application, as regards back wages in terms of the order dated 17th September, 2014 cannot be lost sight of. The respondents are also obliged to consider the same in terms of the order dated 17th September, 2014, passed by the Hon'ble Court in WP No.555 of 2012. The records relating to WP No.555 of 2012 have been produced wherefrom it transpires that the previous writ application was filed on 6th July, 2012. Such fact would corroborate from the presentation form.

15. In this case, it does not appear that the respondents had taken any steps on account of unauthorised absence of the petitioner. Although Ms. Chattaraj has claimed that the petitioner had been re-employed and as such is not entitled to back wages, the records produced by the respondents do not support the aforesaid contention. Pursuant to directions passed by this Court, the learned Advocate representing the respondent Corporation has produced the original service record of the petitioner. The learned Advocate representing the Corporation, however, could not produce any document to demonstrate that the petitioner had been re-employed. The service records also do not show that there has been break in service of the petitioner. It shall in the given facts also be iniquitous to treat the petitioner as re-employed in terms of the order dated 17th September 2014, since the Coordinate Bench of this Hon'ble Court had also by the very same order, permitted the petitioner to apply for back wages.

16. Records reveal that although a show cause had been issued, no further steps have been taken by the respondents subsequent to receipt of reply to such show cause. Having, thus, not taken any steps, in my view, no punishment can be inflicted on the petitioner for his absence between 5th March, 2014 and 2nd May, 2014. As such the respondents could not have held back the resume duty order. The respondents by their conduct have condoned the petitioner's absence. I find that the petitioner's right to be considered for back wages has been crystallised vide order dated 17th September, 2014, passed by this Hon'ble Court. Despite being obliged to consider the petitioner's application, for years together the respondents have kept such application pending.
17. Having regard to the conduct of the respondents, in my view, no fruitful purpose would be served at this stage to remand the matter to the respondents for a decision in the matter. The respondents having not taken any steps for the unauthorised absence of the petitioner and by their conduct having condoned the absence cannot deny the payment of back wages to the petitioner for the period between 2nd May, 2014 and 24th September, 2014, especially when the petitioner was prevented from joining the duty for reasons of failure on the part of the respondents to issue resume duty order. In my view justice would be sub-served if the petitioner is paid 50% back wages from 2nd May, 2014 till 24th September, 2014, less the amount already disbursed in his favour. The

respondents are directed to compute the back wages payable to the petitioner and disburse the same in favour of the petitioner within a period of eight weeks from the date of communication of this order.

18. With the aforesaid observations, the writ application is disposed of.
19. There shall be no order as to cost.
20. Urgent certified photostat copy of this order if applied for be made available to the parties upon compliance of all formalities.

(RAJA BASU CHOWDHURY, J.)