

Gaikwad RD

IN THE HIGH COURT OF JUDICATURE AT BOMBAY
CIVIL APPELLATE JURISDICTION
WRIT PETITION NO. 4130 OF 2018

CAPT HK MISHRA,
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...Petitioner

~ VERSUS ~

- 1. UNION OF INDIA,**
Through The Secretary, Ministry of
Shipping, Govt of India, Through
Ministry of Law and Justice/Govt
Standing Counsel Govt of India,
Mumbai.
- 2. THE DIRECTOR GENERAL OF
SHIPPING,**
Govt of India, Directorate General of
Shipping 9th Floor, Beta Building I-
Think Techno Campus, Kanjurmarg
(E), Mumbai 400 042, Through
Ministry of Law and Justice/Govt
Standing Counsel.
- 3. INDIAN MARITIME UNIVERSITY,**
Through The Registrar Indian
Maritime University, East Coast Road,
Sammencherry, Chennai 600 119,
Through Director, IMU Mumbai Port
Campus.

...Respondents

APPEARANCES

FOR THE PETITIONER **Mr HK Mishra, *Petitioner in person.***

FOR RESPONDENT NO.1 **Mr Rui Rodrigues,** *with NR
Prajapati.*

FOR RESPONDENT NO.3 Mr Mihir Desai, Senior Advocate,
i/b Devyani Kulkarni.

**CORAM : G.S.Patel &
Neela Gokhale, JJ.**

RESERVED ON : 21st March 2023

PRONOUNCED ON : 6th April 2023

ORAL JUDGMENT (Per Neela Gokhale J):-

1. **Rule.** The contesting 3rd Respondent has filed an affidavit in reply. By consent, Rule made returnable forthwith.
2. The matter involves an administrative conflict between the parties arising out of refusal of the Petitioner to mark his attendance in Biometric Attendance System (“**BAS**”) portal as mandated by Office Memorandum (“**OM**”) issued by the Government of India and the relevant Rules and Ordinances of the Respondents. This resulted in the Respondents treating him as ‘absent’ from duty and off-setting the absence period against his accumulated leave. Aggrieved by the penal action by the Respondents, the Petitioner seeks recovery of his deducted salary with interest, in addition to restoring the accumulated leave to his credit. He has further prayed for a direction to the 3rd Respondent University to compensate him

with equal amount of money towards notional advance of LTC. There are also prayers in damages, etc.

3. Pertinently the Petitioner has neither assailed the Office Memorandum issued by the Government of India nor the Rules/Instructions of the 3rd Respondent University mandating the marking of attendance by its employees in the BAS machine. It is further relevant to note that the Petitioner abstained from the discipline of BAS for a limited period of three months and 16 days and only in the year 2017. The Petitioner resumed marking his attendance in the BAS from 14th December 2017.

4. The 1st Respondent is the Union of India through the Secretary Ministry of Shipping and Ministry of Law and Justice. The 2nd Respondent is the Director-General of Shipping of the Union of India and 3rd Respondent is the Indian Maritime University.

5. **FACTUAL MATRIX**

(a) The Petitioner is an employee of the Government of India, appointed as a Nautical Officer on 26th September 2001 in TS Chanakya under the Director-General of Shipping. His formal appointment was issued on 11th April 2002. He subsequently joined the LBS College of Advanced Maritime Studies and Research on 6th December 2006. Four Maritime Institutes were merged with the TS Chanakya Ship and brought under the Indian Maritime University (“IMU”) established on 14th November 2008 by the

Indian Maritime University Act. The University is regulated by its own Statutes and Ordinances.

(b) Pursuant to the directions issued by the Government of India on 23rd December 2014 to secretaries of all government organisations directing all employees to mark their attendance in BAS portal on regular basis, the 3rd Respondent University, on 22nd July 2015 issued instructions to its employees regarding adherence to the BAS in IMU. Ordinance No. 06 of 2017 of the IMU cautioned disciplinary/legal action against any employee who failed to abide by the BAS. The Ordinance was to take retrospective effect from 27th July 2015

(c) The Petitioner complains of harassment at the hands of the administration and is also aggrieved by exemptions granted to some Officers of IMU from marking their attendance on BAS which he alleges to be discriminatory.

(d) In 2016, the Petitioner was issued a transfer order to Kochi, which he challenged in this Court by filing Writ Petition No. 6351 of 2016. A Division Bench of this Court stayed the transfer. IMU's Special Leave Petition to the Supreme Court failed. IMU cancelled the transfer order and the Petitioner continued at Bombay.

(e) Initially, the Petitioner was marking his attendance in the BAS. However he abstained from adhering to the BAS from last three days of August 2017 through September 2017, October 2017,

November 2017 and until 13th December 2017. Resultantly, the 3rd Respondent University treated him as absent from service for those days and further treated his balance leave as exhausted. The calculation placed on record indicates that the IMU deducted 321 days of earned leave of the Petitioner treating the days on which he had not marked his attendance in the BAS as absence from service.

(f) The Petitioner filed Contempt Petition No. 426 of 2017 in Writ Petition No. 6351 of 2016 in this Court. A Division Bench of this Court, by its order dated 24th February 2018 dismissed the Contempt Petition holding, prima facie, that if an institution provides for adherence to BAS and if an employee refuses to do so, the employer would not be unjustified in taking action for the same. However, this Court recorded that if the Petitioner contended that the act was illegal, it would give the Petitioner a fresh cause of action.

(g) The 3rd Respondent University intimated the Petitioner about status of leaves to his credit by OMs dated 28th August 2017, 29th September 2017, 31st October 2017 and 5th January 2018. The OMs also put the Petitioner to notice of deductions in his salary in the event of further non-adherence of BAS. The Petitioner resumed marking his attendance through BAS from 14th December 2017 and immediately IMU started paying his salary.

(h) The Petitioner insists that he has attended his office and regularly discharged his duty on the days on which he has been

shown absent only on account of non-adherence to BAS. Thus, the Petitioner aggrieved by the deduction in his salary, and treating his leave as exhausted has filed the present Writ Petition seeking reliefs as prayed.

(i) The contesting 3rd Respondent University has filed its Affidavit in Reply and the Petitioner has also filed an Affidavit in Rejoinder.

6. SUBMISSIONS OF THE PETITIONER:

(a) The Petitioner appears in person. He contends that the IMU Act and its Statutes and Ordinances are not applicable to him since he is a Central Government Officer on deemed deputation to LBS College of Advanced Maritime Studies and Research. He relies on Section 49 of the Indian Maritime University Act 2008 (“**IMU Act**” which provides the employees of the four Maritime Institutes merging with the Training Ship Chanakya an option to join IMU as per its service conditions.

(b) The Petitioner has complained of harassment at work including instances such as: many officers of the IMU being exempted from marking their attendance in BAS, the reasons being kept secret; teachers being treated differently from officers occupying administrative positions; a freshly appointed Associate Professor, 14 years his junior, being appointed as Director of the Mumbai Port Campus and the Petitioner having to report to him;

BAS being used as a weapon to silence officers raising charges of organised corruption against IMU.

(c) The Petitioner thus claims that he had no intention to undermine the discipline at workplace and his refusal to adhere to BAS was only a protest against the discrimination in IMU which was arbitrarily exempting select officers from mandatory BAS adherence.

(d) The Petitioner has challenged the action of IMU in issuing the four OM's on the grounds that the action is *mala fide*, illegal, without authority and in violation of Section 49 of the IMU Act, the provisions of the Fundamental Rules and the Central Civil Services (Classification, Control and Appeal) Rules 1972 ("CCS Rules"). The Petitioner has further objected to the retrospective effect given to the University Ordinance No. 06 of 2017 to apply from 2015.

(e) In view of the above contentions, the Petitioner seeks directions of release of his salary with interest, restoration of deducted leave and also amounts towards lost anticipated LTC.

7. SUBMISSIONS OF THE 3rd RESPONDENT:

(a) Mr Rodrigues appears for the Respondent No.1 Union of India. Mr Desai, learned Senior Advocate appearing for the 3rd Respondent University, contested the claim of the Petitioner that he is not bound by the IMU Act, Statutes and Ordinances, being on

deputation from the Central Government. He states that the Petitioner was transferred to LBS College of Advanced Maritime Studies and Research and clarifies that the legal effect of merging various Maritime Institutes in TS Chanakya is that the legal identity of the Institutes stood extinguished and merged into IMU on 14th November 2008

(b) Mr Desai contends that every other employee except the Petitioner was complying with the BAS. He emphasises the authority of the IMU to deduct from the salary of its employees by following due procedure and denies the action against the Petitioner as a form of punishment. The action is justified by the IMU by pointing to its own Circular No. 15 dated 27th July 2015 and Ordinance No. 06 of 2017 providing for disciplinary/legal action against indiscipline of an employee.

(c) Mr Desai draws our attention to the assailed OMs and canvases that the Petitioner was put to notice of the consequences of non-adherence to the BAS and was intimated that not marking his attendance by BAS resulted in him being treated as absent and also exhaustion of leaves to his credit. It was further contended that the action and behaviour of the Petitioner in not complying with the mandated BAS caused indiscipline and disturbance at the 3rd Respondent University. His action amounted to indiscipline and insubordination for which the Respondents were well within their authority to make deductions from his salary. Mr Desai further argued that the IMU was merely following the orders of the Central Government that specified disciplinary action against employees against non-compliance of BAS. He contended that even holding

against the University, the Petitioner being a government servant was still subjected to Rules stipulated by the Central Government, if not the Ordinance and Circular of IMU.

(d) Further rebutting the allegations of the Petitioner regarding a junior person being appointed as Director in-charge of the newly created IMU (Mumbai Port Campus) and compelling the Petitioner to report to him, it was clarified that the said person was appointed by the IMU HQ Chennai and others similarly placed as the Petitioner were also reporting to him.

(e) It has been further contended by the 3rd Respondent University that during surprise checks conducted, it was found that the Petitioner was not taking classes as per the time-table, for which an explanation was called from the Petitioner. No reply was forthcoming. The 3rd Respondent University has stated this to be an act of negligence and insubordination by the Petitioner, affecting the discipline and reputation of the Institute. The 3rd Respondent has thus termed the Petition as not maintainable and sought its dismissal.

8. ANALYSIS

(a) Having gone through the submissions and documents placed on record by conflicting parties, the admitted position that emerges is that the Government of India by its letter dated 23rd December 2014 had communicated to all its Departments and Organisations to ensure marking of attendance of its employees in

BAS Portal on regular basis. The object of introducing the BAS was to monitor attendance of its employees and ensure discipline as a large difference was found between the number of registered employees and the number of employees marking their attendance.

(b) The Letter dated 23rd December 2014 was followed by an OM dated 28th January 2015 mandating all employees to register in the BAS and mark their attendance. The OM further authorised appropriately dealing with cases of late attendance/unauthorised absence as per existing instructions.

(c) Acting in aid of the Government directions, the IMU issued instructions for the BAS by its Circular dated 27th July 2015. Clause 4 of the Circular mandated that all employees other than those exempted were required to compulsorily mark their arrival and departure in the BAS machine. Clause 10 stipulated that if the casual leave of the employee is already exhausted, it will be treated as earned leave or any other leave to which he is entitled, failing which as leave without pay.

(d) Ordinance 06 of 2017 of the IMU was promulgated and was to apply retrospectively from 27th July 2015. Clause 15 of the Ordinance cautioned that '*disciplinary/legal action shall be initiated against any employee who doesn't abide by the Biometric Attendance System (BAS) or is found to be directly or indirectly tampering with the BAS or with the surveillance system or unauthorisedly tampering with the attendance particulars.*' It was thus not until 2017 that non-adherence to the BAS invited disciplinary or legal action.

(e) Undoubtedly, the Petitioner being an employee of the Government of India was bound by the OM issued by the Central Government. Even if the claim of the Petitioner is accepted that he was on '*mere deputation*' and has not opted to be subjected to the IMU service conditions under Section 49 of the IMU Act, a bare reading of the Ordinance No. 06 of 2017 clarifies that it applies to him. The Ordinance says '*The Ordinance will apply to all employees of the Indian Maritime University. "Employee" means any teacher or non-teaching staff of the University who has been appointed by the University or who stood transferred to the University by virtue of Section 49 of the IMU Act 2008 and includes deputationists of the University.*' The Ordinance thus clearly includes deputationists, apart from employees who have exercised options under Section 49 of the Act. Hence, we have no hesitation in holding that the Ordinance/Instructions and Rules of the IMU are binding on the Petitioner. In any case the Petitioner is bound by the directions and instructions of the Central Government.

(f) It is an admitted fact that the Petitioner had initially marked his attendance by the BAS. It was only as a mark of protest against alleged discrimination among exempted employees and others like the Petitioner compelled to be subjected to BAS, that he refused to mark his attendance by BAS. Consequently, he was visited with penal action by IMU by treating him as 'absent from duty' and thereby deducting his salary. Even his balance and accumulated leave was treated as having been exhausted. Relevant to note is that the Petitioner was not actually on leave and was in fact attending office and discharging his duty. It is not even the case of the 3rd Respondent that he was actually absent from work. He

was being treated as 'absent' only on record for not marking his attendance in BAS. There is a stray allegation that on a surprise inspection, the Petitioner was not in class; however the 3rd Respondent has not seriously nor substantively disputed his physical attendance in office. Hence, the action taken by the IMU by deducting his salary and treating his absence against accumulated leave was nothing but a penal action/disciplinary action against him.

(g) The conduct of the Petitioner cannot be ratified nor justified. Having refused to comply with DoPT instructions and deliberately refusing adherence to institutional discipline, we have no hesitation in holding that the conduct of the Petitioner is that of indiscipline and insubordination. The four OMs impugned in the Petition had given him clear notice of the resultant consequences of failing to mark his attendance as per Institution discipline.

(h) However, the acts of the Petitioner in displaying indiscipline and insubordination does not authorise the Respondents in taking penal action against him without following due process of law. The OM dated 28th January 2015 of the Central Government as well as the Ordinance 06 of 2017 issued by the IMU also authorises the employer to initiate disciplinary action against the errant employee. However, initiation of disciplinary action entails a procedure known to service law to be followed prior to imposition of penal action against the employee.

(i) The factual position is that the Petitioner was not even given any show cause notice to explain his actions. It was only the

monthly memos impugned in the Petition that were communicated to the Petitioner and then too merely informing him that he has been treated as absent and his leave was also being treated as exhausted. The days of purported 'no attendance' were termed as days of 'no pay', despite the fact that the Petitioner was very much attending office. Thus, he was not given an opportunity of being heard. No reply/explanation was sought from him prior to deducting his salary and leave accumulated to his credit. The doctrine of *audi alteram partem* has clearly been violated. Rules of natural justice have not been followed.

(j) There is a consistent pattern of judicial thought that civil consequences entail infractions not merely of property or personal rights, but also of civil liberties, material deprivations, and non-pecuniary damages. Every order or proceeding which involves civil consequences or adversely affects a citizen should be in accordance with the principles of natural justice. No person can be condemned unheard. Thus, the action taken by the 3rd Respondent University cannot be sustained as it has been taken without following the due process of law.

(k) As noted at the outset, the Petitioner has not challenged the mandate of BAS itself, nor any OM of the Central Government or the IMU. The only relief sought by the Petitioner is recovery of salary deducted by the 3rd Respondent University and the restoration of leave at his credit. The Petitioner has made several allegations of harassment against the IMU administration. It is settled law that writ petition under 226 of the Constitution of India cannot be entertained for recovery of money. The remedy for

that lies elsewhere. Similarly, the extraordinary writ jurisdiction of this Court cannot be invoked for relief against harassment by the IMU administration, which entails evidence to be adduced and facts to be proved by parties.

(1) We have already held that due process of law has not been followed by the 3rd Respondent prior to taking penal action against the Petitioner. Leave to the credit of the Petitioner has been treated as exhausted on account of being treated as absent from service. The details of deducted leave placed on record indicate that 321 days of Earned Leave were deducted by the 3rd Respondent. Hence, we deem it fair in the interests of justice that the leave accruing to the credit of the Petitioner and which has been treated as exhausted on account of him being treated as absent from work must be restored to his credit.

9. For the reasons stated herein above, prayer clause (a) seeking direction to the 3rd Respondent University to pay forthwith all balance pay/salary along with interest stands rejected. Prayer clause (c) seeking compensation for notional loss of his LTC is also rejected. However, we direct the 3rd Respondent University to restore the leave accruing to the credit of the Petitioner which has been treated as exhausted on account of him being treated as absent from work forthwith and to that limited extent prayer clause (a) stands partly allowed.

10. The prayer seeking recovery of money cannot be granted in a Writ Petition under Article 226 of the Constitution of India, 1950

and the remedy lies elsewhere. The Petitioner is at liberty to pursue appropriate remedies in a Court of competent jurisdiction. If the Petitioner chooses so to do, all contentions shall be left open. The time spent before this Court in the present proceedings shall stand excluded for the purpose of calculating the period of limitation.

11. The Writ Petition is therefore partly allowed. Rule is partly made absolute in these terms. Interim orders, if any stand vacated.

12. No order as to costs.

(Neela Gokhale, J)

(G. S. Patel, J)

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