

CM-1530-C-2022 &
CM-1531-C-2022 in/&
RSA-3234-1997 (O&M)

. 2023:PHHC:058267
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IN THE HIGH COURT OF PUNJAB AND HARYANA
AT CHANDIGARH

CM-1530-C-2022 &
CM-1531-C-2022 in/&
RSA-3234-1997 (O&M)
Date of Decision :24.04.2023

Kuldip Singh

....Appellant

Versus

Guru Nanak Dev University and others

...Respondents

CORAM: HON'BLE MR. JUSTICE HARSIMRAN SINGH SETHI

Present: Mr. R.K. Arora, Advocate with
Mr. Jugam Arora, Advocate for the appellant.

Mr. M.K. Dogra, Advocate for the respondents.

* * *

Harsimran Singh Sethi, J. (Oral)

CM-1530-C-2022

Present application has been filed for disposal of the main
regular second appeal.

Application is disposed of as the main appeal is taken up for
hearing today itself.

CM-1531-C-2022

As prayed for, application is allowed.

RSA-3234-1997

Present regular second appeal has been filed by the appellant-
plaintiff challenging the judgments and decrees of the Courts below dated

12.11.1994 and 13.06.1997 by which, order dated 26.11.1992 passed by the respondent-University by which, the appellant-plaintiff was removed from service, has been upheld and the suit filed by the appellant-plaintiff has been dismissed.

Certain facts need to be mentioned for the correct appreciation of the issue in hand.

Appellant-plaintiff joined respondent-University in the press department as Compositor on 05.11.1979. While working on the said post, appellant-plaintiff proceeded on leave from 22.09.1992 to 1.10.1992 i.e. for a period of 09 days. The said leave was sought to be extended for further period of 30 days but no communication was received from the respondent-University either rejecting or accepting the said request for extension of leave.

On 02.11.1992, appellant-plaintiff appeared before the authority concerned of the respondent-university so as to allow him to resume duty but he was not allowed to do so on the ground that vide order dated 26.11.1992, the post which was being held by the appellant-plaintiff has been declared vacant by removing him from service keeping in view the Statute 74 of the Guru Nanak Dev University as no enquiry proceedings are liable to be conducted for the said purpose.

Order dated 26.11.1992 passed by the respondent-University was challenged by the appellant-plaintiff by way of filing a civil suit. Notice of the suit was issued to the respondent-University, who appeared and submitted their reply stating that appellant-plaintiff never got the leave sanction before he availed the said leave and that a notice was published in

the news paper on 05.11.1992 asking the appellant-plaintiff to join service but he did not join the same hence, keeping in view the Statute 74 of the Guru Nanak Devi University Calendar (hereinafter referred to as “Statute 74 of the University”), appellant-plaintiff was rightly removed from service.

Keeping in view the evidence which came on record, the trial Court by interpreting the same has held that keeping in view Statute 74 of the University, an employee who remained absent in an unauthorized manner from duty for a period of 07 days can rightly be treated having abandoned his job and without even giving any show cause notice can be terminated from service hence, impugned order dated 26.11.1992 passed by the respondent-University is in accordance with provisions of Statute 74 of the University and no interference at the hands of Civil Court is called for and the suit was dismissed by the trial Court vide judgment and decree dated 12.11.1994.

Feeling aggrieved against the judgment and decree of the trial Court dated 12.11.1994, an appeal was preferred by the appellant-plaintiff which came to be decided on 13.06.1997 by the lower Appellate Court upholding the judgment and decree of the trial Court dated 12.11.1994 on the ground that once the power exists with the respondent-University under Statute 74 of the University to treat the post as vacant in case an employee remained absent from duty in an unauthorized way for a period of more than 07 days, findings recorded by the trial Court cannot be said to be perverse in any manner and trial Court has rightly interpreted the facts and circumstances of the case and the impugned order dated 26.11.1992 has rightly been upheld and the appeal filed by the appellant-plaintiff was

dismissed. Hence, the present regular second appeal.

Learned counsel for the appellant-plaintiff argues that both the Courts below have accepted the plea of the respondent-university that keeping in view Statute 74 of the University according to which, in case an employee remains absent from duty without leave or overstayed his leave for a period of more than one week, his office shall be declared as vacant. Learned counsel for the appellant-plaintiff submitted that the said statute has already been interpreted by this Court holding that absence from duty constitute the service misconduct and thus, attracts provision of Statute 33(1) of the University Statute for conducting departmental proceedings hence, without conducting the disciplinary proceedings, no order can be passed by placing reliance upon Statute 74 of the Guru Nanak Dev University Calendar.

Learned counsel for the appellant-plaintiff further relies upon the judgment of the Coordinate Bench of this Court in **CWP-9948-2009** titled as **Rani vs. Guru Nanak Dev University and another** decided on 14.12.2010 relating to an employee of the Guru Nanak Dev University itself where a Coordinate Bench of this Court has held that any action taken under Statute 74 of the University and that too without holding an enquiry cannot be allowed to be sustained hence, the reliance being placed by the Courts below upon Statute 74 of the University Calendar so as to dismiss the suit filed by the appellant-plaintiff is perverse being contrary to the settled principle of law.

Learned counsel for the respondent-University submits that once, it has already come on record that appellant-plaintiff had remained

absent from duty without authority for a period of more than 07 days, Statute 74 of the University is applicable and action taken against the appellant-plaintiff under the said statute cannot be treated as arbitrary and illegal especially, when the said statute has not been challenged in the civil suit hence, order passed by the respondent-University qua the appellant-plaintiff declaring his post as vacant by exercising power under Statute 74 of the University is perfectly valid and the judgments and decrees of the Courts below are liable to be upheld.

I have heard learned counsel for the parties and have gone through the record with their able assistance.

The question which arises in the present case is whether keeping in view various pronouncement of this Court any action can be taken by the respondent-University under Statute 74 of the University unilaterally and that too without holding any enquiry into the allegations that whether the employee concerned was intentionally absent from duty or the said absence was under certain circumstances which were beyond his control, which question can only be decided in case a departmental enquiry is held into the allegations of absence.

A Coordinate Bench of this Court while passing order in **CWP-16010-2007** titled as **Jaspal Singh vs. Guru Nanak Dev University and others** deiced on 08.07.2010 on similar facts wherein, employee had gone abroad and did not perform duties for a period of one month, application of Statute 74 of the University was held to be non-applicable and rather it has been held that in case any employee remained absent from duty, Statute 33 of the University will be applicable so as to take appropriate action against

him/her. Relevant paragraph of the judgment is as under:-

“5. Admittedly, no charge sheet was ever served upon the petitioner nor any disciplinary inquiry was held against him. The action is said to be initiated under Statute 74 and not under Statute 33(i). It has been held by the Hon'ble Supreme Court in a case reported as AIR 1966 SC 1364 titled as Mafatlal Narandas Barot Vs. D. Rathod, Divisional Controller, State Transport Mehsana and another that the termination of service of a permanent employee on account of absence without leave without giving opportunity to show cause contravenes principles of natural justice. A similar defence by the Road Transport Corporation was negated by the Hon'ble Supreme Court. The relevant observations are as under:-

“ 12. It is true that the respondent may visit the punishment of discharge or removal from service on a person who has absented himself without leave and without reasonable cause, but this cannot entail automatic removal from service without giving such person reasonable opportunity to show cause why he be not removed. The appellant is entitled to a reasonable opportunity to show cause which includes an opportunity to deny his guilt and establish his innocence which he can do only when he knows what the charges levelled against him are and the allegations on which such charges are based. In our judgement, the appellant was entitled to an opportunity to show cause against the action proposed to be taken 4 of 7 :: Downloaded From Local Server on - 01-05-2023 13:11:00 :: CWP. No. 16010 of 2007 -5- against him.”

6. A Constitution Bench of the Hon'ble Supreme Court further examined the validity of a similar rule as Statute 74 framed by the

respondent-university and the right of of the permanent employee.

In 1991 (supplement) SCC 600 titled as Delhi Transport Corporation Vs. D.T.C. Mazdoor Congress and others, the Hon'ble Supreme Court considered the entire law on the subject and the validity of such a provision in the light of principles of natural justice and observed as under:-

“Thus on a conspectus of the catena of cases decided by this Court the only conclusion follows is that Regulation 9(b) which confers powers on the authority to terminate the services of a permanent and confirmed employee by issuing a notice terminating the services or by making payment in lieu of notice without assigning any reasons in the order and without giving any opportunity of hearing to the employee before passing the impugned order is wholly arbitrary, uncanalised and unrestricted violating principles of natural justice as well as Article 14 of the Constitution. It has also been held consistently by this Court that the Government carries on various trades and business activity through the instrumentality of the State such as Government Company or Public Corporations. Such Government Company or 265 Public Corporation being State 'instrumentalities are State within the meaning of Article 12 of the Constitution and as such they are subject to the observance of fundamental rights embodied in Part III as well as to conform to the directive principles in Part IV of the Constitution. In other words the Service Regulations or Rules framed by them are to be tested by the touchstone of Article 14 of Constitution. Furthermore, the procedure 5 of 7 :::: Downloaded From Local Server on - 01-05-2023 13:11:00 :::: CWP. No. 16010 of 2007 -6- prescribed by their Rules or Regulations must be reasonable, fair and just and not arbitrary,

fanciful and unjust. Regulation 9(b), therefore, confers unbridled, uncanalised and arbitrary power on the authority to terminate the services of a permanent employee without recording any reasons and without conforming to the principles of natural justice. There is no guideline in the Regulations or in the Act, as to when or in which cases and circumstances this power of termination by giving notice or pay in lieu of notice can be exercised. It is now well settled that the 'audi alteram partem' rule which is essence, enforces the equality clause in Article 14 of the Constitution is applicable not only to quasi-judicial orders but to administrative orders affecting prejudicially the party-in-question unless the application of the rule has been expressly excluded by the Act or Regulation or Rule which is not the case here. Rules of natural justice do not supplant but supplement the Rules and Regulations. Moreover, the Rule of Law which permeates our Constitution demands that it has to be observed both substantially and procedurally. Considering from all aspects Regulation 9(b) is illegal and void as it is arbitrary, discriminatory and without any guidelines for exercise of the power. Rule of law posits that the power to be exercised in a manner which is just, fair and reasonable and not in an unreasonable, capricious or arbitrary manner leaving room for discrimination. Regulation 9(b) does not expressly exclude the application of the 'audi alteram partem' rule and as such the order of termination of service of a permanent employee cannot be passed by simply issuing a month's notice under Regulation 9(b) or pay in lieu thereof without recording any reason in the order and without giving any hearing to the employee to controvert the allegation on the basis of which the purported order is made.”

7. In view of the settled legal position, this petition is allowed.

The impugned order (Annexure P-10) is hereby quashed.

Petitioner is directed to be reinstated to service forthwith, however, he shall not be entitled to any financial benefit for the period he remained out of service, though, his emoluments/salary shall be fixed on notional basis by giving him notional benefit of increments and other such benefits as might have accrued during such period. The respondents are, however, at liberty to proceed against the petitioner in accordance with law for absence from duty, if, so desired.”

LPA being LPA No.1580 of 2010 filed by the respondent-University against the said judgment in Jaspal Singh (supra) was also dismissed by the Division Bench of this Court vide order dated 07.12.2010 upholding the judgment of the Single Bench of this Court by holding that Statute 74 of the University cannot be made applicable without holding the departmental proceedings.

The same question came up for consideration again before this Court in CWP-9948-2009 titled as **Rani vs. Guru Nanak Dev University and another** decided on 14.12.2010 wherein also, an employee remained absent from duty for a period of 17 days and action was taken against the said employee under Statute 74 of the University that once an employee remained absent from duty for a period of more than 07 days, the post was rightly declared vacant. The said action of the University was held to be bad by the Court and it has been held that no action can be taken under Statute 74 of the University without holding a regular enquiry. Therefore, even for applicability of Statute 74 of the University, enquiry for proving the

misconduct was made mandatory. Relevant paragraphs of the judgment are

as under:-

“7.While an act of 'willful' absence from duty would undoubtedly be a 'misconduct', the absence from duty for a reason beyond the control of an employee can not be termed so. If an employee is unable to attend his duties for a reason, like mishap; serious ailment of his own or in family; law and order problem; failure of transport etc., it can not be termed as a case of 'deliberate' or 'willful' absence from duty. Where an employee is accused of absence from duty and he gives a plausible explanation and if the Competent Authority does not ex-facie accept such explanation, it shall be obligated to hold an inquiry to find out as to whether such an absence from duty is willful, deliberate or for the reasons beyond the control of the employee. The observance of principles of natural justice is sine-quo-non before subjecting an employee with a punitive order.

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11.While an act of 'willful' absence from duty would undoubtedly be a 'misconduct', the absence from duty for a reason beyond the control of an employee can not be termed so. If an employee is unable to attend his duties for a reason, like mishap; serious ailment of his own or in family; law and order problem; failure of transport etc., it can not be termed as a case of 'deliberate' or 'willful' absence from duty. Where an employee is accused of absence from duty and he gives a plausible explanation and if the Competent Authority does not ex-facie accept such explanation, it shall be obligated to hold an inquiry to find out as to whether such an absence from duty

is willful, deliberate or for the reasons beyond the control of the employee. The observance of principles of natural justice is sine-quo-non before subjecting an employee with a punitive order.

12. For the reasons afore-stated, the writ petition is allowed; the orders dated 22.09.2008 and 27.01.2009 [Annexures P-5 and P11] are hereby quashed and the respondents are directed to release all the consequential service benefits including 'family pension' to the petitioner along with interest @ 7% per annum within a period of three months from the date a certified copy of this order is received. The petitioner shall also be entitled to the costs of Rs.25,000.”

Bare perusal of the above stated settled principles of law shows that Statute 74 of the University has been interpreted by this Court to mean that action under Statute 74 of the University can only be taken in case an enquiry proceedings have been held so as to prove the unauthorized and intentional absence of the employee concerned.

Concededly, in the present case, no such enquiry was held against the appellant-plaintiff for remaining absent from duty for a period of 30 days. That being so, judgments and decrees of the Courts below by which, suit filed by the appellant-plaintiff for declaring impugned order dated 26.11.1992 passed by the respondent-University as bad, has wrongly been dismissed. The said view taken by the Courts below is perverse to the settled principles of law noticed hereinbefore hence, both the judgments and decrees of the Courts below cannot be allowed to be remain in operation and the same are liable to be set aside.

Learned counsel for the respondent-University submits that in

case impugned order passed by the respondent-University is being set aside on the ground that enquiry proceedings should have been conducted for proving the allegation of unauthorized absence and only thereafter, action could have been taken under Statute 74 of the University, respondent-University be given liberty to initiate disciplinary proceedings against the appellant-plaintiff.

Learned counsel for the appellant-plaintiff submits that appellant-plaintiff is now 76 years old and has already attained the age of superannuation and therefore, holding departmental proceedings against him at this stage, will not bear any fruit and rather after a period of 31 years there is no record/evidence to prove the allegations or to defend the allegations. Learned counsel for the appellant-plaintiff further submits that the Coordinate Bench of this Court while passing order in Jaspal Singh (supra) had given benefit of reinstatement in service to Jaspal Singh but without initiating the disciplinary proceedings but no benefit of arrears was given for the period he remained out of service but his pay was notionally fixed up to the date of retirement, which order has already been upheld by the Division Bench of this Court and the said relief has already been extended by the Guru Nank Dev University in favour of Jaspal Singh.

Learned counsel for the respondent-University has not been able to rebutt the factum that Jaspal Singh has been given benefit without initiating any fresh enquiry and concedes that the benefit of reinstatement in service has been granted to Jaspal Singh on the terms and conditions mentioned by the learned Single judge in his order.

As the appellant-plaintiff is a senior citizen of about 76 years of

age and is not in a position to associate himself in the departmental proceedings coupled with the fact that similarly situated employee has already been granted the benefit of reinstatement in service but without back wages, interest of justice will be served in case impugned order dated 26.11.1992 passed by the respondent-University is set aside and appellant-plaintiff is reinstated in service from the date the said order was passed.

Learned counsel for the appellant-plaintiff on instructions from appellant-plaintiff submits that appellant-plaintiff will not claim any arrears for the period he remained out of service and only benefit of fixation of his pay by deeming fiction that he remained in service up to the date of his retirement be given and thereafter, keeping in view the pay which appellant-plaintiff would have got, had he been in service, his pensionary benefits be fixed accordingly and he be paid pension along with arrears.

Keeping in view the facts and circumstances mentioned hereinbefore, impugned order dated 26.11.1992 passed by the respondent-University is set aside and the respondent-University is directed that appellant-plaintiff be treated in service for all intent and purposes up to the date of his retirement but he will not be entitled for any monetary benefit for the period he remained out of service up to the date of his retirement but his pay will be fixed notionally in accordance with law up to the date of his retirement and retiral benefits will be computed on the basis of the said notional pay fixed. Further, on the basis of the said notional pay fixed, his pension will also be fixed and he will be given arrears of pension.

Learned counsel for the appellant-plaintiff on instructions from the appellant-plaintiff submits that appellant-plaintiff will not claim any

interest on the arrears of pension. Consequently, appellant-plaintiff will be given pensionary benefits upon calculating his notional pay up to the date of his retirement and he will be paid all the pensionary benefits along with pension with arrears from the date he became entitled for the same but without any interest.

The present regular second appeal stands allowed in above terms.

April 24, 2023
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(HARSIMRAN SINGH SETHI)
JUDGE

Whether speaking/reasoned : Yes/No
Whether reportable : Yes/No