

IN THE HIGH COURT OF PUNJAB & HARYANA
AT CHANDIGARH

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CWP-21318-2019
Date of decision : 09.01.2024

Rajesh BhallaPetitioner

Versus

State of Punjab and othersRespondents

CORAM: HON'BLE MR. JUSTICE NAMIT KUMAR

Present : Mr. Davinder Kumar, Advocate with
Mr. Sachin Jain, Advocate for the petitioner.

Mr. T.P.S. Walia, AAG, Punjab.

Mr. Harsh Aggarwal, Advocate
for the respondent No.3.

NAMIT KUMAR, J. (ORAL)

1. The petitioner has approached this Court by way of filing the present writ petition under Articles 226/227 of the Constitution of India seeking writ of certiorari for quashing of order dated 29.05.2019 (Annexure P-5) passed by respondent No.2-Director, Local Bodies, Punjab whereby the claim of the petitioner for grant of leave encashment has been rejected on the ground that dismissed employee is not entitled for leave encashment.

2. The brief facts leading to the filing of the present petition are that the petitioner was working as J.D., B&R in the Municipal Corporation, Jalandhar when he was booked in case FIR No.17 dated 01.04.1999 for the offences under Sections 7 and 13(2) of the Prevention of Corruption Act, 1988 and was thereafter convicted under

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the above sections and sentenced to undergo rigorous imprisonment for a period of 04 years vide judgment dated 07.03.2002. The said judgment was challenged by the petitioner before this Court by filing appeal bearing No.CRA-S-453-SB-2002 which was dismissed vide judgment dated 20.05.2015 by upholding the conviction and sentence awarded by the Trial Court. Even the Special Leave to Appeal (Crl.) No.6767 of 2015 filed by the petitioner against the abovesaid judgment has also been dismissed by the Hon'ble Supreme Court vide order dated 28.08.2015.

3. Keeping in view the conviction of the petitioner, he was dismissed from service by respondent No.1 vide order dated 19.08.2015 and it is the case of the petitioner that he is behind the bars since 10.08.2015, when he surrendered in compliance to the order passed by the Hon'ble Supreme Court and thereafter he was released on interim bail on 15.12.2017 in compliance to the order dated 04.12.2017 passed by this Court.

4. It is the case of the petitioner that he approached the respondents for releasing his leave encashment which was not paid from 1981 to 19.08.2015 and since no action was taken by the respondents, therefore, he served a legal notice dated 18.03.2019 and vide impugned order dated 29.05.2019, it has been informed to the petitioner that he is not entitled for leave encashment as the same is not applicable to the employees who has been removed/dismissed from service.

5. Learned counsel for the petitioner submits that in view of judgment passed by this Court in ***Dhir Chand Vs. State of Haryana*** :

2019(1) S.C.T. 134, the petitioner is entitled for leave encashment and therefore, the action of the respondents in rejecting his claim vide impugned order dated 29.05.2019 is totally illegal and arbitrary and is against the law laid down by this Court in the abovesaid judgment.

6. On the other hand, learned counsel for the respondents submits that the judgment passed in ***Dhir Chand's case (supra)***, on which the reliance has been placed by learned counsel for the petitioner, has already been distinguished by the another Coordinate Bench of this Court in the judgment rendered in ***Ram Kumar Ranga Vs. State of Haryana and others : 2019(4) S.C.T. 99*** and in the said judgment the relevant provisions of the rules and instructions have been extensively considered and it has been held that an employee who has been dismissed from the service is not entitled for leave encashment.

7. I have heard learned counsel for the parties and perused the relevant documents.

8. No doubt, the learned Single Bench of this Court in ***Dhir Chand's case (supra)*** has held that the dismissed employee is entitled for leave encashment, however, the said judgment has been considered by another Coordinate Bench of this Court in ***Ram Kumar Ranga's case (supra)*** and it has been held that the relevant provisions of Rules and the latest instructions were not brought to the notice of the Court at the time of deciding ***Dhir Chand's case (supra)***. The relevant portion from the judgment passed in ***Ram Kumar Ranga's case (supra)*** is as under :-

“47. Therefore, Coordinate Bench while deciding *Dhir*

Chand's case (supra) was not informed about the order passed in review petition by the Full Bench on 11.08.2014 in respect of the jurisdiction of the State on withholding the benefit of leave encashment of an employee at the time of his retirement in case the proceedings either departmental or criminal are pending against him. Therefore, the findings, which were recorded by the Coordinate Bench in Dhir Chand's case (supra) that an employee becomes entitled for the grant of leave encashment even if any proceedings are pending as Coordinate Bench by relying upon the order passed by the Full Bench on 09.11.2012 were contrary to order dated 11.08.2014 passed in review petition by the Full Bench judgment in Pyare Lal's case (supra) wherein it was held that the leave encashment can be withheld where the departmental proceedings were pending. Therefore, no benefit of the order passed by this Court in Dhir Chand's case (supra) can be extended in favour of the petitioner, in view of the above.

48. *Counsel for the respondents-State has argued that once, the relevant rules/instructions were not brought to the notice of the Hon'ble Court at the time of deciding Dhir Chand's case (supra), the said judgment need not be followed in view of the settled principle of law. Counsel for the respondents has further argued that even the review of order passed by the Full Bench in Pyare Lal's case (supra) wherein, it has been held that the Government has the power to withhold the leave encashment during the pendency of enquiry proceedings, was not brought to the notice of the Bench and therefore, the order passed by the Coordinate Bench in Dhir Chand's case (supra) was passed in the absence of relevant rules/instructions issued by the State of Haryana and is also contrary to the settled principle of law*

49. *Hon'ble Supreme Court of India has held that a decision which has been rendered in ignorance of a binding precedent or in ignorance of constitutional provision would be held as per incuriam. Hon'ble Supreme Court of India while deciding **Civil Appeal No. 5092 of 2009 titled as Subhash Chandra and another Vs. Delhi Subordinate Services Selection Board and others, 2009 (3) S.C.T. 827 decided on 04.08.2009** held as under:-*

“44. The only question which survives is as to whether *S. Pushpa (supra)* constitutes a binding precedent. A decision, as is well known, is an authority for what it decides and not what can logically be deduced therefrom.

In *S. Pushpa (supra)*, decisions of the Constitution Benches of this Court in *Milind (supra)* had not been taken into consideration. Although the case of *Chinnaiah (supra)* was decided later on, we are bound by the same. It is now a well settled principle of law that a division bench, in case of conflict between a decision of a Division Bench of two Judges and a decision of a larger Bench and in particular Constitution Bench, would be bound by the latter. [See *M/s Sardar Associates v. Punjab & Sind Bank*, CAs @ SLP (C) Nos. 5249- 5250 of 2008 decided on 31st July, 2009]

This Court in *Marri Chandra Shekhar Rao (supra)* categorically held that when a person is held to be a member of scheduled caste for one State, he cannot be treated as such in another. In *Milind (supra)*, it was categorically held that the High Court, in exercise of its supervisory jurisdiction, under Article 227 of the Constitution of India, cannot make any roving inquiry for the purpose of finding out as to whether a person belonging to one caste would, for one reason or the other, can be held to be belonging to another caste or tribe which had been notified as scheduled caste or scheduled tribe. It is also well known that a decision rendered in ignorance of a binding precedent and/or in ignorance of a constitutional provision, would be held to have been rendered *per incuriam*. In *Harinder Kaur & Ors. v. Union of India & Ors.* [2009 (7) SCALE 204], this Court held:

"16. A judgment of a Constitution Bench of this Court laying down the law within the meaning of Article 141 of the Constitution of India must be read in its entirety for the purpose of finding out the ratio laid down therein. The Constitution Bench, in no uncertain terms, based its decision on the touchstone of the 'equality clause' contained in

Articles 14 and 16 of the Constitution of India. Emphasis has been laid at more than one place for making appointments only upon giving an opportunity to all concerned. Appointment through side-door has been held to be constitutionally impermissible."

*[See also **Oriental Insurance Company Limited v. Mohd. Nasir and Another (2009) 6 SCC 280**]*

In Black's Law Dictionary, 8th edition, 2004, it is stated:

"There is at least one exception to the rule of stare decisis. I refer to judgments rendered per incuriam. A judgment per incuriam is one which has been rendered inadvertently. Two examples come to mind: first, where the judge has forgotten to take account of a previous decision to which the doctrine of stare decisis applies. For all the care with which attorneys and judges may comb the case law, errare humanum est, and sometimes a judgment which clarifies a point to be settled is somehow not indexed, and is forgotten. It is in cases such as these that a judgment rendered in contradiction to a previous judgment that should have been considered binding, and in ignorance of that judgment, with no mention of it, must be deemed rendered per incuriam; thus, it has no authority.... The same applies to judgments rendered in ignorance of legislation of which they should have taken account. For a judgment to be deemed per incuriam, that judgment must show that the legislation was not invoked."

Louis Philippe Pigeon, Drafting and Interpreting Legislation 60 (1988) "As a general rule the only cases in which decisions should be held to have been given per incuriam are those of decisions given in ignorance or forgetfulness of some inconsistent statutory provision or of some authority binding on the court concerned, so that in such cases some features of the decision or some step in the reasoning on which it is based is found on that account to be demonstrably wrong. This definition is not necessarily exhaustive, but cases not strictly

within it which can properly be held to have been decided per incuriam, must in our judgment, consistently with the stare decisis rule which is an essential part of our law, be of the rarest occurrence." Rupert Cross & J.W. Harris, Precedent in English Law 149 (4th ed. 1991)"

In an article "Final Appellate Courts Overruling Their Own "Wrong" Precedents: The Ongoing Search For Principle" by B.V. Harris published in (2002) 112 LQR 408-427, it is stated: "A decision may be held to be per incuriam where relevant statutory provisions, or binding case law authority, have been overlooked or misinterpreted in arriving at the holding in the precedent....

Considerations Relevant To Deciding whether to Defer to or Overrule Precedent:

The first consideration for a final appellate court called upon, in the exercise of its discretion, to overrule an allegedly wrong precedent of its own, will be whether the precedent can be distinguished on the facts, including changing social and other contexts, or distinguished on the law. If the precedent can be distinguished, overruling will not be necessary. The subsequent appellate court will rather be free to choose not to follow the precedent which can be distinguished.

Second, the precedent should be considered closely to determine whether the decision was reached per incuriam. A per incuriam precedent may be overruled.

Third, the workability of the precedent should be assessed. Evidence of lack of workability may justify overruling.

The fourth consideration will be whether any reasons have been advanced in the appeal which were not considered in deciding the precedent.

This category could arguably be included in many circumstances, either in the first category as a form of distinguishing, or in the second category if the omission is sufficiently serious to cause the precedent to be per incuriam.

All of the first four considerations have traditionally been accepted as exempting subsequent appellate courts from the obligation to follow precedent."

*In the context of overruling the two leading precedents {**de Freitas v. Benny** [1976] AC 239 and **Reckley v. Minister of Public Safety and Immigration (No. 2)** [1996] A.C.527} which had held the exercise of the prerogative of mercy to be nonjusticiable, Lord Slynn of Hadley in **Lewis v. Att. Gen. Of Jamaica** [2001] 2 AC 50 at p. 75, stated:*

"The need for legal certainty demands that they should be very reluctant to depart from recent fully reasoned decisions unless there are strong grounds to do so. But no less should they be prepared to do so when a man's life is at stake, where the death penalty is involved, if they are satisfied that the earlier cases adopted a wrong approach. In such a case rigid adherence to a rule of stare decisis is not justified."

*The case of **Attorney General v. Blake** [(1997) Ch D; (1998) Ch 439 CA; and (2001) 1 A.C.268 HL] has been referred by SIR Richard Buxob in his article *How the Common Law Gets Made: Hedley Byrne and Other Cautionary Tales*" [(2009) 125 L.Q.R. 60], as decision given per incuriam. Prof.A.W.Brain has prepared a memorandum on the said note. In the particular case in 1961 Blake pleaded guilty to five offences against Official Secrets Act 1911. He had communicated information which he has come to possess as a member of the Secret Intelligence Service (SIS). He was sentenced to term of 42 years imprisonment. The House of Lords decision stated that Blake was a member of the security and intelligence. However it is stated by the author that there is no practice of describing the SIS as a security service; it is not concerned with security but with foreign intelligence, including the sponsorship of espionage and was "an offshoot of some sort of the Foreign Office, possibly also being associated with the Cabinet Office or the Prime Minister's Personal Office." Thus there was no details explained as regards to the employment of*

Blake and it was not clear. The author states that it was a well settled in 1940s that the relationship between a member of the armed services and the crown was non-contractual. However it is stressed that if the nature of employment of Blake was in civil capacity then the application of above observation needs to be considered. But more importantly, what needs to be addressed is that "to treat incidental undertakings by members of the armed services as actionable contracts would lead to absurdity". It is also pointed out that "the relationship between the Crown and members of the armed services is and long has been regulated by disciplinary proceedings, by failure to promote, or by retirement, not by the private law of contract or tort. If this position is to be changed by a judicial decision then the court surely needs to attend to the radical nature of such a change." Also it is noted that the "signing the Official Secrets Acts" created a binding contract relating just to one aspect of Blake's duties, is something which is problematic. Thus author states that "the supposed contract case was decided without any careful investigation of the very existence of a binding contract, or of its scope and character, assuming there to have been one. It does not seem to be a good idea to proceed in this way, and at end of day there is therefore a strong case for regarding the decision as having been given per incuriam in their Lordships' attention had never been adequately directed to either the relevant facts or the relevant law." [See A Decision Per Incuriam? -Prof.A.W.Brian Simpson, The Law Quarterly Review, volume 125, July 2009, p.433]

We have noticed hereinbefore that the premise on which S. Pushpa (supra) was rendered, namely, Marri Chandra Shekhar Rao (supra), had no application to union territories was not correct."

50. A bare perusal of the facts recorded above clearly go to show that while deciding Dhir Chand's case (supra), the instructions regarding grant of leave encashment as well as review order dated 11.08.2014 passed by the Full Bench in Pyare Lal's case (supra)

were not brought to the notice of the Court. Rather it can be said that this Court was misled in passing the order in Dhir Chand's case (supra) by not providing due assistance and concealing the instructions on the grant of leave encashment issued by the Government of Haryana from time to time as well as the review order passed in Pyare Lal's case (supra) by the Full Bench and therefore, no reliance can be placed by the petitioner on the said judgment to claim the benefit of leave encashment, though not eligible under the rules governing the service as well as instructions issued by the Government of Haryana from time to time in this regard.”

9. The abovesaid judgment has been followed in case of ***Balwinder Singh and another Vs. State of Punjab and others*** : ***2020(2) S.C.T. 437*** and the relevant portion from the said judgment is as under :-

“xx xx xx In Ram Kumar Ranga's case(supra), after noticing the relevant Rule governing the services as well as instructions issued by the Government of Haryana for the grant of leave encashment, which have been noticed and reproduced in the abovesaid judgment, it was held that the dismissed employee is not entitled for the leave encashment. Further, it was noticed in Ram Kumar Ranga's case (supra) that the review order passed by the Full Bench dated 11.08.2014, by which the earlier order of the Full Bench dated 9.11.2012 was reviewed, wherein it was held that the government as the power to withhold the leave encashment in case the disciplinary proceedings are pending, was not brought to the notice of the Hon'ble Court at the time of hearing in Dhir Chand's case (supra), which led to the grant of benefit of leave encashment to a dismissed employee.

Therefore, keeping in view the subsequent judgment in Ram Kumar Ranga's case (supra), no benefit can be claimed by the petitioner, who is a dismissed employee in the present writ petition.

Even otherwise, the Rules relating to the grant of leave encashment in the State of Haryana and Punjab are not identical. The petitioner, who is claiming the benefit from the State of Punjab has to base his claim upon Rule 8.21, which has been reproduced hereinbefore, which does not entitle a dismissed employee the benefit of leave encashment. Therefore, keeping in the view the Rule governing the grant of leave encashment in respect of the employee of the State of Punjab as well as order passed in Ram Kumar Ranga's case (supra), no benefit can be granted to the petitioner by placing reliance upon Dhir Singh's case (supra) for the grant of leave encashment being a dismissed employee.

Further, as per Rule 3.17-A(1) (ix), an employee who has been removed from service for misconduct, insolvency, inefficiency or failure to pass an examination, will entail forfeiture of the past service. In the present writ petition, the petitioner has been dismissed from service on account of conviction and, therefore, the past service, for which the petitioner was claiming for grant of leave encashment, also stands forfeited. The relevant Rule is reproduced hereunder:

3.17-A. (1) Subject to the provisions of rule 4.23 and other rules and except in the cases mentioned below, all service rendered on establishment, interrupted or continuous, shall count as qualifying service:-

xx

xx

xx

(ix) Removal from public service for misconduct, insolvency, inefficiency not due to age, or failure to pass an examination will entail forfeiture of the past service.”

Therefore, the claim of the petitioner for the grant of leave encashment is liable to be rejected on this ground as well.”

Learned counsel for the petitioners is unable to rebut the argument raised by the learned counsel for the respondent-State that according to the provisions of Punjab Civil Services Rules, 1970, the petitioners, who

were dismissed from service are not entitled for gratuity as the benefit of gratuity is only available for the employees, who have retired from service on attaining the age of superannuation.

That being so, keeping in view the law laid down by this Court in **CWP No.20751 of 2019 titled as Gurdeep Singh vs. State of Punjab and others decided on 28.08.2019**, the present writ petition is dismissed.”

10. Further the same Bench who rendered the judgment in **Dhir Chand’s case (supra)** has also followed the judgment passed in **Ram Kumar Ranga’s case (supra)** in the case of **Harbans Lal Vs. State of Punjab and others : 2019 (4) S.C.T. 501** and the relevant portion of the said judgment is as under :-

“2. Brief facts of the case are that the petitioner is a dismissed employee of the District Court. He was caught taking bribe while posted as a Reader to a Court in the Sessions Division, Amritsar. He was convicted under the provisions of the Prevention of Corruption Act, 1988. Consequently, the petitioner was dismissed from service after issuing him a show cause notice. Service appeal of the petitioner against dismissal order was also dismissed on the administrative side. The petitioner also filed petition before this Court against his dismissal order but remained unsuccessful. He prays for payment of leave encashment on the basis of a judgment of this Court in ‘**Dhir Chand v. State of Haryana & others**’ 2019 (1) S.C.T. 134. In Dhir Chand case following an earlier Full Bench decision of this Court in case ‘**Punjab State Civil Supplies Corporation Ltd. & others vs. Pyare Lal**’, 2014(4) SCT 711 and two judgments of other High Courts, it was held that leave encashment cannot be legally withheld from a dismissed government employee except in accordance with rules made in this behalf. In para 5 it was held as under:-

“4. The legal position regarding leave encashment has been subject matter of attention of the Full Bench decision of this Court in case titled **Punjab State Civil Supplies Corporation Ltd. & others Vs. Pyare Lal**, 2014(4) SCT 711. The Court specifically

*dealt with the issue of leave encashment in the background of criminal and disciplinary proceedings. Agreeing with the opinions expressed by the Allahabad and Jharkhand High Courts in their Full Bench decisions in cause titled **Bengali Babu Misra Vs. State of U.P. & others reported as 2003 3 AWC 1760** and MANU/UP/1042/2002 decided on 05.12.2002 and **Dr. Dudh Nath Pandey Vs. The State of Jharkhand & others, 2009 (2) SLJ 105** both the Courts were of one mind in holding that leave encashment is a right in property, withholding of which, in the absence of statutory rule would mean depriving a person from his property without the procedure established by law. The action would be rendered in violation of Article 300-A of the Constitution of India. The result of dismissal would be only deprivation of pension and gratuity. But this is not true of leave encashment as it is part and parcel of salary.*

5. The Full Bench in Pyare Lal case ruled that leave encashment is payable to a retiring employee notwithstanding pendency of departmental inquiry or criminal proceedings. The only distinction in this case is that it is not one of a retiring employee as this is a case of dismissal from service. However, this difference, to my mind, will not tilt the balance in favour of the State as still the settled legal position remains that leave encashment is part of salary and salary, like credit in General Provident Fund account of an employee, cannot be withheld in the event of dismissal because it represents money saved/earned for unutilized leave as a matter of right for work performed and duties discharged while in service.”

3. The decision rendered in Dhir Chand's case was authored by me and has been rendered per incuriam without noticing the many successive instructions issued by the Government. The subject matter is presently covered by the decision of Brother Harsimran Singh Sethi, J, in ‘Ram Kumar Ranga Vs. State of Haryana and others’ (CWP-3843-2019 decided on 15.07.2019) in which the entire conspectus of instructions/clarifications/

modifications of the State of Haryana issued from time to time on the point of leave encashment have been noticed and the legal principle culled out, exhaustively examined and an elaborate judgment rendered which I am full agreement with. Those instructions were not brought to my notice when the judgment was made in Dhir Chand.

4. *Haryana Government instructions issued/modified from time to time clearly show that there is no rule or instructions which entitles an employee to leave encashment prior to his retirement and this benefit is only available at the time of retirement and not as and when the relationship of employee and employer comes to an end. In other words leave encashment is linked with retirement on superannuation or prematurely without any element of associated misconduct and dismissal from service by way of punishment.*

5. *Neither the entire instructions issued by the State of Haryana nor an order passed subsequently by the Full Bench on 11.08.2014 in Review Petition filed in Pyare Lal case itself was brought to my notice in Dhir Chand case (supra). While reviewing judgment dated 09.11.2012, the Full Bench held that the State is well within its right to withhold the grant of leave encashment during the pendency of departmental enquiry and criminal proceedings. The Full Bench held that the benefit of leave encashment cannot be extended under the Punjab Civil Services Rules if the proceedings are pending against an employee and only 100% provisional pension at the time of retirement is to be paid alongwith commutation of the pension.*

6. *In view of the above, on reading the judgment in Ram Kumar Ranga case (supra), I am convinced that I took an incorrect view in Dhir Chand case. Therefore, Dhir Chand case and any other order/judgment passed by me in the same line are no longer good law.”*

11. Since the petitioner has been convicted under the Prevention of Corruption Act, 1988 and on the basis of the said conviction, he has been dismissed from the service, therefore, he is not entitled for leave encashment in view of law as rendered in **Ram Kumar**

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Ranga’s case (supra), Balwinder Singh’s case (supra) and Harbans Lal’s case (supra).

12. Consequently, finding no merit in the instant revision petition, the same is dismissed with no order as to costs.

09.01.2024

Kothiyal

(NAMIT KUMAR)
JUDGE

Whether Speaking/reasoned
Whether Reportable

Yes/No
Yes/No