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IN THE CENTRAL ADMINISTRATIVE TRIBUNAL
PRINCIPAL BENCH, NEW DELHI.

O.A.No. 630/88

Date of decision: 6.3.88

SHRI GYANENDER

...APPLICANT.

versus

UNION OF INDIA & OTHERS

...RESPONDENTS.

Shri T.C. Aggarwal

...counsel for the applicant.

Shri K.C. Mittal

...counsel for the respondents.

CORAM:

Hon'ble Mr. Justice Ram Pal Singh, Vice-Chairman(J)

Hon'ble Mr. I.K. Rasgotra, Administrative Member.

J U D G E M E N T

(DELIVERED BY HON'BLE MR. I.K. RASGOTRA)

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Shri Gyanender Singh, formerly Preventive Officer Grade I in the Collectorate of Customs, Bombay in this OA filed under Section 19 of the Administrative Tribunal Act, 1985, has assailed the order No.S/9-12/87-Vig. dated 13.11.1987 terminating his services under Rule (5)(1) of CCS(TS) Rules, 1965 and order of the appellate authority No.S/9-12/87-Vig. dated 18.01.1988, rejecting his appeal.

2. The short issue raised in the O.A. is if the services of the applicant could be terminated when he was on probation for unauthorised absence under Rule 5(1) of CCS(TS) Rules, 1965 without following the provisions made in the CCS(CCA) Discipline and Appeal Rules.

3. The necessary facts of the case are that the applicant was appointed to the post of Preventive Officer Grade I, Collectorate of Customs, Bombay vide OM No.S/1-27/87-Estt. dated 6.1.1986. The appointment letter prescribed the following, among others, as conditions of service:-

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- 1." He will be on probation for a period of two years. The period of probation may, however, be extended at the discretion of the appointing authority.
2. If he wishes to r-esign his/her employment, he shall give a notice in writing for a period of one month to his intention to resign and shall continue in service for the period of notice. If he/she remains absent from duty du-ring that period such disciplinary action as is fit shall be taken against him/her.
12. He/She is warned that his appointment will be treated as until further orders. He/She is also informed that his/her appointment is also informed that his/her appointment is purely provisional."

In his application submitted to the Staff Selection Commission (S-SC) the applicant had given his preference for posting for Delhi Region. He was, however, given appointment in the Bombay Region. He is said to have met with higher officers and requested for his posting at Delhi, as his wife was a serious mental patient and was receiving treatment in a mental hospital at Delhi. He further submits that while his orders of pos-ting could not be changed he was assu-red that after his joining the post, his case for inter-collectorate transfer will be considered sympathetically. He joined duty at Bombay but absented himself frequently either on account of the illness of his wife or his minor daughter. He also applied for his transfer in terms of Central Board of Excise and Customs' letter dated 27.5.1985 (A-4) permitting inter-Collectorate transfers on compassionate grounds even in cases where officers had not completed

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the period of probation on 27.11.1986. Later the applicant gave his willingness even to be accommodated in Meerut region if it was not possible to accommodate him in Delhi region. While he had not received any favourable reply to his request for transfer, he was threatened that disciplinary action would be taken against him for his frequent absence from duty unauthorisedly. Finally his services were terminated vide impugned order dated 13-11-1987, giving him a sum equivalent to the amount of his pay for the period of notice of one month. He filed an appeal which was rejected vide OM dated 18.1.1988.

2 By way of relief he has prayed that the orders issued by the respondents dated 13.11.87 and 18.1.88 be set aside and the applicant be reinstated in service and further deemed to have continued in service in a manner as if the impugned orders of termination dated 13-11-1987 had not been at all. He further prays for the payment of salary and allowance for the period since his services were terminated till the date of his reinstatement.

3. Shri T.C. Aggarwal, learned counsel for the applicant submitted that the applicant had been proceeding on sanctioned leave to look after his ailing wife and daughter. He had to get his leave extended from time to time depending upon the condition of his wife or daughter. The learned counsel further submitted that the service of the applicant could not be terminated under CCS (TS) Rules, as he was on probation and further in accordance with his service conditions if he remained absent from duty only disciplinary action could be taken against him. The learned counsel

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relying on Rule 25 of Leave Rules (F.R.S.R. Swamy's Compilation Part-III) submitted that the action of the respondents was ab-initio void as all that the respondents should have done was to take disciplinary action against the applicant. The said rule reads as under:-

"25. Absence after expiry of leave

(1) Unless the authority competent to grant leave extends the leave, a Government servant who remains absent after the end of leave is entitled to no leave salary for the period of such absence and that period shall be debited against his leave account as though it were half-pay leave, to the extent such leave is due, the period in excess of such leave due being treated as extraordinary leave.

(2) Wilful absence from duty after the expiry of leave renders a Government servant liable to disciplinary action."

Before proceeding further we may clarify that Rule 25 deals with a situation where a Government servant on expiry of leave remains wilfully absent from duty. The rule covers kinds of leave which are admissible under Chapter IV of the said Leave Rules viz. Earned Leave on full pay, half pay leave, commuted leave, leave not due, extraordinary leave. In support, the learned counsel cited the following judicial pronouncements to fortify the case of the applicant:-

- i) 1991 (16) ATC 18 Ram Bilas Paswan v. UOI & Ors.
- ii) 1991 (1) ATJ 315 Kishori Lal v. UOI
- iii) 1991 (1) ATJ 626 Naresh Kumar v. UOI & Ors.
- iv) 1991 (2) ATJ 83 Jai Dev v. UOI
- v) 1991 (15) ATC 851 Shridhar s/o Ram Dular v. Nagar Palika.

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- vi) 1991 (1) ATJ 402 Heera Lal Nath Koche & Ors. v.
D.G. Ordnance, Army Headquarters & Anr.
- vii) 1987 (1) SLR G.K. Murthy v. UOI & Ors.
- viii) Decision of the Principla Bench in OA 1004/88 decided
on 20.4.90 Suresh Chand v. Lt. Governor, Delhi.

4. We have carefully perused the above judicial pronouncements and find that these cases are distinguishable on the issues of the facts from the case before us.

5. There is no dispute about the initial facts of the case. The applicant joined as Preventive Officer Grade I on 14.5.1986 on the basis of the recommendations of the SSC, New Delhi. The respondents, however, pointed out that before he joined the Collectorate of Customs, the applicnat was working in the Central Public Works Department (CPWD) as UDC. He was offered the appointment as Preventive Officer Grade I vide offer of appointment dated 6.1.1986 wherein the following conditions was specifically mentioned that "you have not been nominated according to the regions of your choice, because you have failed to qualify. It is made clear to you that you are not eligible for the post of Prevenitve Officer in your own region. This offer is made on the presumption that you are willing to join in the other zones, the proforma is enclosed for giving your willingness for Bombay Region. The proforma should be brought in person when you are called for the physical standard test." In the photo copy of the proforma filled by the applicant, the applicant has clearly stated "....I inform you that I am willing to be considered for the post of Preventive Officer Grade I Inspector of Central Excise in Bombay Customs/Bombay Central Excise Collectorate." After he joined the Collectorate in Bombay the applicant remained absent on the following occasions, totalling to 301 days:-

<u>Sr. No.</u>	<u>Period of leave</u>	<u>Total No. of days</u>	<u>Remark</u>
1.	18.9.86 to 11.10.86	24 days	Leave started with 4 days C.L.
2.	12.11.86 to 22.1.87	72 days	-do- <i>h</i>

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3.	02.02.87 to 24.4.87	82 days	Leave started with C.L.
4.	18.05.87 to 11.8.87	86 days	-----do-----
5.	06.10.87 to 11.11.87	37 days	-----do-----

301 days

The modus operandi of the applicant was to take a few days leave and then ask for extension of leave by sending telegrams and applications. The respondents contend that the applicant was working in the CPWD, New Delhi and he was aware of the sickness of his wife, it would have been clear to him that it would be difficult to look after his family from Bombay when the family was staying in Delhi. He should have, therefore, taken into consideration all these aspects before exercising his option for appointment in Bombay. His total service was for the period 14.5.86 to 31.11.87, out of which he remained absent for 301 days. The applicant also failed to produce medical certificate in support of his contention that his wife and three year old daughter were sick. All that he produced was O.P.D. papers. The respondents further deny that any assurance was held out to him for inter-Collectorate transfer. However, his representation was forwarded to Delhi Central Excise Collectorate who in turn informed the Bombay Customs that the request of the applicant will be considered at appropriate time. This could not be communicated to the applicant "as he was constantly absent." Before, however, his request for Meerut Collectorate could be forwarded his services were terminated under Rule 5 of CCS (TS) Rules, 1965. Regarding his allegation of non-payment of his salary the respondents have admitted that salary for the month of November, 1986 to June 1987 is payable to him except from December, 1986 to March 1987 due to non-availability of leave to his credit.

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6. Shri K.C. Mittal, learned counsel for the respondents emphasized that the applicant never submitted any medical certificate and O.P.D. papers do not substitute a medical certificate. The applicant had not denied that he remained on unauthorised absence. The learned counsel also produced the file dealing with the case of the applicant and drew our attention to the memo of 15.1.1987 which clearly warned the applicant that in case the applicant does not join duty within three days his services will be terminated under CCS (TS) Rules. The learned counsel also submitted that the authorities cited by the applicant are not relevant to the issue. If an officer during the period of probation is not available for 301 days in a total service of 1½ years he cannot be considered suitable for retention in service, as he would never be available to complete his probation successfully and would become a liability for the respondents.

7. We have heard the learned counsel for both the parties and also perused the record carefully, including the file, produced by the learned counsel for the respondents. After perusing the record we find that on each occasion the applicant initially took casual leave and followed it by requests for extending it. From the record it is also seen that the respondents also made effort with the Collectorate of Delhi if he could be accommodated there, keeping in view his repeated absence from duty. There is a three page note recorded by the office and seen by the D.C.P. relating to the applicant. The relevant portion which led to the decision to terminate the his service is reproduced below:-

"After about a week, he had a repeated performance of asking for 6 days C/L from 2.2.87 to 7.2.87. This 6 days C/L/ were also sanctioned by ACP(G) on compassionate ground but instead of reporting

back for duty on the due date, a telegram dated 10.2.87 was received from him requesting for extension till 14.2.87, but he failed to report for duty on the expiry of extended period. He remained absent continuously for 82 days till 14.4.87. This time, he was allowed to resume duties with a clear understanding that in future, any unauthorised absenteeism/indicipline will not be overlooked by the Deptt. An undertaking was ordered to be taken from him in this regard besides issuing a memo to him. Accordingly, a Memo was kept ready on 8.5.87, but the officer managed to avoid the receipt of this memo besides refusing to give an undertaking based on the instruction from ACP(G). Instead, on 17.5.87 he made a request to ACP (G) directly for 6 days C/L from 18.5.87 to 23.5.87. ACP(G) had sanctioned the leave again on compassionate ground. In spite of the instructions given to him not to resort to unauthorised absenteeism, on this occasion also he continued to remain absent till 11.8.87 which accounts for 86 days. He was allowed to resume by ACP(G) on 12.8.87. Thus his total absence during the service period of 15 months, he stayed away from the place of work for 264 days of which 96 days have been sanctioned as extraordinary leave as mentioned above, leaving an absence of 168 days in two occasions without approval.

It may be pertinent to note that this Officer has the habit of approaching ACP (G) directly whenever he applied for C/L or for permission to join duty, instead of through proper channel. As a result the Posting Section has no comments to offer. If the family background of the Officer does not permit him to continue in service, the better course for him to resign the job and stay away with his family, rather than misleading the Deptt. at every stage

and putting the Govt. machinery at disarray by his frequent unauthorised absence for prolonged absentism. The Deptt. cannot count the services of such officers for any purpose. Such officers are a liability rather than asset."

The office note further brings out:-

"After that incident on 6.10.87, when ACP (G) was on official tour, Shri Gyanendar, again without caring to route through posting section, during office hours approached acting ACP (G) Shri Ajwani and got 6 days Casual Leave sanctioned, and proceeded. The General Shift was effective from 28.9.87 and Shri Gyanendar who is posted in Timber Pond, guard duty station suddenly disappeared without the knowledge of the posting section, and this has created administrative problem. This attitude of the P.O is highly reprehensible and it is unbecoming of an executive officer."

It was in these circumstances, that the department appears to have come to the conclusion that the applicant was not suitable for retention in service. As far as Rule 25 of the Leave Rules is concerned, it is apparent that the applicant was initially taking casual leave and thereafter asking for extension of leave. Rule 25-B therefore, does not come to the help of the applicant as "expiry of leave" mentioned in Rule 25 relates to 'leave' other than 'casual leave'. Casual leave does not come under the purview of Rule 25. In fact Appendix III to the said Leave Rules deals with the orders regarding grant of casual leave and special casual leave. These orders clarify:-

"Casual Leave is not a recognised form of leave and is not subject to any rules made by the Govt. of India. The official on casual leave is not treated as absent from duty and his pay is not

intermitted."

Casual leave can also be combined with special casual leave but with not any other kind of leave. Thus Rule 25 is of no assistance to the applicant."

Admittedly, the applicant was on probation. On successful completion of the probation the employee is confirmed in the appointment held by him. Obviously the purpose of putting an employee on probation is to find out his suitability to hold the post substantively or permanently in the sense that he thereafter gets a right to hold the post. Having remained absent for 301 days in a total service of about 1½ years the assessment of the respondents that he was not suitable for retention in service cannot be found fault with. It is not the question of mere absence from work and that absence constitutes misconduct; the real issue is that the applicant was not available to the department most of the time when in service, to enable the respondents to watch his progress in acquiring the work experience and make an assessment leading to vesting of a right in him to claim the post to which he was appointed on probation. In a case like this there was no alternative available to the respondents but to terminate his service after giving him due warnings and due notice which they did. In fact he was even asked to give an undertaking at the last stage that he would not act in a manner as he was doing, i.e., taking casual leave without following proper channel and then not resuming duty but asking for extension of leave on account of wife/daughter ill health without producing medical certificates. He failed even to give this undertaking in late 1987. This action on his part indicates that he never took his probation seriously.

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The next question which arose is whether the applicant's service have been terminated by way of punishment. There is nothing on record to show that the intent of the respondents was to punish the applicant. In fact they tried to accommodate him to the maximum extent possible. Only when they found that he was proving a liability to the public service, the ultimate action was taken against him. Article 311 (2) of the Constitution does not protect such temporary public servants or probationers. In **V. Jyagaraj v. Chief Security Officer 1986 (1) SLJ CAT 206** it has been held that "when there are material for the competent authority, indicating unsatisfactory performance of the probationer even in the middle of probation he can terminate the probation without awaiting for the completion of the period of probation."

In the circumstances of the case, we are not persuaded to interfere with the orders passed by the respondents, terminating the services of the applicant under Rule 5 (1) of CCS (TS) ~~Rules~~, 1965. The O.A. is accordingly dismissed, with no order as to costs.

(I.K. RASGOTRA)
(I.K. RASGOTRA)
MEMBER (A) 6/3/92
6/3/92

(RAM PAL SINGH)
6.3.92
(RAM PAL SINGH)
VICE-CHAIRMAN (J)