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OA No.361 of 2008

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|-------------------------|------|-------------|
| Banshidhar Ojha         | .... | Applicants  |
| Versus                  |      |             |
| Union of India & Others | .... | Respondents |

Order dated: 18 / 02 / 2010

C O R A M

THE HON'BLE MR. C.R. MOHAPATRA, MEMBER (A)

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Applicant was GDSBPM of Bodakapatna BO under Bhadrak Postal Division. He reached the age of superannuation on 4.4.2008. By filing this Original Application he sought direction to the Respondents to pay him his retiral benefit as the same has not been paid to him till date.

2. By filing counter, the Respondents have stated that in connection with a fraud case, the applicant was placed under off duty from 12.09.1983 to 16.04.2004. In terms of Rule under Annexure-R/4, unauthorized absence or authorized absence in excess of 180 days shall constitute a break which will have the effect of forfeiting all past service for the grant of gratuity. Since the put off duty period of the applicant exceeded beyond 180 days, the applicant is not entitled to the gratuity.

3. Heard Learned Counsel for both sides and perused the materials placed on record. It appears, while continuing as GDSBPM, applicant was placed under off duty by order dated 12.09.1983 and a departmental proceeding was initiated against him and ultimately he was removed from service. As it further reveals, finally, he challenged the entire matter before this Tribunal in OA No. 456 of 1998 and this Tribunal, vide order dated 23.12.2003, allowed the reliefs sought by the applicant in the said OA. The aforesaid order of this Tribunal was challenged by the Respondent-Department before the Hon'ble High Court of Orissa in W.P. (C) No.6274 of 2004 and the Hon'ble High Court of Orissa in order dated 05.01.2010 dismissed the Writ Petition filed by the Respondent-Department thereby



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upholding the order dated 23.12.2003 of this Tribunal. The order of the Hon'ble High Court is extracted herein below which would make the matter more clear.

"The Opp. Party was the applicant before the Tribunal. He had joined as EDBPM on 12.10.1961 in Bodakapatna Branch Post Office under Bhadrak Postal Division. While continuing as such, by order dated 12.09.1983, he was put under suspension (off duty) and a Departmental Proceeding was initiated against him. A copy of the charge sheet was supplied to him on 31.07.1984. On conclusion of the enquiry, he was removed from service by order dated 31.12.1986. Challenging the said order of punishment, the opposite party preferred an appeal and the appellate authority remitted the matter back to the Disciplinary Authority by order dated 31.8.1987 directing a de novo enquiry. However, the Disciplinary Authority without conducting a de novo enquiry drew up a fresh charge sheet on 28.9.1988 and on conclusion of the enquiry again passed the order of removal from service as a measure of punishment. Challenging the said order, the opp. Party again preferred an appeal, but the same was returned to him with a direction to submit the same before the Director of Postal Services, Sambalpur. No order having been passed in the appeal, the opp. Party approached the Tribunal in OA No. 243 of 1991. The said Original Application was disposed of on 16.11.1995 quashing the order of punishment framing fresh charges and directing the Disciplinary Authority to abide by the order made by the appellate authority on 31.08.1987 with a further direction to complete the enquiry within 120 days from the date of receipt of a copy of the said order. After disposal of the said Original Application, the opp. Party was supplied with a copy of the enquiry report passed on the charges framed on 28.9.1988 and was asked to submit a representation. On 1.2.1997 the opp. party submitted his representation and Ad hoc Disciplinary Authority was appointed for taking decision in the matter. Challenging the same, the opp. Party again approached the Tribunal in the present Original Application seeking for quashing of the charge sheet and for reinstatement in service.

The petitioners resisted the prayer of the opp. party before the Tribunal by filing counter affidavit. The Tribunal in the impugned order found that the proceeding has been continuing since 1983 and relying on a decision of the apex Court in the case of State of Andhra Pradesh v N. Radhakishan reported in 1988 SCC (L&S) 1044 and also referring to one earlier decision of the Tribunal quash the proceeding on the ground of delay and also directed for payment of full back wages.

In course of hearing of the writ petition, learned Addl. Solicitor General confined his argument to the question of payment of back wages. According to learned Addl. Solicitor General, after disposal of the Original Application, the opp. Party was reinstated in service and has also superannuated in

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the meantime and, therefore, the question of reinstatement is no more in issue.

It is submitted by learned counsel for the Union of India that the opp. Party having not worked at all from September, 1983, he is not entitled to any back wages. We are unable to accept such contention considering the fact that from the date opp. Party was placed under suspension i.e. 12.9.1983 he had not been reinstated till the OA was disposed of by the Tribunal in 2003. In spite of the direction of the appellate authority against the first order of punishment, a de novo enquiry was not conducted and a fresh charge sheet was drawn up. On the basis of enquiry conducted in respect of fresh charge sheet, he was again removed from service as a measure of punishment. The said order was also set aside by the Tribunal in OA No. 243 of 1991 and the Disciplinary Authority was directed to conduct a de novo proceeding in terms of the order passed by the appellate authority. The said direction of the Tribunal was also not carried out and unnecessary delay was caused by the Officers of the petitioners resulting in continuance of the proceeding from 1983 till it was quashed by the Tribunal in 2003. For no fault of the opp. Party he has been kept out of service. The Tribunal allowed the back wages for the period he was kept out of service after deduction of subsistence allowance already paid to him.

We do not find any illegality in the impugned order for the reasons stated above. The Writ Petition is devoid of merit and is accordingly dismissed.”

The DGP&T instruction under Annexure-A/4 based on which the Respondents resist the claim of the Applicant reads as under:

“(1) Payment of *ex gratia* gratuity-The question for grant of some kind of purely *ex gratia* monetary grant to ED Agents working in the Indian Posts and Telegraphs Department on termination of their services has been under consideration for a long time. It has been decided as follows:-

1. ED Agents as defined in P&T Extra-Departmental Agents (Conduct and Service) Rules, 1964, whose services are terminated otherwise than (i) for unsatisfactory work or (ii) as a measure of disciplinary action or (iii) in consequence of their being appointed in a regular post under the P&T Department, may be sanctioned monetary grants termed as ‘Gratuity’, provided that they have put in not less than ten years of continuous satisfactory service as ED Agents.

2. “Continuous Service” for the purpose of this order shall mean only such continuous service rendered in any capacity as an ED Agent.

3. In determining the period of continuous service, periods where an ED Agent himself does not personally attend to the duties assigned to him shall be treated as breaks in service unless each such period is of a duration of 90 days or less and the absence from his duties is authorized by the written order of the appointing authority.

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4. **Unauthorized absence or authorized absence in excess of 180 days shall constitute a break which will have the effect of forfeiting all past service for the grant of gratuity.**

5. Annexure- ED Agent, who becomes eligible for the grant of gratuity as indicated above, may be granted at the rate of half month's basic allowance as drawn by him immediately before the terminating of service for each completed year of service, subject to a maximum of Rs. 18, 000 or 10 1/2 months' basic allowance last drawn, whichever is less.

6. Gratuity admissible in accordance with the above conditions shall be purely *ex gratia*."

4. Respondents' contention is mainly based on the provisions of paragraph 4 of the above instructions of the DGP&T which says that in the event a GDS employee remains absent exceeding 180 days the period of absence will constitute a break in service thereby forfeiting all past service for the grant of gratuity. According to the Respondents, as the Applicant was placed under off duty w.e.f. 12.09.1983, by the order of the Hon'ble High Court was reinstated in service on 17.4.2004 and ultimately retired from service 4.4.2008 the applicant is not entitled to gratuity as his total period of service after reinstatement comes to 3 years, 11 months and 18 days which is less than ten years required for grant of gratuity. But I am not at all convinced with the logic advanced by the Respondents in denying the dues to the applicant; because it is trite law that suspension is not a punishment nor it comes within the purview of any kind of leave/absence. An employee is kept under suspension in contemplation of disciplinary proceedings by the employer with specific instruction to the suspended employee that he/she should not leave headquarters without prior permission of the employer. However, at the conclusion of the disciplinary proceedings the employer has a right as also it is obligatory on the part of the employer to pass specific order how the period of suspension would be treated. The employer has also a right to treat the period of suspension as such without granting any wages except the subsistence allowance one has received during the period of suspension.



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Even if the period of suspension is treated as such, in strict sense it cannot be said that the employee was on either authorized or un-authorized absence. But it is not necessary to go into the aforesaid aspect of the matter; in view of the order of the Hon'le High Court of Orissa upholding the decision of this Tribunal in quashing the disciplinary proceedings initiated against the applicant with direction for payment of back wages to the applicant from the date of suspension till his reinstatement in other words treating the entire period from the date of put off duty on 12.09.1983 till his reinstatement on 17.04.2004 as duty for all purposes. In the peculiar circumstances of this case, the stand of the Respondents that the applicant is not entitled to gratuity cannot be sustained in the eyes of law. As such, the applicant is entitled to count his entire period of service towards payment of gratuity. Accordingly, Respondents are hereby directed to pay the same to the applicant, of course after adjusting any legal dues payable by the Applicant, forthwith at any rate by the end of March, 2010.

5. In the result, this OA stands allowed in the afore-stated terms.

No costs.

  
(C.R. MOHAPATRA)  
MEMBER (ADMN.)