

Central Administrative Tribunal Lucknow Bench Lucknow

Original Application No. 322/2008

This, the ^{16/12} day of December, 2009.

**Hon'ble Ms. Sadhna Srivastava, Member (J)
Hon'ble Dr. A. K. Mishra, Member (A)**

Dr. Vishnu Dayal Agarwal, aged about 65 years, son of Late Sri G.P. Agarwal, resident of A-14, Malviya Nagar, Aish Bagh, Lucknow (lastly working in Geological Survey of India, Northern Region, Lucknow).

Applicant

By Advocate Sri R.C. Singh.

VERSUS

1. Union of India, through, Secretary, Ministry of Mines, Department of Mines, Shastri Bhawan, New Delhi.
2. Secretary, Ministry of Mines, Department of Mines, Shastri Bhawan, New Delhi.
3. Director General, Geological Survey of India, 4, Chaurangi Lane, Kolkata-16.
4. Senior Deputy Director General, Geological Survey of India, Northern Region, Alignaj, Lucknow.
5. The Director-in charge, Geophysics Division Geological Survey of India, Northern Region, Lucknow.

Respondents

By Advocate Sri Sunil Sharma/Sri A. N. Singh.

ORDER

By Hon'ble Dr. A. K. Mishra, Member (A)

This application has been filed challenging the order dated 26.3.2008 passed by the President of India in which no specific penalty has been imposed except communicating the displeasure of the President, but the period of unauthorized absence of the applicant from 1.1.88 to 21.7.1999 has been treated as break in service entailing forfeiture of his entire past service for all purposes including pensionary benefits. Subsequently, the applicant has challenged the order of the competent authority communicated in the letter of the Ministry of Mines dated 29.2.2008 in which, his absence from 1.1.88 to 21.7.99 has been treated as break in service involving forfeiture of the entire past service for all purposes.



2. The applicant was working as Geophysicist (Senior) belonging to Group A of the Central Services. He proceeded on leave from 20.10.1987 to 31.12.1987. According to him, he suffered from mental ailment and could not resume his duty and remained under treatment at Lucknow for a very long time. A charge sheet was issued to him on 10.8.1994 alleging, interalia, misconduct on account of unauthorized absence, his engagement in promotion of an industry at Gonda with financial assistance from the Pardeshiya industrial and Investment Corporation without taking any permission from the competent authority in violation Rule 15 of CCS(Conduct) Rules, 1964, his refusal to accept the show cause memo issued against him sent through a special messenger and his direction to a Munim to write a false statement about his absence at the address. On denial of the charges, a regular inquiry was conducted. But there was delay in conclusion of the inquiry proceeding. The applicant filed O.A. No. 145/99 in which, an interim order was passed directing the respondent authorities to allow the applicant to join on his post. Accordingly, he was allowed to join 21.7.99. Earlier, he had submitted his joining report on 20.3.1995 which was not accepted and he was allowed to do so only at the express direction of this Tribunal. The applicant had made a prayer in that O.A. for quashing the charge sheet issued against him and for allowing regular salary to him at least from 23.9.95 when he submitted his joining report. The O.A. was dismissed on 29.6.2004. The applicant filed a Writ Petition No. 1972/2005 (SB) before the Lucknow Bench of Allahabad High Court which was disposed of on 20.9.2007 with a direction to the respondents to conclude the disciplinary proceedings in accordance with law and pay provisional pension to the petitioner during the pendency of the disciplinary proceedings. It may be mentioned that the applicant had, meanwhile, superannuated from government service on 31.8.2004. On conclusion of the disciplinary proceedings, the disciplinary authority i.e., the President of India has issued the impugned order dated 26.3.2008 in which, the following observations were made:

“12. And whereas in the first instance, a decision needed to be taken regarding treatment of the unauthorized absence of Dr. Agarwal. As Dr. Agarwal had already superannuated, any penalty that can be imposed has to be with reference to the pensionary benefits admissible to him.

13. And whereas the Disciplinary Authority i.e. the President, after careful consideration of the facts and circumstances of the case and the relevant Rules of the Government of India, has decided to treat the absence of Dr. V. D. Agarwal from 1.1.1988 to 21.7.99 as unauthorized absence amounting to interruption in service and forfeiture of the entire past service for all purposes including pensionary benefits.

14. And whereas Dr. V.D. Agarwal has already superannuated, no penalty under Rule 14 of the CCS (CCA) Rules, 1965 can be imposed, any penalty that could be imposed could be under Rule 9 of the CCS(Pension) Rules, 1972 and with reference to the pensionary benefits admissible to him. However, after the treatment of absence of Dr. Agarwal from 1.1.1988 to 21.7.1999 as unauthorized absence amounting to interruption in service and forfeiture of the entire past service for all purposes including pensionary benefits, the officer is not entitled to any pensionary benefits, and as such no penalty can practically be imposed under CCS (Pension) Rules, 1972 either.”

3. Having come to the conclusion, on the basis of the findings of the Inquiry Officer, that the articles of charge had been proved against the applicant and further that no penalty could be imposed on the applicant, who had by then superannuated from government service, except by way of withholding either fully or partly the pension amount payable to him and further that a decision had been taken to treat the absence of the



applicant from 1.1.88 to 21.7.99 as unauthorized absence amounting to interruption in service and forfeiture of the entire past service for all purposes including pensionary benefits and on that basis, no pensionary benefit was payable to the applicant, the disciplinary proceedings were closed by expressing displeasure of the authority to the applicant.

4. During the course of hearing, the learned counsel for the respondents submitted that a decision had been taken by the competent authority to treat this period as break in service which was communicated in the letter dated 29.2.2008 of the Ministry of Mines. A copy of this letter was also placed on record by him. The learned counsel for the applicant pleaded total ignorance about existence of this order until it was placed before the Tribunal at the time of hearing. Therefore, he filed an amendment application challenging this letter.

5. The grounds taken by the learned counsel for the applicant at the time of hearing are discussed in the following paragraphs.

That the charge sheet dated 10.8.94 was issued by the acting Director General of GSI and from the charge sheet it is not evident whether the charge sheet was issued after obtaining the approval of the President of India who is the appointing authority competent to initiate major penalty disciplinary proceedings against a Group A Officer of the Central Civil Services. Further, an acting Director General could not exercise statutory powers of the Director General. Therefore issue of the memorandum of the charge by an incompetent authority has rendered the disciplinary proceedings drawn up against the applicant vitiated right from the stage of its initiation. The learned counsel for respondents submits that the power of disciplinary authority even for major penalty was delegated to the Director General. In this case the Acting Director General referred the matter to the Government of India and issued the charge sheet only after getting approval there from. But he skipped the issue on the ground that the disciplinary proceedings had been closed

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without award of any penalty under Rule 9 (1) of the CCS (Pension) Rules. According to him, the decision to treat the period of unauthorized absence as break in service is an administrative one taken under Rule 27 of the Pension Rules. Therefore, the argument about validity of the charge sheet according to him is irrelevant.

5.1. We find that the applicant had made the same prayer for quashing the charge sheet issued against him on the ground of incompetence of the authority in the O.A. No. 145/99 which was not allowed in the final order passed on 29.6.2004. This Tribunal held that the disciplinary proceedings had been initiated by a competent authority. Similarly, the grounds of prejudice and bias alleged against the inquiry officer were also considered in this order of the Tribunal and rejected. We find that the applicant had filed Writ Petition No. 1972 of 2005 in which these issues had not been agitated. As such the findings of this Tribunal as recorded in its judgment dated 29.6.2004 have acquired a finality. The applicant is barred by the principle of res judicata to raise the same issue again.

6. As regards the ground taken about appointment of a retired official as the inquiry officer, the applicant has placed reliance on the decision of Guwahati Bench of this Tribunal in the case of ***Sri Vijay Bhatnagar Vs. U.O.I. and Others and others reported in 2005 (3) ATJ 40*** where it was held that a retired officer could not be appointed as an inquiry officer. This issue was considered by the Full Bench of this Tribunal which, in its order and judgment dated 1.4.2009 in O.A. No. 1699/2008, has held that a retired officer can be appointed as an inquiry officer. The Supreme Court in ***H.V. Nirmala Vs. Karnataka Financial Corporation and Others (2008) 7 SCC 638*** has held that if no prejudice is established the inquiry conducted by a retired officer could not be treated as vitiated. It was further held that the employee should have taken objection at the earliest opportunity while the inquiry was being conducted so that the authorities could have

4

taken remedial measure. If he had not made any objection at that stage, he would be estopped from taking this plea at a later stage. Relevant portion of the judgment of the Supreme Court is extracted below:-

"We however, notice that in a case of this nature where appointment of the inquiry officer may have something to do only for carrying out the procedural aspect of the matter, strict adherence to the rules may not be insisted upon. Superior courts in a case of this nature may not permit such a question to be raised for the first time. XXXXXXXX Appointment of an incompetent inquiry officer may not vitiate the entire proceeding. Such a right can be waived. In relation thereto even the principle of estoppel and acquiescence would apply."

7. The impugned order dated 29.2.2008 has been assailed on the ground that no opportunity had been given to the applicant before taking the so called administrative decision which had far reaching civil consequences for him. He relied on a number of judicial pronouncements to support the contention that the elementary principle of natural justice as embodied in the maxim audi-alteram partem of providing an opportunity to show cause before taking a decision having civil consequences had not been observed before holding that his past service would not be counted towards pensionary benefits. It was further pointed out that the respondents have not indicated under what rule the order declaring the period of unauthorized absence as break in service was taken. It could be either under Rule 17 A (iii) of FR in respect of serving government servant, or Rule 27 of the Central Civil Services (Pension) Rules. Since, the applicant had already superannuated by the time the decision was communicated in the impugned letter, it has to be inferred that it was taken under Rule 27. The learned counsel for the respondents took the position that the decision in question was, in fact, taken under Rule 27 of the Pension Rules. He also fairly conceded that an opportunity to show cause should have been granted.



-2-

8. The learned counsel for the applicant drew our attention to the provisions of Rule 27 (1) (b) which reads as under:

"(b) unauthorized absence in continuation of authorized leave of absence so long as the post of absentee is not filled substantively."

According to him, the case of the applicant falls in the category of (1) (b) in view of the fact that his unauthorized absence was in continuation of authorized leave of absence. The Admitted fact is that he went on sanctioned leave from 20.10.87 to 31.12.87 but remained unauthorisedly absent thereafter for more than 7 years until he made an application seeking permission to resume his duty on 23.9.95 and thereafter, till he was actually allowed to join on 21.7.99. *AP*

8.1. The learned counsel for the respondents submits that harmonious construction of this rule should be made by the Tribunal. It has to be seen whether the exception made in Rule 27 (1) (b) could cover cases where an employee goes on sanctioned leave for two months and remains unauthorisedly absent for years together. Primary objective in this rule was not to penalize a Government Servant with break in service for small spells of unauthorized extension of authorized leave. The learned counsel for the applicant however, urged that the Tribunal could not go beyond the express provisions of the rule. It is only when there was lack of clarity in the rule that the court could interpret applying the principles of harmonious constructions. This case, admittedly, being one of unauthorized absence in continuation of authorized absence, was saved by the exception clause in Rule 27 (1) (b) and the period of unauthorized absence could not be treated as break in service under Rule 27 of the CCS (Pension) Rules.

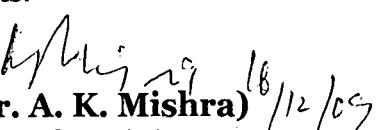
9. The argument of the learned counsel for the respondents is that the impugned order dated 26th March 2008 was passed in the context of

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the earlier order dated 29.2.2008. In that event, the final order in the disciplinary proceedings passed on that basis cannot be sustained if the decision of 29.2.2008 is also seen to have been made without observance of the principle of natural justice. Additionally, it was contended that no order under Rule 9 of the Pension Rules could be made by the President of India, without consulting the UPSC. Admittedly, in this case, no such consultation has taken place prior to issuance of the impugned penalty order. For these reasons, it is not possible to sustain the final order dated 26.3.2008 in the disciplinary proceedings started against the applicant.

10. In the circumstances, we set aside both the impugned orders. However, the respondent authorities are given the liberty to pass appropriate orders afresh according to law.

11. The application is allowed with the aforesaid observations. No costs.


(Dr. A. K. Mishra) 16/12/09
Member (A)


(Ms. Sadhna Srivastava)
Member (J)

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