
(2012) 02 AHC CK 0349

Allahabad High Court

Case No: Civil Miscellaneous Writ Petition No. 5102 of 2008

Mohd. Nafees

APPELLANT

Vs

State of U.P. and Others

RESPONDENT

Date of Decision: Feb. 22, 2012

Citation: (2012) 5 ADJ 250 : (2012) 3 AWC 3177 : (2012) 133 FLR 1006

Hon'ble Judges: Sunil Hali, J

Bench: Single Bench

Advocate: G.K. Singh and V.K. Singh, for the Appellant; C.S.C., for the Respondent

Final Decision: Allowed

Judgement

Hon'ble Sunil Hall, J.

The question which calls for consideration in this writ petition is as to whether remaining absent for more than 45 days for whatever reason would tantamount automatic dismissal from service or whether appointing authority is empowered to go into the question as to whether the petitioner had sufficient cause to remain absent for the said period. The controversy involved in this writ petition is confined to the issue that the petitioner who was undergoing training had remained absent from duty for more than 45 days as a result of which recommendation was made to the appointing authority for terminating his service by invoking instruction No. 15-D of the general instructions of PAC Constable training manual.

2. The case set out by the petitioner is that he was undergoing training in 2006 after his selection as constable in the police department. The post appointment training was for a period of seven months. It appears that the petitioner remained absent from duty from 24.1.2007 to 3.4.2007. He remained absent for 70 days, beyond the period of 45 days as provided under the instruction No. 15-D of the Manual. For having remained absent for more than 45 days, a recommendation was made to the appointing authority in terms of the aforementioned instructions seeking the termination of petitioner's service. The recommendation was accepted and an order of termination was passed on 5.8.2007 on account of petitioner's failure to

complete the training after his appointment. This order is subject-matter of challenge.

3. While scanning through the instruction No. 15-D, it clearly appears that for having remained absent for more than 45 days for whatever reason, a trainee is required to be terminated by the appointing authority on recommendation being made by the concerned officer. It is an admitted case of the parties that the petitioner suffered an accident on account of which he sustained fracture in right leg as result of which he remained confined to bed and could not resume his duties. This is the reason for his being absent from duty.

4. Recommendation made by the concerned officer to the appointing authority indicates that the petitioner has remained absent for more than 45 days as such his termination order is to be passed by the appointing authority on the recommendation made. According to the respondents, there was no requirement to provide an opportunity to the petitioner before the termination order was passed. The recommending authority admittedly does not have power to terminate the service of the petitioner, but recommendations made by him are required to be accepted by the appointing authority.

5. The question that calls for consideration is as to whether appointing authority has any duty to seek explanation from the petitioner for the reasons of his absence for more than 45 days, even if the instructions indicate that on remaining absent for more than 45 days on any account his services are required to be terminated. According to learned counsel for the respondents no other interpretation is possible and the appointing authority is bound to accept the recommendation of the appointing authority.

6. In order to examine this aspect of the matter, it is always necessary to examine the consequences of passing the termination order to see as to whether any right of the person is affected thereby. It cannot be assumed that absence from duty for more than 45 days for whatever reason which results in automatic termination would not tantamount in denying the petitioner's right to be heard in this behalf. Absence from duty without authorization is misconduct provided a person is not able to explain the reasons for his absence. There can be a case where absence is due to unavoidable circumstances, which prevent a person from attending his duties. Unless he is provided an opportunity to explain cause of his absence, prejudice would be caused to such employee who is prevented from performing his duties on account of his illness.

7. In the service jurisprudence it is admitted position in law that absence from duty would not result in automatic termination. The Apex Court has ruled in so many cases that an inquiry should be conducted in such matters. Inquiry in such case is only to examine the explanation submitted by the employee which may be sufficient cause for his absence.

8. The intent and purpose of this principle is only to obviate the possibility of denying a person of his right to explain the reasons for his absence which may be due to unavoidable circumstances which prevented him from attending his duties. It is for this purpose the requirement of seeking explanation from the employee is necessary.

9. The right of hearing is an essential ingredient of rule of law which is a basic feature of our constitution. It is in this background that the power of the appointing authority to seek an explanation under instruction No. 15-D of the manual is required to be considered even though the language of the instruction does not contemplate of the same. Right of hearing is always to be read in a statute of rule or order even if it is not provided therein.

10. Now for examining the present controversy, it will be seen that on the recommendations made against a person remaining absent from duty for more than 45 days the appointing authority is required to pass an order of termination. Whether such order can be passed without seeking explanation from the employee regarding his unauthorized absence is the issue which falls for consideration in the present case.

11. As already stated herein above the right of hearing is inherent in every statute. Denial of right of hearing would render the action as illegal. The word used in instruction No. 15-D "whatever reasons" cannot be extended to such an extent that it will deny an employee right of being heard as also to explain his reasons for absence which may be due to unavoidable circumstances.

12. The words "beyond 45 days for whatever reasons" will not include such cases of an employee who has an explanation to offer for remaining absent from duty. The appointing authority is not required to accept the recommendations of the concerned officer in such cases but is required to examine the cause of absence before resorting to order of dismissal. While taking recourse to instruction No. 15-D it will always be open to the appointing authority to seek an explanation from the employee to show-cause for remaining absent from duty unauthorizedly. He cannot pass order of dismissal from service of a Government servant merely on the ground that employee has remained absent from duty for more than 45 days. Rule of natural justice requires the appointing authority to provide an opportunity to a person to indicate the reason of his absence.

13. In absence of seeking explanation would deprive the applicant not only of the right of hearing but also deprivation of his livelihood on account of his termination from service. This rule has to be followed more stringently in a cases where there is no provision in the statute or rule for providing opportunity of hearing to the employee.

14. In the present case the petitioner has suffered a serious accident as result of which his right leg was fractured which precluded from attending his duty and he

remained absent for more than 45 days. Due to unavoidable circumstances he could not join his duties. Taking recourse to instruction No. 15-D the order of termination was passed without giving an opportunity of hearing and to explain the reasons for absence, which in the present case was admittedly unavoidable. The order per se violates the rules of natural justice as right of hearing was always deemed to be inherent while invoking the power under instruction No. 15-D of the manual. I allow the writ petition, set aside the impugned order and direct the respondents to allow the petitioner to complete the part of his training within a period of two months from the date a certified copy of this order is produced before the respondents.