
(2011) 05 GAU CK 0007

Gauhati High Court (Agartala Bench)

Case No: W.A. No. 15 of 2011

Sri Manabendra Chakraborty

APPELLANT

Vs

The State of Tripura and Others

RESPONDENT

Date of Decision: May 6, 2011

Acts Referred:

- Central Civil Services (Pension) Rules, 1972 - Rule 48A(1), 48A(2)

Citation: (2011) 4 GLR 673 : (2011) 4 GLT 418

Hon'ble Judges: Utpalendu Bikas Saha, J; C.R. Sharma, J

Bench: Division Bench

Advocate: P. Roy Barman, for the Appellant; A.S. Lodh, Additional Government Advocate and P.K. Biswas, Asstt. S.G., for the Respondent

Final Decision: Dismissed

Judgement

U.B. Saha, J.

In challenge is the order, dated 15.03.2011, passed by the learned Single Judge in W.P.(C) No. 550/2010, wherein the learned Single Judge dismissed the writ petition filed by the Appellant herein.

2. Heard Mr. P. Roy Barman, learned Counsel appearing for the Appellant as well as Ms. A.S. Lodh, learned Addl. Govt. Advocate appearing for the State-Respondents and Mr. P.K. Biswas, learned Asstt. S.G., who appears on behalf of Respondent No. 4, the Accountant General (A&E), Tripura.

3. Brief facts, needed to be discussed, are as follows:

The Appellant, who was the writ Petitioner in the aforesaid writ petition, was initially appointed as a Assistant Teacher in the Education Department of the State of Tripura on 22.06.1978, in the pay scale of Rs. 325-665/-, for a period of three months and, thereafter, his service was extended from time to time. While in service, he, on 06.12.1993, was transferred to Halahali Class-XII School and consequent thereto, he

was released from his earlier post of posting on 01.03.1994. As he was suffering from various ailments, he could not immediately comply with the orders of transfer and release rather sought leave. He claimed to have eventually joined the Halahali Class-XII School at Kamalpur on 21.09.2004. The appointing authority, who is also the Disciplinary Authority, taking note of his absence, without prior intimation, initiated disciplinary proceeding against him for his failure to comply with the order of transfer vide Memorandum dated 23.09.2004 under the Central Civil Services (Classification, Control & Appeal) Rules, 1965 (hereinafter for short referred to as "the CCS(CCA) Rules"). He was charged with misconduct of lack of integrity and also of behavior unbecoming of a government servant under the Tripura Civil Service (Conduct) Rules, 1988. In response to the charges, he denied the same and justified his absence on the ground that he was suffering from ailments. By order dated 22.12.2004, the Disciplinary Authority, taking note of the entire facts as stated by the Appellant-writ Petitioner and considering the materials on record before him, held as follows:

Having considered so, I order that the entire absence period is to be regularized by applying "DIES-NON" without any break of service and his joining report should be accepted accordingly.

4. The Appellant-writ Petitioner, thereafter, on 19.01.2005, submitted his representation before the appointing authority, Director of School Education, Govt. of Tripura, expressing his mind to go on voluntary retirement w.e.f. 01.04.2005. On being intimated that the request for voluntary retirement ought to be preceded by a notice of three months, he reiterated his prayer by a fresh representation dated 22.02.2005 to the appointing authority, imploring that he may be allowed to go on voluntary retirement w.e.f. 01.06.2005. The said prayer for voluntary retirement has been negated by the Director of School Education by order dated 19.08.2005 stating, inter alia, that Sri Manabendra Chakraborty, Assistant Teacher, may not be permitted to retire voluntarily from Government service w.e.f. 01.06.2005. This order has been impugned in the said writ petition. The learned Single Judge, after hearing the learned Counsel for the parties, dismissed the writ petition on 15.03.2011, which is impugned in the instant appeal.

5. Mr. Roy Barman, learned Counsel appearing for the Appellant-writ Petitioner, while urging for admission of the instant appeal, contends that, the learned Single Judge failed to consider the case of the Petitioner and misinterpreted the meaning of "dies-non" and consequent thereto, excluded the period between 03.01.1994 and 21.09.2004, from the period of his service and ultimately held that as the Petitioner did not complete 20 years of qualifying service, the Director of School Education rightly rejected his prayer for voluntary retirement. He further contend that, the learned Single Judge ought not to have dismissed the writ petition at the admission stage in absence of counter-affidavit to be filed by the Respondents. The learned Counsel finally contends that, the disciplinary authority, while passing the order of

"dies-non", nowhere stated that the period, which has been regularized for service, can't be counted for determining the qualifying service, as required for voluntary retirement under Sub-rule (1) of Rule 48-A of the Central Civil Services (Pension) Rules, 1972 (for short referred to as "the Rules").

6. Ms. A.S. Lodh, learned Addl. Govt. Advocate, while resisting the prayer for admission, submits that, admission of a writ appeal is not a matter of right unless a prima facie case is made out. If after examining the judgment and the order of the learned Single Judge it is apparently faulted for perversity then only the court should admit the appeal for hearing. In support of her aforesaid contention, she placed reliance upon a decision of a coordinate Division Bench of this Court in *Sonaram Baruah and Anr. v. Assam State Electricity Board and Ors.* (2011) 2 GLR 630, wherein, the Division Bench held that -

... Admission of writ appeal is not a matter of right, like Civil First Appeal or Criminal Appeal but when a prima facie case is made out for examining the judgment and order of the learned Single Judge, then only the court should admit the appeal for hearing. Even if the opinion of the learned Single Judge is erroneous then also the appellate court cannot interfere with the order of the learned Single Judge unless it is totally perverse and violative of provisions of law. At the time of admission of the appeal the appellate court should be more cautious to examine the prima facie merit of the appeal and when there is no prima facie merit in an appeal, the court should avoid admitting the same.

The impugned order passed by the learned Single Judge is a reasoned order and the learned Single Judge rightly considered the meaning of "dies-non", more so there was no other option before the learned Single Judge when the Appellant-Petitioner did not challenge the order of "dies-non", passed by the disciplinary authority.

7. Mr. Biswas, learned Asstt. S.G. appearing for the Respondent No. 4, the Accountant General (A&E), Tripura, has also echoed in the same tune as of Ms. Lodh, learned Addl. Govt. Advocate.

8. We have given our anxious thought to the impugned order passed by the learned Single Judge and found that the learned Single Judge, while dismissing the writ petition at the admission stage, took note the fact of disciplinary proceeding and also noted, inter alia, that "..... It is undeniable fact that the disciplinary proceeding against the Petitioner involved a charge of his failure to join the Halahali Class XII School on being released on 01.03.1994 (AN) transfer on thereto. It is the recorded case of the Petitioner that he had joined the said School only on 21.09.2004". The learned Single Judge also noted that, on sheer admission of the Petitioner, it is apparent that there was a time gap of 10 years between 01.03.1994 and 21.09.2001 between his release and joining in service and the disciplinary authority concluded the disciplinary proceeding by treating this period to be "dies-non" without any break of service. The learned Single Judge, also considered the meaning of

"diesnon", which signifies that the period involved would neither be counted as service nor be considered as break in service and this being the position, as Rule 48-A of the Rules, in clear terms, requires 20 years of qualifying service to be an essential precondition for entertaining a prayer for voluntary retirement of a government servant, and correctly held that the impugned order declining the Petitioner's request to go for voluntary retirement cannot be faulted. It is the admitted position that the Appellant-Petitioner did not challenge the order of "dies-non" before the disciplinary authority prior to the filing of the writ petition and order of "dies-non" passed by the disciplinary authority admittedly attained its finality and the same can't be reopened by a writ court while exercising its power of judicial review.

9. Had the Appellant-Petitioner challenged the order of "dies-non" then the Appellant-Petitioner might have a case and the learned Single Judge could have consider the same, but in absence of any challenge to the said order, the learned Single Judge rightly did not interfere with the order of "dies-non".

10. We have also considered the meaning of "dies-non". As per P. Ramanatha Aiyar's The Law Lexicon, 2nd Edition, the meaning of "dies-non" is as follows:

A day on which the courts do not ordinarily sit or carry on business; a day on which general business may not lawfully be transacted.

11. As per the Government of India's decision in cases of absence from work without proper permission, the leave sanctioning authority may treat such period of absence as "dies-non" and the period for "dies-non" neither can be counted as "service" nor can be construed as "break in service". As the period "dies-non" can't be counted for "service", the learned Single Judge rightly held that the Petitioner having not completed 20 years of continuous service, as required under Rule 48-A of the Rules, the Respondent-authority, particularly the Director of School Education, rightly passed the order, not permitting the Petitioner to go on voluntary retirement. More so, we are of the considered opinion that, to appreciate the submission of Mr. Roy Barman, it would be proper on our part to visit Rule 48-A of the Rules and reproduced the relevant portion of the said Rules, which reads as follows:

48-A. Retirement on completion of 20 years" qualifying service.

(1) At any time after a Government servant has completed twenty years" qualifying service, he may, by giving notice of not less than three months in writing to the Appointing Authority, retire from service.

Provided that this sub-rule shall not apply to a Government servant, including scientist or technical expert who is-

(i) on assignments under the Indian Technical and Economic Co-operation (ITEC) Programme of the Ministry of External Affairs and other aid programmes.

(ii) Posted abroad in foreign based offices of the Ministries/Departments, (iii) On a specific contract assignment to a foreign Government, unless, after having been transferred to India, he has resumed the charge of the Post in India and served for a period of not less than one year.

(2) The notice of voluntary retirement given under Sub-rule(1) shall require acceptance by the Appointing Authority:

Provided that where the Appointing Authority does not refuse to grant the permission for retirement before the expiry of the period specified in the said notice, the retirement shall become effective from the date of expiry of the said period.

(3) Deleted.

(3-A) (a) A Government servant referred to in Sub-rule(1) may make a request in writing to the Appointing Authority to accept notice of voluntary retirement of less than three months giving reasons therefore;

(b) On receipt of a request under Clause(a), the Appointing Authority subject to the provisions of Sub-rule(2), may consider such request for the curtailment of the period of notice of three months on merits and if it is satisfied that the curtailment of the period of notice will not cause any administrative inconvenience, the Appointing Authority may relax the requirement of notice of three months on the condition that the Government servant shall not apply for communication of a part of his pension before the expiry of the period of notice of three months.

(4) A Government servant, who has elected to retire under this rule and has given the necessary notice to that effect to the Appointing Authority, shall be precluded from withdrawing his notice except with the specific approval of such authority;

Provided that the request for withdrawal shall be made before the intended date of his retirement.

....

....

12. Upon visiting the aforesaid Rule, we are of the considered opinion that, an employee is entitled to give a notice to the employer for voluntary retirement, only after completion of 20 years of qualifying service. Only when an employee completes 20 years of qualifying service, the appointing authority can allow the prayer for voluntary retirement. We are of the further opinion that, when an employee is not even entitled to issue notice due to shortage of qualifying service, the question of non-acceptance of the prayer for voluntary retirement after expiry of a period of three months, as required under Sub-rule (1) of Rule 48-A of the Rules does not arise at all. Sub-rule (1) of Rule 48-A of the Rules could be applied only when an employee after completion of 20 years of qualifying service, gives a notice

of three months to the appointing authority and after completion of prescribed period of three months, if the appointing authority did not respond, then only in view of the proviso of Sub-rule (2) of Rule 48-A of the Rules, the prayer for voluntary retirement shall become effective from the date of expiry of the statutory period.

13. According to us, the order of the learned Single Judge is neither perverse nor erroneous and does not call for any interference.

In the result, the appeal is dismissed.