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Madras High Court

Case No: Writ Petition No. 36264 of 2006 and O.A. No. 7557 of 1998

S. Retna Bai — APPELLANT

Vs

The Government of Tamil Nadu — RESPONDENT

Date of Decision: Oct. 14, 2009

Acts Referred:

- Constitution of India, 1950 - Article 309, 311(2), 51A
- Tamil Nadu Civil Services (Classification, Control and Appeal) Rules, 1953 - Rule 23, 23(1)
- Tamil Nadu Civil Services (Discipline and Appeal) Rules, 1955 - Rule 17

Hon'ble Judges: K. Chandru, J

Bench: Single Bench

Advocate: P. Mohanraj, for the Appellant; R. Neelakantan, GA, for the Respondent

Final Decision: Dismissed

Judgement

@JUDGMENTTAG-ORDER

K. Chandru, J.
The petitioner was working as a Rural Welfare Officer (Women) in Agastheeswaram Panchayat Union. After her retirement, she filed O.A. No. 7557 of 1998, challenging the order passed by the second respondent, dated 30.4.1997. By the said order, the petitioner was removed from service for her unauthorized absence.

2. On notice from the tribunal, the respondents have filed a reply affidavit, dated 1.7.2001 justifying the order of removal. In view of the abolition of the Tribunal, the matter stood transferred to this Court and was renumbered as W.P. No. 36264 of 2006.

3. It is the case of the petitioner that while she was working as a Rural Welfare Officer (Women) at Palani Panchayat Union, she had applied for medical leave for a period of 60 days from 3.3.1966. Afterwards, she asked for a posting order

supported with a medical certificate, but she did not get any posting order. She further submitted an application to the second respondent on 29.10.1966 and again on 11.3.1968. On 05.10.1970, the second respondent asked the petitioner''s willingness to join any Block where she can be posted. The petitioner, by her letter, dated 17.11.1970, gave her willingness. But she was not given any posting order. After protracted correspondence, she was given a posting order by the Joint Director of Social Welfare vide order, dated 27.12.1984 at Sedapatti Panchayat Union, Madurai.

4. She joined duty on 7.1.1985. As soon as she joined duty, she was placed under suspension with effect from 8.1.85. Thereafter, a charge memo was given to the petitioner, dated 5.9.85 under Rule 17(b) of the Tamil Nadu Civil Service (Discipline and Appeal) Rules. The charge against the petitioner was that she had failed to resume duty on the expiry of her leave for a period of two months from 3.3.1966. She had also failed to apply for leave and getting a posting order after the expiry of two months leave availed by her. Therefore, she was liable to be removed from service under FR 18(2). The petitioner submitted her explanation on 7.8.86. An enquiry was conducted against the petitioner by the Joint Director of Social Welfare, Madurai. Thereafter, by an order, dated 21.11.1986, she was removed from service. This was on the ground that as per records, she had stayed away from duty for over 15 years. Under FR 18, if a person failed to resume duty after the expiry of a period of five years, he/she is deemed to have resigned their post and ceased to be a Government employee.

5. The petitioner filed an appeal against the order of removal. The appellate authority rejected her appeal, by an order, dated 19.9.1988. It was thereafter, the petitioner filed OA No. 368 of 1989, challenging the said order. The Tribunal, by its order, dated 25.10.1990 set aside the order passed by the Director of Social Welfare and passed the following order, which is as follows:

In this case, the fact of absence from duty for a period of five years has been established, but the aspects in Sub-clause (b) & (c) of Rule 23(1) of the Tamil Nadu Civil Servants (Control & Appeal) Rules, taking the totality of the facts of this case, covering defaults both by the applicant and the respondent, whether there was sufficient ground for taking action and whether the punishment imposed is appropriated had not been examined. For these reasons, we set aside the order passed by the Director of Social Welfare on appeal and direct the first respondent to reconsider the matter with reference to the specific requirements under Rule 23(1) referred to above, the first respondent is directed to issue orders within thirty days from the date of receipt of this order.

6. The short point on which the Tribunal had allowed the OA was that the appellate authority''s order was bereft of any reason. Pursuant to the direction issued by the Tribunal, the petitioner was directed to appear before the Joint Director vide notice, dated 12.12.1995. The petitioner once again challenged the said notice by filing an

another OA, being O.A. No. 375 of 1996. The Tribunal set aside the said notice and directed the second respondent on his own to consider her appeal. Thereafter, the second respondent once again took up the matter and after considering the case of the petitioner, passed an order, dated 30.4.1997. In paragraphs 7 and 8 of its order, he had stated as follows:

7. In the above circumstances, the charge of continued unauthorised absence for several years without leave application, has been established. The matter with reference to the specific requirements under Tamilnadu Civil Services (Discipline and Appeal) Rules, Rule 23(i), taking the totality of the facts of the case, covering defaults both by the applicant and the respondent was reconsidered. In view of the continued absence of Tmt. S. Ratnabai, who proceeded on Medical Leave and never returned with a Medical Fitness Certificate for obtaining postings, it was not possible to provide any postings. The totality of the facts is that she stayed away from duty conveniently for years together. There is no proof of letter or petition sent by her during 16 years to this office. Without any proof, it is an afterthought on the part of Tmt. S. Ratnabai to say that she has sent some petitions during such a long period of 16 years.

8. Therefore as per Government order, unauthorised absence should be treated seriously and she deserves to be removed from service. In the result, Tmt. S. Ratnabai, Rural Welfare Officer (Women) is ordered to be removed from service from the date of this order.

7. The petitioner preferred an appeal against the said order to the first respondent, vide her appeal, dated 7.7.1997. Even before the appeal could be disposed of by the first respondent, the petitioner filed the OA No. 7557 of 1998 before the Tribunal, seeking to challenge the order of removal passed by the second respondent, dated 30.4.1997.

8. The grounds raised by the petitioner was that the Director of Social Welfare did not pass any order within the time frame fixed by the Tribunal. The petitioner was restored to duty on 10.2.1991 at Sembanarkoil Panchayat Union, Nagapattinam District. Only on 12.12.1995, she was called to appear for an enquiry, which was also stayed by the Tribunal. Ultimately, the Tribunal directed the second respondent to pass an order in accordance with law. The reference to FR 18(2) is misconceived because a Government servant can only be removed by following procedure under Rule 17(b). The mandatory penalty of removal provided under FR 18(2) was illegal as it takes away the jurisdiction of the disciplinary authority in imposing an appropriate punishment vested under Article 311(2) and the rules framed under Article 309 of the Constitution. It was also stated that the punishment was not based upon any acceptable evidence. Though the petitioner asked for posting order even as early as 15.4.1966, she was given posting order only on 7.1.1985.

9. In the reply affidavit, it was stated that in the OA filed by the petitioner, the Tribunal merely set aside the appellate authority''s order on the ground of non application of mind. Therefore, the petitioner cannot get any extra right in assailing the appellate authority''s order. It was also stated that merely because the petitioner was allowed to join duty that will not wipe out the misconduct committed by her. It was also stated that it was pursuant to the order of the Tribunal, erroneously the petitioner was given a provisional posting order. With reference to considering the petitioner''s case, it was stated that after conducting an enquiry and pursuant to the materials produced in the enquiry, she was removed from service. Therefore, there was no illegality or irregularity in the order passed by the respondents.

10. In this context, it must be stated that merely because FR 18(2) was referred to in the order, it does not mean that either the discretion of the disciplinary authority or the appellate authority was taken away. In this case, the petitioner was continuously absent and posting order was given on a mistaken notion. There was no obligation to reinstate the petitioner, since in the first round of litigation, the Tribunal had set aside only the appellate authority''s order.

11. In any event, with reference to continuous absence, it is necessary to refer to the following three decisions of the Supreme Court. The Supreme Court in State of Rajasthan and Another Vs. Mohammed Ayub Naz, has held in paragraph 9 as follows:

9. Absenteeism from office for a prolonged period of time without prior permission by government servants has become a principal cause of indiscipline which has greatly affected various government services. In order to mitigate the rampant absenteeism and wilful absence from service without intimation to the Government, the Government of Rajasthan inserted Rule 86(3) in the Rajasthan Service Rules which contemplated that if a government servant remains wilfully absent for a period exceeding one month and if the charge of wilful absence from duty is proved against him, he may be removed from service. In the instant case, opportunity was given to the respondent to contest the disciplinary proceedings. He also attended the enquiry. After going through the records, the learned Single Judge held that the admitted fact of absence was borne out from the record and that the respondent himself had admitted that he was absent for about 3 years. After holding so, the learned Single Judge committed a grave error that the respondent can be deemed to have retired after rendering of service of 20 years with all retiral benefits which may be available to him. In our opinion, the impugned order of removal from service is the only proper punishment to be awarded to the respondent herein who was wilfully absent for 3 years without intimation to the Government. The facts and circumstances and the admission made by the respondent would clearly go to show that Rule 86(3) of the Rajasthan Service Rules is proved against him and, therefore, he may be removed from service.

12. The Supreme Court in an another case reported in Government of India and Anr. v. George Philip reported in 2006 (13) SCC 1 : 2007 AIR SCW 379 in paragraph 18 held as follows:

18. Before parting with the case we consider it our duty to refer to a rather unusual one-sided approach of the High Court. In the penultimate paragraph of the judgment, the High Court has observed "that the respondent was not personally representing himself in the proceedings and he had authorised throughout his power-of-attorney holder, obviously indicating that he was not available for being considered for employment". Then in the operative portion of the order six months'' time is granted to the respondent to report for duty. It appears that this long period of time was granted to the respondent as he was not present in India and was abroad. In a case involving overstay of leave and absence from duty, granting six months'' time to join duty amount to not only giving premium to indiscipline but is wholly subversive of the work culture in the organisation. Article 51A(j) of the Constitution lays down that it shall be the duty of every citizen to strive towards excellence in all spheres of individual and collective activity so that the nation constantly rises to higher levels of endeavour and achievement. This cannot be achieved unless the employees maintain discipline and devotion to duty. Courts should not pass such orders which instead of achieving the underlying spirit and objects of Part IV-A of the Constitution have the tendency to negate or destroy the same.

13. The Supreme Court in The Regional Manager, Central Bank of India Vs. Vijay Krishna Neema and Others, as follows:

15. The question as regards validity of Clause 16 of Shastri Award and/or provisions akin thereto is no longer res integra. An employee may, in certain situations, abandon or deemed to have abandoned his job. What constitutes abandonment may be a matter of a statutory provision or agreement between the employer and the Union. Although absence without leave for a long time may constitute a grave misconduct on the part of the employee concerned, in a case of this nature, in view of Clause 16 of the Shastri Award, an employee can be treated to have ceased from employment.

16. In Viveka Nand Sethi v. J&K Bank Ltd., this Court inter alia, relying upon the decision of this Court in Punjab & Sind Bank v. Sakattar Singh and Syndicate Bank v. Staff Assn., held as under: (Viveka Nand Sethi case, SCC pp.344-45, paras 15 & 20).

15. The bipartite settlement is clear and unambiguous. It should be given a literal meaning. A bare perusal of the said settlement would show that on receipt of a notice contemplated there under, the workmen must either: (1)report for duties within thirty days; (2) give his explanation for his absence satisfying the management that he has not taken any employment or avocation; and (3) show that he has no intention of not joining the duties. It is, thus, only when the workman

concerned does not join his duties within thirty days of fails to file a satisfactory explanation, as referred to hereinbefore, that the legal fiction shall come into force. In the instant case except for asking for grant of medical leave, he did not submit any explanation for his absence satisfying the management that he has not taken up any other employment or avocation and that he had no intention of not joining his duties.

* * *

20. It may be true that in a case of this nature, the principles of natural justice were required to be complied with but the same would not mean that a full-fledged departmental proceeding was required to be initiated. A limited enquiry as to whether the employee concerned had sufficient explanation for not reporting to duties after the period of leave had expired or failure on his part on being asked so to do, in our considered view, amounts to sufficient compliance with the requirements of the principles of natural justice.

The same view was reiterated by this Court in New India Assurance Co. Ltd. v. Vipin Behari Lal Srivastava at SCC p.451, para 13.

Therefore, even the attack made against invocation of FR 18(2) is misconceived and it does not violate any law of the land.

14. In the light of the above, this writ petition stands dismissed. However, there will be no order as to costs.