

(2013) 08 CAL CK 0004

Calcutta High Court

Case No: F.M.A. No. 236 of 2009

Masih Jabu Khalku

APPELLANT

Vs

Union of India and Others

RESPONDENT

Date of Decision: Aug. 13, 2013

Citation: (2013) 5 CHN 76 : (2013) 139 FLR 654 : (2014) LabIC 118

Hon'ble Judges: Arun Mishra, C.J; Joymalya Bagchi, J

Bench: Division Bench

Advocate: Achin Majumder, for the Appellant; Swapan Banerjee, Mr. Jyoti Prakash Chatterjee, Mr. Kunal Ganguly and Mr. Arunava Ganguly, for the Respondent

Judgement

Joymalya Bagchi, J.

This appeal is directed against the judgement and order dated 13.11.1998 whereby the learned Single Judge has dismissed the writ petition challenging the order of removal dated 22.12.1994 passed by the disciplinary authority as well as the appellate order dated 01.02.1996 affirming the same. The writ petitioner was a constable of Railways Protection Force in South Eastern Railway. He absented from duty on and from 24.08.1992. Despite notice, he did not report to his duties. A disciplinary proceeding was initiated against the petitioner and copy of charge-sheet was sent to him.

2. On receipt thereof, Renuka Khalku, wife of the writ petitioner, wrote a letter dated 29.03.1993 wherein she stated that her husband was suffering from mental illness and was undergoing treatment at Ranchi. By another letter dated 14.06.1993, the authorities called upon the petitioner and/or his wife to send unfit medical certificate in support of his sickness. No such certificate was filed. However, by letter dated 18.12.1993, Renuka Khalku intimated the authorities that her husband had been admitted in Ranchi Mental Hospital since last one year. However, no contemporaneous medical records in support of such claim of hospitalisation was submitted.

3. Enquiry Officer on perusal of relevant documents and/or evidence on record, including the letters written by the wife of the writ petitioner, as aforesaid, came to a finding that the writ petitioner was guilty of the charge for unauthorised absence from duty and such absence was till continuing but he requested the disciplinary authority to consider the intimation of the wife of the petitioner before arriving at a final decision.

4. Such enquiry report was considered by the disciplinary authority who, inter alia, considered the letters written by the wife of the writ petitioner and ordered removal of the writ petitioner from service with immediate effect.

5. The appellate authority by order dated 17.04.1995 upheld such order of the disciplinary authority. Hence, the writ petition.

6. Learned Single Judge after an elaborate and pain staking analysis of the materials on record, including the medical certificates annexed to the writ petition, came to a finding that notwithstanding the defence taken by the wife of the writ petitioner in her letters to the respondent authorities, as aforesaid, no document pertaining to hospitalization of the petitioner could be placed on record and accordingly, upheld the order of dismissal passed against the writ petitioner.

7. Learned counsel appearing for the writ petitioner submitted that the Enquiry Officer had proceeded ex parte and that the writ petitioner was not permitted to cross-examine the witnesses. He further submitted that the enquiry was conducted in terms of rules which had been declared ultra vires. He also submitted that the explanation given by the wife of the writ petitioner in her letters was not considered by the respondent authorities.

8. Learned counsel appearing for the respondents submitted that adequate opportunity was given to the delinquent employee to represent himself and in spite of the same he chose not to participate in the enquiry proceeding. He further submitted that no document relating to hospitalization of the writ petitioner was submitted in the course of enquiry and the defence taken by the writ petitioner, as evidenced through the letters submitted by his wife, was duly considered and rejected. He further submitted that no prejudice was caused to the writ petitioner in the manner in which the enquiry was held.

9. We have considered the submissions of the parties.

10. Plea of breach of natural justice is to be judged on the factual matrix of each case and on the anvil of prejudice. It is not a magic wand which can give life to an otherwise doomed defence. It is evident that ample opportunity was given to the writ petitioner to defend himself in the course of the enquiry proceeding. In spite of such opportunity, he chose not to avail of the same. His wife wrote letters taking a specific defense that he was hospitalized but notwithstanding opportunities given, neither the petitioner nor his wife submitted document in support of such

hospitalisation or any unfit medical certificate before the respondent authorities. As a consequence, the respondent authorities came to a conclusion that the writ petitioner had absented himself for more than 28 months without any reason and removed him from service.

11. In the backdrop of the facts of this case when the petitioner himself failed to avail of opportunities given to participate in the enquiry, his plea of breach of natural justice on the ground of not permitting representation through a person of his own choice and/or cross-examination of department's witnesses do not hold water. Further, we are unable to appreciate as how the petitioner could have improved his case by cross-examining the department's witnesses when he himself failed to produce medical records relating to his hospitalization which was the only defence taken by him in the letters written on his behalf by his wife. In view of the nature of his defence and his inability to substantiate it with contemporaneous records in spite of repeated opportunities, we are of the opinion that he did not suffer any prejudice in the course of the departmental proceeding in any manner whatsoever.

12. That apart, learned Single Judge has taken pains to analyze the annexures appended to the writ petition in support of his claim of purported illness and has correctly come to the finding that the said documents are mere prescriptions and do not help the writ petitioner to establish his case of hospitalization.

13. It must be borne in mind that the writ petitioner was a member of a disciplined force and had absented himself without justifiable cause. In spite of repeated requests for submitting unfit medical certificate and/or documents relating to his alleged hospitalization, no document was submitted. The impugned order of removal from service, therefore, in our considered opinion cannot be said to be disproportionate so as to necessitate interference in writ jurisdiction.

14. We are further of the view that maximum leniency has been shown to the writ petitioner by directing that the period of unauthorised absence is to be treated as non-duty for all purposes. But such direction cannot be a valid justification to interfere with the order of removal, as argued by the learned counsel for the writ petitioner. The appeal and all other connected applications are accordingly dismissed.