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(2013) 08 DEL CK 0406

Delhi High Court

Case No: WP (C) No. 8692 of 2006

Surender Pal Singh	APPELLANT
Vs	
Union of India and Another	RESPONDENT

Date of Decision: Aug. 5, 2013

Citation: (2013) 5 ILR Delhi 3414

Hon'ble Judges: Gita Mittal, J; Deepa Sharma, J

Bench: Division Bench

Advocate: Rajeshwar Kumar Gupta, Ms. Sumati Sharma and Ms. Ramandeep Kaur Chawla, for the Appellant; Saroj Bidawat, for the Respondent

Judgement

Deepa Sharma, J.
The undisputed facts of the case are that the petitioner had joined the Border Security Force as Sub-Inspector and had retired as Deputy Commandant on 31st December, 2005 at the age of 57 years. When he was posted at Barmer, Rajasthan, he availed 30 days earned leave from the period 11th February, 2005 to 13th March, 2005 and came to Delhi. The case of the petitioner is that during this period he had fallen sick on 7th March, 2005 and reported at the BSF Hospital, Tigri Camp, Delhi. The hospital noted on examination that he had a mild enlarged prostate gland apart from other clinical observations. He was, therefore, referred to the Surgical Specialist, Safdarjung Hospital for "thorough check-up and management" (page 12). On the 9th of March, 2005, the petitioner reported at the Safdarjung Hospital General Surgery Department for check up which referred him to the OPD of Department of Urology.

2. The petitioner remained on treatment at the Safdarjung Hospital thereafter and has placed copies of his OPD card, medical treatment and the reports of the radiology and pathology test performed on him on record. Information with regard to his illness was given to Shri Hoshiyar Singh, Deputy Commandant who was the adjutant in the petitioner''s unit on 13th of March, 2005 and thereafter again on 7th of April, 2005.

The petitioner has supported these with receipts of the telephone calls made from the STD Booth. This fact is also not disputed by the respondents before us.

3. On 27th April, 2005, the respondent no. 2 wrote a letter to the petitioner referring to the petitioner''s letter of 23rd April, 2005. The petitioner was directed by this letter to submit a certificate issued by the BSF Hospital, R.K. Puram, New Delhi or by the Medical Officer of the 25th Battalion, BSF to the effect that he was unable to travel failing which he should present himself on duties at the headquarter.

By a second letter, also dated 27th April, 2005, the respondents directed the petitioner to report for further treatment to the CMO(SG) I/C STS Hospital and a medical certificate issued by the Medical Officer of the force as well as medical card be sent to the office.

4. On receipt of the first letter, the petitioner claimed that he reported to the CMO (SG) I/C STS Hospital. He was advised not to travel and, therefore, he could not attend to his duties.

5. The petitioner was still undergoing urology treatment when on 2nd of May, 2005 he complained of heart problem and he was therefore referred to Cardiology Department of the Safdarjung Hospital by the CMO(SG) I/C STS Hospital, Tigri Delhi. The petitioner was thereafter undergoing treatment for his cardiology condition in the Department of Cardiology, Safdarjung Hospital as well from the 2nd of May, 2005 onwards. On the 18th of May, 2005, the petitioner was referred to undergo several tests including TMT; eco Cardiogram, etc. which were performed on him.

6. The petitioner appears to have undergone several pathology and radiology investigation, both at the Urology Department as well as Cardiology Department of the Safdarjung Hospital. He was also admitted in the Department of Cardiology, Safdarjung Hospital between 24th May, 2005 to 25th May, 2005 for undergoing CAG and asked to report to the Cardiology OPD after four weeks. Photocopy of the complete record of the Safdarjung Hospital from the departments where the petitioner underwent treatment or investigation have been placed before us. On 8th June, 2005, the petitioner underwent a stress thallium test and again reported to the hospital on 13th June, 2005 and 20th June, 2005 with chest pain. On 16th May, 2005, the petitioner undergone a TMT and was reported that it was positive for provocative ischaemia. On 28th May, 2005, the petitioner undertook stress myocardial perfusion scan.

7. So far as information of the petitioner''s health to his employer is concerned, it is an admitted position that the BSF STS Hospital, Tigri Delhi sent regular telegrams to the petitioner''s battalion i.e., 120th Battalion, B.S.F. keeping them informed of the petitioner''s treatment and condition. Vide a telegram dated 7th may, 2005, the BSF Hospital informed the petitioner''s battalion that he had been directed to report to the hospital on 7th May, 2005 and that his TMT is scheduled for 9th May, 2005 at the Safdarjung Hospital.

8. This telegram was followed by telegram dated 19th May, 2005 sent by the BSF Hospital intimating the 120th Battalion that the petitioner had undergone TMT at Safdarjung Hospital on 16th May, 2005, had been found positive and that the officer had been advised admission at the Safdarjung Hospital on the 24th May, 2005 for undergoing angiography.

9. On the 26th May, 2005, BSF Hospital again telegraphically informed 120 Battalion that the petitioner had undergoing ordinary angiography at AIIMS and that he had been further advised to undergo the stress thallium test. In the telegram dated 8th June, 2005, the BSF STS Hospital, Tigri intimated 120th Battalion that the petitioner had undergone the stress thallium test and that he had been advised treatment for seven days and review thereafter. Copies of the medical record of the petitioner as well as the telegrams have also been placed before us are undisputed.

10. The respondents have complained that the petitioner was on 30 days earned leave with effect from 11th February, 2005 to 13th March, 2005 and that he did not join duty on expiry of the said leave. Vide letter dated 2nd April, 2005, he was directed to join duty forthwith or submit an application for extension of leave vide letter dated 2nd April, 2005. This was followed with the communication dated 22nd April, 2005 asking him to forward medical documents and a medical certificate of his illness. The respondents state that the petitioner had intimated that he would join duty after his treatment vide an application dated 10th May, 2005 with his medical prescription. However, he did not join duty despite letters dated 17th May, 2005 and June, 2005.

11. The petitioner joined duty at Barmer (Rajasthan) on 23rd June, 2005 and submitted an application to the respondents for sanctioning 102 days commuted leave on 25th June, 2005.

12. The respondents do not dispute the petitioner''s submission that he had enclosed all requisite medical records with his application. The respondents however did not consider the petitioner''s request favourably.

13. On 15th July, 2005, the respondent no. 2 through the petitioner''s Commandant passed an order converting the petitioner''s request of 102 days commuted leave into earned leave and so informed the petitioner. The petitioner''s request dated 17th August, 2005 for reconsideration of the matter to the Commandant was also not favourably considered. The petitioner had pointed out that he was to retire on 31st December, 2005; that he was losing amount of Rs. 74,500/- approximately in case the respondent regularized his 102 days leave as earned leave and that he would never be able to get the loss compensated to him. The petitioner points out that in the period of 33 years of service, he was able to have credited only 224 days of leave; that he was a heart patient and at that stage of his life needed cooperation.

14. The petitioner was informed by the respondents that to process his overstayal case on priority as per Leave Rules 24(3)(a) and 30 of CCS (Pension) Rules, 1972, he was required to submit a sickness and fitness certificate with regard to his illness along with original medical record to the office of the Commandant 120th Battalion, BSF.

The petitioner had consequently approached the Safdarjung Hospital for the necessary certificates. It appears that prior thereto, the Department of Cardiology of the Safdarjung Hospital had issued a medical certificate in Form 3 certifying that the petitioner was suffering from TMT and CD and absence from duty of 50 days with effect from 2nd May, 2005 to 20th June, 2005 was absolutely necessary for restoration of his/her health. This related to the Cardiology treatment which the petitioner had undergone. However, so far as the Urology treatment was concerned, the CMO of the Safdarjung Hospital sent a letter dated 9th August, 2005 to the petitioner communicating the remarks of the Head of the Urology Department to the effect that the petitioner should submit his OPD treatment slip as proof of attendance of the Urology OPD for treatment which is still valid.

15. On 24th October, 2005, the petitioner personally appeared before the Deputy Inspector General of respondent no. 2 to explain the above position but his request for reconsideration of the order was rejected.

16. On 10th November, 2005, the petitioner appeared before the Directorate General of the BSF who sent him to the DIG with comments to examine the case. The petitioner again met the DIG on the 16th of December, 2005 who by an order dated 17th December, 2005 rejected the petitioner''s request for treating his leave as commuted leave.

17. Before us, petitioner points out that he has been granted medical leave of 109 days for the treatment period with effect from 22nd November, 2002 to 10th March, 2003 which was regularized as medical leave by an order dated 16th April, 2001. Similarly 39 days treatment period between 8th July, 2001 to 15th August, 2001 was again regularized by converting 78 days HPL as medical leave by an order passed on 28th September, 2001. It is contended that the refusal to regularize the absence of the petitioner as commuted leave is arbitrary, illegal and unjustified compelling the petitioner to invoke the extraordinary jurisdiction of this court by way of the present petition. The petitioner has contended that he was denied any opportunity to represent against the action taken by the respondents.

18. In their counter affidavit, the respondents have controverted the case of the petitioner on the sole ground that the petitioner had failed to submit a medical certificate and the fitness certificate which is a sine qua non before sanctioning the commuted leave on medical grounds and that the act of the respondent is as per the rules and provisions.

19. It is submitted by the respondents that a sympathetic view was taken in favour of petitioner since he was retiring with effect from 31st December, 2005. As the petitioner

was on the verge of retirement, his overstaying on leave without information, was condoned and his commuted leave was simply converted into the earned leave and his absence was regularised. It is pointed out that that during the year 2004-2005, the officer has availed leave as under:-

(i) 60 days EL with effect from 01 May, 2005 to 29 Jun, 2004.

(ii) 15 days EL with effect from 25 Sep to 09 Oct 2004 and extended 14 days EL with effect from 10 Oct to 23 Oct 2004.

(iii) 08 days CL with effect from 10 Dec to 17 Dec 2004

(iv) 30 days EL with effect from 11 Feb to 13 Mar, 2005 and overstayed from the leave for 102 days which has been later on converted into EL upto 23 Jun, 2005.

20. Before us, the petitioner''s request for granting commuted leave for 102 days was turned down by the DIG BSF Barmer only due to non production of medical documents as required under CCS (Leave) Rules 19(1)(i) in Form 3 and fitness certificate as per leave rule 24(3)(a) in Form No. 5. The respondents have taken the stand that he had taken treatment from the Safdarjung Hospital as OPD patient for which no rest/leave was recommended by the Medical Officer of the said hospital. The respondents point out that the petitioner had himself stated in his application dated 4th July, 2005 that the hospital authorities were reluctant to issue the medical fitness certificate to him. The respondents have stated that on 22nd November, 2005, the officer had submitted an application along with his medical certificate of Safdarjung Hospital for 50 days, sick leave by putting back date i.e. 20th June, 2005. However, as no fitness certificate was submitted along with so the same was not considered. It is submitted that there is no violation of any principle of natural justice and due hearing at all stages had been given to the petitioner. It is submitted that the petition has no merit and is liable to be dismissed.

21. We have heard the learned counsels for the parties and have given due consideration to their submissions and documents on record.

22. The sole question for consideration before us is whether the respondents can suo moto convert commuted leave into earned leave?

23. In this regard, both parties have drawn our attention to Rule 7(2) of FRSR Part III Leave Rules which stipulates as under:

7. Right to leave

(1).....

(2) When the exigencies of public service so require, leave of any kind may be refused or revoked by the authority competent to grant it, but it shall not be open to that authority to

alter the kind of leave due and applied for except at the written request of the Government servant.

(Emphasis supplied)

From a bare reading of this provision it is apparent that the authorities i.e. the respondents have no authority to alter any kind of leave due and applied for except at the written request of the government servant. The expression used in Rule 7(2) aforestated is "shall not", leaving no discretion to alter the leave sought with the authorities. If the petitioner''s application was not finding favour, the respondents'' only option was to refuse the applied for leave. In the present case, the petitioner has admittedly not made any written request for conversion of his commuted leave (applied for) into earned leave. In the absence of written request of petitioner for conversion of his commuted leave to earned leave, the respondents had no authority to sanction earned leave on the application which specifically sought commuted leave. The act of so altering by the respondents, therefore, is, violative of the Rule 7(2) of FRSR Part III Leave Rules.

24. The second question which arises is whether the petitioner was entitled to commuted leave under the present circumstances when he could not submit a medical certificate and fitness certificate as per the prescribed format along with his application for commuted leave. Commuted leave are dealt with in Rule 30(1)(a) and (d) of FRSR Part III Leave Rules which reads as under:

30. Commuted leave

(1) Commuted leave not exceeding half the amount of half pay leave due may be granted on medical certificate to a Government servant (other than a military officer), subject to the following condition:-

(a) the authority competent to grant leave is satisfied that there is reasonable prospect of the Government servant returning to duty on its expiry:

(b) Deleted

(c) Deleted

(d) when commuted leave is granted, twice the amount of such leave shall be debited against the half pay leave due;

(e) Deleted

From the bare reading of this rule, it is apparent that commuted leave can be granted to a government servant on submission of a medical certificate.

25. The indisputable facts are that the petitioner while on earned leave in Delhi had fallen ill and he reported to BSF hospital, Tigri (Delhi) and was referred to Safdarjung Hospital

where he continued treatment first for his Urological problem and thereafter his heart ailment and underwent Angiography also. When the petitioner was asked by the respondents vide letter dated 27th April, 2005 to report to CMO, (SG) I/C STS Hospital, Tigri (Delhi) and to send medical document in case of his inability to travel due to illness, he did so. The CMO (SG) I/C STS Hospital, Tigri (Delhi) who was apprised of the medical condition of the petitioner had sent telegrams dated 7th May, 2005, 19th May, 2005, 26th May, 2005, 8th June, 2005, 10th June, 2005 and 15th June, 2005 regularly apprising the respondent of medical conditions of petitioner. No issue was raised by the respondents.

26. It is also the admitted fact that vide his application dated 10th May, 2005, the petitioner had informed the respondents about his treatment and inability to join his duty. The respondents made no objection and accepted the correctness of this position.

27. The petitioner was asked by the respondent vide letter dated 26th June, 2005 of 120 Bn BSF office, to submit the sickness and fitness certificate of his illness along with original medical documents. The petitioner replied to the letter vide his application dated 4th July, 2005 under a covering letter stating therein that he had requested the Safdarjung Hospital for issuing fitness certificate but the hospital was reluctant to issue the same for the reason that the petitioner was still under their treatment. Thus it was the hospital which refused to issue the fitness certificate on the ground that the petitioner was still undergoing treatment with the hospital. Under these circumstances, the petitioner obviously could not have submitted his fitness certificate while joining his duty. The issuance of the fitness certificate was not in the hands of the petitioner.

28. The sole requirement of Rule 30 FRSR Part III Leave Rules that the government servant is required to furnish a medical certificate for sanction of commuted leave on medical grounds. This is obviously because the employer is to be satisfied that the employee was prevented by sickness from performing duties.

29. As noted above, the Cardiology department of Safdarjung Hospital refused to initially issue the medical and fitness certificate on the ground that petitioner was still undergoing treatment in the hospital. The Cardiology department of Safdarjung Hospital however, subsequently issued a medical certificate of 50 days from 2nd May, 2005 to 20th May, 2005 which was duly submitted by petitioner along with his review application dated 22nd November, 2005. The same, however, was not given any weightage by the reviewing authorities.

30. The petitioner had also applied for issuance of medical certificate to Urology department at Safdarjung hospital. Vide their letter dated 9th August, 2005, they have informed as under:

...

Reference your letter No. nil dated 29-7-05 on the subject cited above. The remarks of Dr. N.K. Mohanty, Professor & H.O.D. Urology Deptt. of this hospital are given below.

OPD treatment slip should be submitted as proof for attendance of Urology OPD for treatment which is valid.

xxx xxx xxx"

31. Even though the petitioner thus could not produce the medical certificate for the entire period of his absence, contemporaneous documents, including information from the BSF Hospital, were regularly given to them. The petitioner has stated that he had submitted necessary documents with his leave application as well. In this background though, not in prescribed form, there was substantive compliance with the requirement of the respondents. The above document clearly show that the petitioner could not produce the medical certificate to the respondents while applying for commuted leave only because the concerned hospital refused to issue the same. The petitioner was referred for treatment to Safdarjung Hospital on 7th March, 2005. He remained under continuous treatment at the BSF Hospital, Tigri (Delhi) Hospital. The petitioner was on earned leave till 13.3.2005.

32. We may note in the examination the respondent"s requirement for production of fitness certificate by the petitioner. In this regard learned counsel for the petitioner has also drawn our attention to the stipulation made in Rule 24(3)(a) of the FRSR Leave Rules which reads as follows:-

24. Return from leave

(1) - (2) xxx xxx xxx

(3)(a) A Government servant who has taken leave on medical certificate may not return to duty until he has produced a medical certificate of fitness in Form 5.

(Underlining by us)

33. In Rule 24(3) which requires production of a medical certificate of fitness, the rule making authority has used the expression "may" not return without a fitness certificate suggesting that the requirement of production of the medical certificate was directory and not mandatory.

34. The above rule position shows that the fitness certificate may be required to be produced upon returning to duty after medical leave. In the instant case, the petitioner was permitted to resume duties without necessity of any fitness certificate by the respondents. The respondents themselves have therefore, not treated the requirements of the fitness certificate as mandatory and cannot be now permitted to urge the requirement thereof as binding the petitioner for consideration of his application for grant of commuted leave. The petitioner was permitted to resume duties admittedly without production of any medical certificate of fitness.

35. In any event, it is apparent that the failure on the part of the petitioner to submit the requisite medical certificate in prescribed format along with commuted leave application cannot be held to be fatal for the petitioner''s request because of any fault attributable to him. The Cardiology Department refused to issue such certificate because the petitioner was still under treatment with them. It later issued the medical certificate for 50 days. The Urology department of Safdarjung Hospital refused to do it on account of non submission of OPD treatment slip as proof for attendance of Urology OPD.

36. This aspect can be examined from yet another angle. In the instant case, the respondents do not dispute that the petitioner had been unwell and that his absence was on account of the ongoing medical treatment. The progress thereof was regularly informed to the respondents by the BSF Hospital. The petitioner has produced the medical certificate for the treatment which he had undergone at the Department of Cardiology as well. The petitioner was referred by the BSF Hospital for treatment to the Safdarjung Hospital where he was referred to the Urology Department. Evidence of the petitioner being treated at the Department of Urology was available with the respondents. It is well settled that rules of procedure are merely handmaiden to the ends of justice. Mere format cannot be permitted to thwart the petitioner''s application.

The matter when looked at from the aspect of substantive compliance with the aforenoticed requirement of the production of the medical certificates amply supports the petitioner''s contention that all information, required in the prescribed form, had been made available to the respondents.

37. It is also evident that the respondents had allowed the petitioner to join his duties and he continued on duty till his retirement. He was permitted to do so despite his failure to submit fitness certificate. This fact by itself manifests that the respondents treated the petitioner as fit to join and perform all duties.

38. The petitioner had retired from service on 31st December, 2005. As per his service conditions, he was also entitled for encashment of the earned leave due to him on the date of his retirement. The respondents had wrongly treated his 102 days of commuted/medical leave as earned leave which is in violation of the applicable rules. Due to this loss has accrued to the petitioner as he has been precluded from encashing the earned leave which were deducted from his account of earned leave.

39. It therefore is clear that due to no fault on his part, the petitioner has been wrongly made to suffer a monetary loss.

40. From the above discussion, it follows that petitioner''s claim for commuted leave was within the prescribed rules and there was substantive compliance thereof on his part. We hold that the act of the respondents of converting his commuted leave to earned leave was unjustified and against the rules. The claim of the petitioner for commuted leave was justified. Indisputably there were adequate commuted leaves in his account. The

petitioner is seeking adjustment of 102 days commuted leave only. It is held that the petitioner was entitled to grant of his application for his leave being treated as commuted leave.

41. We, therefore, set aside and quash the impugned orders dated 15th July, 2005 and 17th December, 2005 and direct as follows:

(i) the respondents shall consider the matter and pass an order afresh on the petitioner"s application for sanction of commuted leave in the light of the above position within four weeks from today. The same shall be forth with communicated to the petitioner.

(ii) all consequential benefits shall be released to the petitioner within eight weeks from the date of order.

(iii) in case the respondent fails to release the consequential benefits, the petitioner shall be entitled to interest thereon at the rate of 9% per annum from the date of this order till its release.

The writ petition is allowed accordingly.

C.M. No. 6299/2006

This application has become infructuous and is disposed of as such.