

Sunil Kumar (Ex. Constable) Vs. Presiding Officer and ors.

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Court : Delhi

Decided On : Apr-18-2000

Reported in : 2000(54)DRJ22

Judge : Anil Dev Singh and; R.S. Sodhi, JJ.

Acts : [Constitution of India](#) - Article 226

Appeal No. : Civil Writ Petition No. 5935 of 1999

Appellant : Sunil Kumar (Ex. Constable)

Respondent : Presiding Officer and ors.

Advocate for Def. : Mr. Aditya Madan, Adv.

Advocate for Pet/Ap. : Ms. Jasvinder Kaur, Adv

Judgement :

ORDER

R.S. Sodhi, J.

1. The petitioner, an Ex-constable in Delhi Police, challenges the order of the Central Administrative Tribunal, Principal Bench, New Delhi, (for short 'the Tribunal) dated 14th May, 1999 in R. A.No. 114 of 1999 in O.A. 1437 of 1993 whereby the Tribunal chose not to interfere with its earlier order dated 11th March,

1999 by which it had dismissed the O.A. by a detailed order even though without assistance of counsel for the petitioner who chose not to be present. The review application was primarily based on the judgment of the Supreme Court in State of Punjab & Ors. v. Bakshish Singh, but the Tribunal rejected the review on the ground that this is clearly an after-thought.

2. Being aggrieved of the order of the Tribunal dated 14th May, 1999, the petitioner has moved this court by way of the instant writ petition under Article 226 of the [Constitution of India](#). It is the case of the petitioner that during the pendency of the Original Application No. 1437 of 1998 before the Tribunal, the Supreme Court had delivered a judgment dated 8th September, 1998, entitled State of Punjab & Ors. v. Bakshish Singh where the Supreme Court had upheld the order of the Additional District Judge to the effect that 'once a period of absence from duty has been treated as 'leave without pay', it cannot be legally held that the defaulter was guilty of misconduct for any unauthorised absence from duty. It was contended that counsel for the petitioner could not be present before the Tribunal where the case was called out for hearing and, therefore, this judgment could not be placed before the Tribunal on that date and the Tribunal without taking note of the judgment in Bakshish Singh's case upheld the order of dismissal. It is further stated that this error was sought to be rectified in the review application which too did not find favor with the Tribunal and, therefore, the petitioner was compelled to challenge the same by way of this writ petition.

3. Before us, the only point urged is that the period of absence having been treated by the disciplinary authority as 'leave without pay', the judgment in Bakshish Singh's case applies on all fours and, therefore, the petitioner ought to be reinstated in service.

4. It is contended on behalf of the respondents that the case in hand would be covered by the judgment of the Supreme Court in State of M.P. v. Harihar Gopal, 1969 SLR 274 wherein the Supreme Court, in no uncertain terms, held that :

'The order granting leave was made after the order terminating employment and it was made only for the purpose of maintaining of correct record of the duration of service and adjustments of leave due to the respondent and for regularising his

absence from duty. Our attention has not been invited to any rules governing the respondent's service conditions under which an order regularising the absence from duty subsequent to termination of employment has the effect of invalidating the termination'.

The court further held :

'We are unable to hold that the authority after terminating the employment of the respondent intended to pass an order invalidating the earlier order by sanctioning leave so that the respondent was to be deemed not to have remained absent from duty without leave duly granted'.

5. This judgment is by three Hon'ble Judges of the Supreme Court in contrast to the decision of two judge bench of the Supreme Court in Bakshish Singh's case (supra) and, therefore, learned counsel for respondents 2 to 4 submitted that it ought to be followed. As against this, learned counsel for the petitioner submitted that the judgment of the Supreme Court in State of Punjab & Ors v. Bakshish Singh (supra) overruled its earlier judgment in Harihar Gopal's case. We have noted the submissions of the learned counsel and have carefully gone through the precedents cited.

6. Bakshish Singh's case arose from a suit filed before the Sub-Judge, Jalandhar, for a declaration to the effect that the order dated 11th January, 1990 passed by the Inspector General of Police, PAP, Jalandhar Cantt, by virtue of which his revision petition was rejected and the order dated 6th January, 1989 passed by the DIG PAP (Admn.) Jalandhar Cantt. and the order dated 1.6.1988 passed by the Commandant, 80th Bn. PAP, Jalandhar Cantt dismissing him from service were confirmed, were illegal.

7. The suit was decreed and, in appeal, the Additional District Judge, Jalandhar, by his order dated 15th January, 1996 took note of the various judgments as also the judgment of the Supreme Court in Harihar Gopal's case (supra). The decision of the Supreme Court in Harihar Gopal's case was distinguished by the Additional District Judge on the ground that the order regularising leave without pay was made after terminating the employment and that it was made only for the purpose

of maintaining correct record of duration of service. It needs to be highlighted that the order granting leave was made subsequent to order terminating the employment. Both the orders were passed separately and not rolled into one. In other words it was not a case of a composite order. In Bakshish Singh's case, however, the District Judge while concurring with the view of the trial court found on the facts of that case that the absence of the official was regularised by the administrative authority and the charge of absence from duty did not survive. In spite of having arrived at the conclusion that the charge of absence from duty did not survive, the District Judge proceeded to consider the question whether or not absence of the official from duty was a misconduct of gravest kind so as to warrant the maximum penalty of dismissal from service or was it a bare misconduct for which lesser punishment would be appropriate. The District Judge having found that it was not a case of misconduct of gravest kind remanded the case to the punishing authority for passing a fresh order of punishment. Aggrieved by the order of the first appellate court, the State of Punjab moved the High Court by way of a Regular Second Appeal No. 1555 of 1996. The High Court, by its judgment and order dated 21st August, 1996, dismissed the Regular Second Appeal of the State of Punjab without a speaking order. This led the State of Punjab to move the Supreme Court under Article 136 of the Constitution which came to be disposed of by the Supreme Court as Appeal No. 4212 of 1997. The Supreme Court, taking note of the findings of the fact arrived at by the trial court and the lower appellate court, namely, that the charge of absence from duty did not survive, went on to hold that the lower appellate court was not right in remanding the matter to the punishing authority. The Supreme Court also noted that the trial court had returned a findings of fact that proper opportunity of hearing was not given and signatures were obtained under duress during the departmental proceedings which findings were neither adverted to nor disputed by the first appellate court. It appears to us that in view of the aforesaid findings of fact the Supreme Court held that there was no occasion to remand the matter to the punishing authority for passing a fresh order of punishment. In this regard the Supreme Court observed as follows:-

'It will thus be seen that the trial court as also the lower appellate court both had recorded the findings that the period of absence from duty having been regularised and converted into leave without pay, the charge of absence from duty did not

survive. Once it was found as a fact (emphasis supplied) that the charge of unauthorised absence from duty did not survive, we fail to appreciate how the lower appellate court could remand the matter back to the punishing authority for passing a fresh order of punishment. In the face of these findings especially the finding of the trial court that proper opportunity of hearing was not given and the signatures of the respondent were obtained under duress during the departmental proceedings which have not been set aside by the lower appellate court, we are of the view that there was no occasion to remand the case back to the punishing authority merely for passing a fresh order of punishment',

8. therefore, it is clear that in Bakshish Singh's case (supra) the Supreme Court was dealing with the question whether it was open to the first appellate court to remit the matter to the punishing authority in view of findings of fact arrived at by the trial court and not disturbed by the appellate court. The Supreme Court was not dealing with a proposition of law already settled by Harihar Gopal's case and has not overruled the same. To say the least the Supreme Court could not in Bakshish Singh's case be understood to have done so without adverting to its earlier decision in Harihar Gopal's case. On a further argument raised by the State of Punjab before the Supreme Court in Bakshish Singh's case that the respondent had not filed any cross appeal, and, therefore, the order of remand passed by the lower appellate court for a fresh order of punishment need not be interfered with, particularly, as that order had been upheld by the High Court which has summarily dismissed the second appeal filed by the State of Punjab and if, therefore, the Supreme Court intervenes in the matter, even in exercise of its power under Article. 142 of the [Constitution of India](#), the same would be without jurisdiction, it held as follows :-

'Applying the above principles to the instant case, it will be noticed that the trial court recorded a categorical finding of fact that a proper opportunity of hearing was not afforded to the respondent in the departmental proceedings and that his signatures on certain papers during those proceedings were obtained under duress, was not controverted as the State of Punjab had led no evidence in defense. The trial court also recorded a finding that unauthorised absence from duty without leave having been regularised by treating the period of absence as

'leave without pay', the charge of misconduct did not survive. It was with this finding that the suit was decreed. The lower appellate court affirmed the finding that since the period of unauthorised absence from duty without leave was regularised the charge did not survive, but it did not say a word about the finding relating to the opportunity of hearing in the departmental proceedings. Since those findings were not specifically set aside and the lower appellate court was silent about them, the same shall be treated as having been affirmed. In the face of these findings, it was not open to the lower appellate court to remand the case to the punishing authority for passing a fresh order of punishment. The High Court, before which the second appeal was filed by the State of Punjab, did not advert itself to this inconsistency as it dismissed the appeal summarily, which indirectly reflects that it allowed an inconsistent judgment to pass through its scrutiny. It is in these circumstances that we, in exercise of our power of doing complete justice between the parties, finally decide the appeal the whole case by providing as follows.....'

The court finally passed the following directions:-

'(a) the appeal is allowed; (b) the judgment dated 15th January, 1996 passed by the lower appellate court, in so far it purports to remand the case to the punishing authority as also the judgment of the High Court dated 21. 8. 1996 are set aside; (c) the judgment and decree passed by the trial court is upheld.'

9. From the operative part of the judgment it appears that the appeal of the State was allowed even though the reasoning is otherwise. Further, the earlier judgment of the Supreme Court in Harihar Gopal's case was not placed before the Court nor was its attention drawn to the question of law decided by it, namely, that merely by regularising the absence from duty subsequent to termination of employment did not have the effect of invalidating termination. Moreover, the case of Bakshish Singh has been decided on its own fact situation. The judgment of the Supreme Court lays emphasis on the findings arrived at by the trial court on which the suit was decreed, namely, that proper opportunity of hearing was not afforded to the respondent in the departmental proceedings, that his signatures on certain papers during those proceedings were obtained under duress and that the charge of

absence from duty did not survive were not set aside by the first appellate court. In view of the findings of fact arrived at by the courts below, the Supreme Court held that the first appellate court could not have remanded the case to the punishing authority for passing of a fresh order on punishment. We do not find anything in the judgment of Bakshish Singh's case (supra) which expressly or by implication overrules the judgment in Harihar Gopal's case. To our mind, Harihar Gopal's case (supra) still holds the field. The distinction sought to be drawn to the effect that the order regularising the absence from duty as 'leave without pay' is not a separate order, as was in the case of Harihar Gopal, cannot be accepted. It does not stand to reason that the Supreme Court in Harihar Gopal's case has upheld the termination order only because the order of regularising leave was passed subsequently. A reading of the judgment does not give such an impression. The dicta laid down by the Supreme Court is unambiguous and still holds the field, namely, that it is open to the punishing authority to direct the record keeper to complete the service record by treating the period of absence as one without pay.

10. The Supreme Court in Harihar Gopal's case cannot be said to have laid down the law to the effect that the dismissal order is protected only because it has been made on a different sheet of paper, although by the same authority and on the same date.

11. The judgment of the Supreme Court in Bakshish Singh's case is per incuriam and does not over rule nor differentiate the judgment in Harihar Gopal's case. In this view of the matter, we are of the opinion that the order of termination does not suffer from any illegality and that the regularisation of leave without pay is only for purposes of maintaining correct record of service which does not interfere with nor obliterate the order of dismissal from service.

12. The order of the Tribunal dated 14th May, 1999 in R. A. No. 114 of 1999 in O. A. No. 1437 of 1993 is upheld. The writ petition is dismissed and the Rule discharged. No order as to costs.