



GAHC010002422019

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THE GAUHATI HIGH COURT
(HIGH COURT OF ASSAM, NAGALAND, MIZORAM AND ARUNACHAL PRADESH)

Case No. : WP(C)/121/2019

DEBASHIS PUZARI
S/O SRI TARUN CHANDR APUZARI
R/O WEST MILAN NAGAR (K-LANE), P.O.C.R. BUILDING,
DIST. DIBRUGARH, ASSAM
PIN - 786001

VERSUS

THE STATE OF ASSAM AND 5 ORS.
REP. BY THE ADDITIONAL CHIEF SECRETARY TO THE GOVT. OF ASSAM,
PUBLIC WORKS DEPARTMENT,
DISPUR, GUWAHATI -6, ASSAM.

2:THE COMMISSIONER AND SPECIAL SECRETARY
GOVT OF ASSAM
PUBLIC WORKS DEPARTMENT (ROADS)
DISPUR
GUWAHATI -6
ASSAM

3:THE SECRETARY
GOVT. OF ASSAM
PUBLIC WORKS DEPARTMENT (ROADS)
DISPUR
GUWAHATI -6
ASSAM.

4:THE DEPUTY SECRETARY
PUBLIC WORKS DEPARTMENT (ROADS)
ESTABLISHMENT BRANCH
DISPUR
GUWAHATI-6
ASSAM.

5:THE CHIEF ENGINEER



PUBLIC WORKS DEPARTMENT (ROADS)
CHANDMARI
GUWAHATI
ASSAM-3.

6:THE SUPERINENDING ENGINEER
PUBLIC WORKS DEPARTMENT
DIBRUGARH RUADL ROAD
DIVISION
DIBRUGARH
ASSAM
PIN - 786001

Advocate for the Petitioner : MR. U K NAIR
Advocate for the Respondent : GA, ASSAM

BEFORE
HONOURABLE MR. JUSTICE ACHINTYA MALLA BUJOR BARUA

JUDGMENT

Date : 18-11-2022

Heard Mr. SP Sharma, learned counsel for the petitioner and Mr. D Nath, learned Senior Government Advocate for the respondents in the PWD(Roads), Government of Assam.

2. The petitioner was appointed on the recommendation of the Assam Public Service Commission as an Assistant Engineer (Civil) in the PWD and was posted at Dibrugarh Roads Division against a vacant post. Prior to being appointed as an Assistant Engineer (Civil), the petitioner was in Australia for certain educational purpose. After the appointment, he felt that there was a necessity to go back to Australia to complete certain unfinished works. Consequently, he sought for leave from 01.07.2004 to 30.07.2004, which was granted. But the petitioner on his own volition overstayed the leave and returned back in the year 2006. Although it is stated that from time to time he went on giving applications for extension of his leave, but there is nothing on record to show that any leave in respect of such applications were allowed.



3. Be that as it may, after returning back in the year 2006, the petitioner was placed under suspension by an order dated 29.03.2006 of the Commissioner and Special Secretary to the Government of Assam in the PWRD. A disciplinary proceeding was also initiated against the petitioner as per the show cause notice dated 24.06.2009 under Rule 9 of the Assam Services (Discipline and Appeal) Rules, 1964 (in short Rules of 1964) read with Article 311 of the Constitution of India, primarily on the charges that he remained unauthorizedly absent for the aforesaid period.

4. A declaration was made by the petitioner on a non-judicial stamp paper on 18.06.2010 to the effect that the petitioner will not claim any pay and allowances for the period from 31.07.2004 till the date of the declaration, if he is reinstated in service.

5. The respondents through the Deputy Secretary to the Government of Assam in the PWD issued a communication dated 30.05.2012 to the petitioner informing that the department was considering to dispose of the disciplinary proceeding and also to revoke the order of suspension and accordingly the response of the petitioner was invited. The petitioner made a reply to the said communication as per his letter dated 03.07.2012 providing certain medical certificates.

6. Consequently, by an order dated 09.11.2012 of the Deputy Secretary to the Government of Assam in the PWD, the petitioner was reinstated in service and was posted as Assistant Engineer (Civil), PWD(R) at Tinsukia. After being reinstated, the petitioner was aggrieved by a notification dated 12.10.2016 providing for his inter-se seniority in the cadre and against the same, there was also a legal notice dated 21.06.2017 by the petitioner.



7. In the circumstance, WP(C) No. 7317/2017 was instituted by the petitioner, which was given a final consideration by the order dated 11.12.2017, wherein there was a direction to the Commissioner and Secretary in the PWD(R) to give a consideration to the representation that may be submitted by the petitioner. Consequent thereof, the order dated 21.08.2018 was passed by which, amongst others, it had been provided that as advised by the Personnel Department and Judicial Department and upon considering the prayers of the petitioner and taking a humanitarian approach, the disciplinary authority had decided to conclude the departmental proceeding against the petitioner by revoking the suspension order dated 29.03.2006 and to treat his entire period of absence as 'dies non' for all purpose under FR 18 and that the entire past service of the petitioner would stand forfeited as advised by the Judicial Department. Being aggrieved, this writ petition is instituted.

8. Mr. SP Sharma, learned counsel for the petitioner raises a grievance that in the fact and circumstance of the matter, where the petitioner was not performing his duties for whatever reason it may be, there was a disciplinary proceeding and the authorities as per the undertaking given by the petitioner could have passed an order for closing the departmental proceeding without providing the petitioner for any pay and allowances for the period. But the impugned order dated 21.08.2018 which provides that the service period of the petitioner to be treated as dies non for all purpose under FR 18 and that the entire past service would stand forfeited as advised by the Judicial Department is unacceptable in law.

9. As regards the provisions in the order dated 21.08.2018 that the disciplinary authority had decided to conclude the departmental proceeding by revoking the order of suspension and that as per the undertaking given by the



petitioner he will not claim for any pay and allowances for the given period, in the absence of any specific challenge, we are not expressing any view on the said aspect, more so, when the disciplinary proceeding was not concluded in a logical manner but because of certain understanding between the petitioner and the respondent authorities as regards the requirement to pay the pay and allowances for the given period and further that the authorities had taken a humanitarian view on the entire aspect.

10. But as regards the further provision that the period of absence to be treated as dies non for all purpose under FR 18 and that the entire past service would stand forfeited as advised by the Judicial Department, definitely requires a further judicial scrutiny.

11. Mr. D Nath, learned senior Government Advocate appearing for the respondents in the PWD(R) justifies the said provision by referring to FR 54-B(1), which inter-alia provides that when a Government servant who has been suspended is reinstated or would have been so reinstated but for his retirement on superannuation while under suspension, the authority competent to order reinstatement shall consider and make a specific order regarding the pay and allowances to be paid to the Government servant for the period of suspension ending with reinstatement and whether or not the said period shall be treated as a period spent on duty. The provisions of FR-54-B(1)(a)(b) are extracted as below:-

*“**F.R.54-B.** (1) When a Government servant who has been suspended to re-instated or would have been so re-instated but for his retirement on superannuation while under suspension, the authority competent to order re-instatement shall consider and make a specific order,-*

(a) regarding the pay and allowances to be paid to the Government servant for the period of suspension ending with reinstatement or the date of his

retirement on superannuation, as the case may be; and

(b) whether or not the said period shall be treated as a period spent on duty.”

12. It is the submission of Mr. D Nath, learned senior Government Advocate that as per the arrangement between the parties, there was a conclusion that the petitioner would not be paid the pay and allowance for the period under which he was suspended prior to being reinstated and accordingly it is the submission that as provided under FR-54-B(1)(a), the disciplinary authority had taken the decision that the petitioner would not be paid the salary and allowance.

13. Further, by referring to FR 54-B(1)(b), the authorities had also taken their decision that the period for which the petitioner was under suspension be treated to be a period when the petitioner was not on duty. Accordingly, it is the submission of Mr. D Nath, learned senior Government Advocate that based on the decision not to pay the pay and allowances for the suspended period and also to treat the petitioner to be not on duty for the said period, the concept of 'dies non' is applicable in respect of the petitioner and therefore, the entire service period would stand forfeited under the aforesaid provisions of the FR.

14. Although the order impugned dated 21.08.2018 refers it to be treating the entire period of absence as dies non for all purpose under FR 18, but going by the submission of Mr. D Nath, learned senior Government Advocate, we understand that the entire period of absence of the petitioner was treated as dies non by referring to the provisions of FR 54-B(1)(a) and (b). Accordingly, it is the further submission of Mr. D Nath, learned senior Government Advocate that as the period of suspension of the petitioner had been treated as dies non, therefore, the entire period of past service of the petitioner would stand forfeited inasmuch as, the concept of dies non do justify it to have been

forfeited.

15. The stand of the respondents as stated by Mr. D Nath, learned senior Government Advocate that there was an agreement between the parties that the petitioner would not claim any pay and allowance for the suspended period and that it is a discretion exercised by the authorities under FR 54-B (1)(b) to treat the period to be as a period not spent on duty may be an acceptable decision that have been taken under the law. But having taken the aforesaid acceptable decision, a further question would remain as to whether treating the entire period of absence as dies non would also correspondingly be acceptable that the service period would stand forfeited, under the law and if yes whether the concept of dies non also means taht the service period would stand forfeited.

16. As per the Black's Law Dictionary, the expression 'dies non' has the same meaning as 'dies non juridicus' where the expression 'dies non juridicus' means a day exempted from the proceedings, such as a holiday or a Sunday.

17. To further substantiate the meaning of the expression 'dies non', Mr. D Nath, learned Senior Government Advocate for the respondents also refers to a pronouncement of the Supreme Court in *Mangilal Kajodia v. Union of India reported in (2020) 2 SCC 723* wherein the factual situation was such that the Central Government had clarified that the entire period of absence of the person involved therein i.e. from the date of removal till the date he rejoins would be treated as dies non for which no benefits would accrue. In the paragraph 13 of the judgment of the Supreme Court in *Mangilal Kajodia (supra)*, it had been provided that the position taken by the Central Government of India to grant substantive benefits for the duration of absence cannot be per se termed to be harsh and arbitrary as the person therein had not joined the place of posting

nor he approached the Court at the relevant point of time.

18. In the aforesaid circumstance, the Supreme Court was of the view that conceding the benefits of the arrear salary, seniority, continuity and other related benefits would not be fair.

Part of paragraphs 12 and 13 is extracted as below:

"12.....At the same time, the Central Government has clarified that the entire period of absence i.e. from the date of removal till the date he rejoins would be treated as dies non for which no benefit would accrue to him.

13. *This Court is of the opinion that the position taken by the Central Government not to grant substantive benefit for the duration of absence cannot be per se termed harsh and arbitrary. The petitioner did not join the place KV, Kargil, nor did he approach the court at the relevant time or even after his removal contemporaneously. In these circumstances, conceding the benefit of arrears of salary, seniority and continuity, arrears of salary and related benefits would not be fair....."*

19. By referring to the aforesaid proposition of the Supreme Court, Mr. D Nath, learned Senior Government Advocate has raised the contention that in the facts and circumstance of the present case also it was justified that the entire period of absence of the petitioner be treated as dies non.

20. To the extent that the entire period of absence of the petitioner had been treated as dies non and that the petitioner would not be paid his pay and allowance for the said period, may be construed to be treating the service period of the petitioner to be dies non. But the further provision in the impugned order dated 21.08.2018 that the entire past service would stand forfeited requires an examination.

21. As already noted above, the meaning of the expression 'dies non' is that the person upon whom the concept of dies not had been imposed would be treated to be on a holiday.

22. If we go by the concept of dies non which is equated to be a person on a holiday, we see no reason to accept the contention of the Government authorities that the entire service period of the petitioner for which he was absent would stand forfeited meaning thereby that the said period of service never existed. Remaining in holiday or not requiring to be on duty as concluded by the authorities in this case does not *ipso-facto* also denote that the person concerned was not in service for that relevant period of time. The only adverse consequence in the service condition would be that his period was treated to be not on duty and secondly, he would not be paid the salary and allowances. But the employer and employee relationship between the petitioner and the respondents for the said period cannot be said to have been obliterated merely because the pay and allowances are not required to be paid or the period be treated to be as not to be on duty.

23. Even the concept of dies non as accepted by the Supreme Court in its pronouncement in *Mangilal Kajodia (supra)* does not support a situation where the entire service period stands obliterated merely because the concept of dies non had been imposed and there is no payment of any pay and allowances and further that the concerned person was treated to be not on duty. Any person who is treated to be not on duty remains in the service and the only implication is that under the law he would not be entitled to perform the duties but because the person concerned is not required to perform his duties cannot at the same time also mean that the person is/or would be not in service under the employer.

24. Any service condition imposed by which a period of service of an employee is forfeited and not considered to be in service, would require the appropriate procedure of law to be followed for such purpose inasmuch as, a



vested right of an employee that he was in service would be taken away to the effect of adverse civil consequences against him.

25. In view of the aforesaid conclusion arrived, we interfere with the part of the order impugned dated 21.08.2018 to the extent that the entire past service period of the petitioner would stand forfeited but at the same time retaining the other provisions that the departmental proceeding would be concluded by revocation of the order of suspension with the consequence that the petitioner would not be paid the pay and allowances for the concerned period and further that the aforesaid period would not be treated to have been on duty but retaining the employer and employee relationship of the petitioner with the respondents for the entire period of service from the date of initial appointment up-to the date when his service may come to an end as per law.

26. Accordingly, it is provided that for all other purposes other than for payment of salary and allowances, the petitioner to be treated to have been in service and the service period of the petitioner be taken from the date of initial appointment up-to the date when his service came or would come to an end as per law and accordingly, subject to the petitioner to all such benefits that he may be entitled. As the entire period of the petitioner which was forfeited as per the order impugned dated 21.08.2018 had been interfered, therefore, the petitioner would not be construed to be a new entrance in the service after the order impugned dated 21.08.2018.

Writ petition stands allowed as indicated above.

JUDGE

Comparing Assistant