Dr. (Mrs.) Gurjeewan Garewal vs Dr. (Mrs.) Sumitra Dash & Ors on 12 April, 2004

Equivalent citations: AIR 2004 SUPREME COURT 2530, 2004 (5) SCC 263, 2004 AIR SCW 2755, 2004 LAB. I. C. 1958, 2004 (2) ALL CJ 1267, 2004 ALL CJ 2 1267, 2004 (4) SCALE 680, 2004 (4) ACE 435, 2005 (1) SERVLJ 24 SC, 2004 (2) UJ (SC) 1206, 2004 (6) SRJ 292, 2004 UJ(SC) 2 1206, 2004 (4) SLT 559, (2004) 3 LABLJ 1, (2004) 2 LAB LN 808, (2004) 3 SUPREME 467, (2004) 4 SCALE 680, (2004) 4 ESC 449, (2004) 2 SCT 585, (2004) 3 SERVLR 682, 2004 SCC (L&S) 747, (2004) 105 FJR 580, (2004) 101 FACLR 999, (2004) 17 INDLD 395

Bench: S. Rajendra Babu, Ruma Pal

CASE NO.:
Appeal (civil) 2303 of 2004

PETITIONER:
Dr. (Mrs.) Gurjeewan Garewal

RESPONDENT:
Dr. (Mrs.) Sumitra Dash & Ors.

DATE OF JUDGMENT: 12/04/2004

BENCH:
S. RAJENDRA BABU & RUMA PAL.

JUDGMENT:

J U D G M E N T (Arising out of S.L.P.(C) No.15995 of 2001) RAJENDRA BABU, J :

Leave granted.

The 1st Respondent, Mrs. Sumitra Dash, was working with the 2nd Respondent Post Graduate Institute of Medical Education and Research, Chandigarh (PGIMER). At her request, ex-India (extraordinary) leave was granted to her by PGIMER with effect from 16/12/1991 for a period of two years by the Order made on 6/4/1992. This leave was sanctioned, inter alia, on the express condition that "she will neither resign / seek voluntary retirement while on leave nor will request for further extension of ex-India leave." By this time she had already started working as a consultant Haematologist at the Salmaniya Medical Center, Bahrain.

> Sometime in 1992, the 1st Respondent filed a Writ Petition bearing No. CWP No. 16212 of 1992 before the Punjab & Haryana High Court challenging the selection and appointment of Petitioner herein as Professor of Haematology in PIGMER. It is submitted, before us that this matter is still pending before the High Court. On 11/12/1993, 1st Respondent requested PGIMER for an extension of her ex-India leave up to 15/12/1994. This request was rejected. PGIMER asked her to resume duty by 14/2/1994. She did not respond to this request. On 26/9/1994 1st Respondent was informed by the PGIMER that she was deemed to have permanently left the Institute with effect from 16/12/1991. That on 6/9/1994, an Application bearing No. 8535 of 1994 in CWP No. 16212 of 1992 was moved by the 1st Respondent before the High Court to stay the initiation of disciplinary action against her for not joining duty on expiry of the leave. The High Court granted an interim Stay on 6/9/1994, made the same absolute on 21.9.1994.

On 14/1/1995 PGIMER issued a Memorandum to the 1st Respondent. The Memorandum proposed to hold an inquiry against 1st Respondent under Rule 14 of the Central Civil Services (Classification, Control and Appeal) Rules, 1965 concerning her misconduct. The same was also annexed with Articles of Charge, statement of imputations and the relevant documents. 1st Respondent filed a Contempt Petition against PGIMER alleging that the Memorandum amounts to contempt of the Orders of the High Court dated 6/9/1994. Subsequently, PGIMER withdrew the charges against the 1st Respondent and tendered unqualified apology before the High Court.

Later, on 8/2/1999, an application CM No. 5813 of 1999 in CWP No. 16212 of 1992 was moved before the High Court to vacate the Stay Order dated 6/9/1994 so as to enable PGIMER to initiate appropriate disciplinary proceedings against 1st Respondent. It is submitted before us that this matter is also pending before the High Court. By the time, that on 27/12/1999 the 1st Respondent requested the PGIMER to allow her to join the duty by treating her extended ex-India leave as leave under exceptional circumstances in the light of regulations 35 and 36 of the PGIMER Regulations, 1967. Thereafter she is said to have forwarded a joining report. Vide Memo dated 10/1/2000 PGIMER rejected the said joining report. It is also clarified in the same Memo that the President rejected her application on the ground that no exceptional circumstances existed to prevent her from joining the duty. Subsequently the concerned authority ratified this decision of rejection.

On 11/5/2000 1st Respondent moved Application CM No. 4912 of 2000 in CWP No. 16212 of 1992 before the High Court seeking directions to PGIMER to permit her to rejoin her duty. This Application was rejected with liberty to her to move a separate petition to the same effect. On 11/7/2000 CWP No. 8504 of 2000 was filed by the 1st Respondent before the Punjab & Haryana High Court. It challenges the Orders passed by PGIMER on 10/1/2000 whereby the joining report was rejected. The main Prayer of the 1st Respondent before the High Court in CWP No. 8504 of 2000 is to issue a writ of mandamus " directing the respondents to permit the petitioner to rejoin her duties immediately ". She contended in that petition that there couldn't be an automatic termination of service without any charge sheet, departmental proceedings or enquiry against her. Therefore, she submitted that she was not given an opportunity to explain or defend herself and consequently there is violation of the principles of natural justice.

While deciding the matter High Court has adverted to the decision in Jai Shanker v. State of Rajasthan AIR 1966 SC 492, wherein a state government employee was discharged from service due to his unauthorized leave. Here the order of termination was passed without hearing him. In this context, quashing the Order of discharge, this Court held that:

> " A removal is removal and if it is punishment for overstaying one's leave an opportunity must be given to the person against whom such an order is proposed, no matter how the Regulation describes it. To give no opportunity is to go against Article 311."

In State of Assam v. Akshaya Kumar AIR 1976 SC 37 while upholding the High Court order of quashing the unilateral removal of a Government Servant, this Court opined that:

> " the impugned order dated February 13, 1963 was violative of Article 311(2) of the Constitution and as such, illegal. It was imperatively necessary to give the servant an opportunity to show cause against the proposed action ".

High Court then referred to another decision by a Constitution bench of this Court in Deokinandan Prasad v. State of Bihar AIR 1971 SC 1409. This is a case in which a Civil servant was removed from service and this Court ruled that since an opportunity of hearing was not given before passing the Order, the same was held to be violative of Article 311. Another case referred to by the High Court is Uptron India Ltd. v. Shammi Bhan (1998) 6 SCC 538. Here also the issue was related to the violation of Article 311.

Relying on the ratio in the aforementioned decisions the High Court allowed the Petition filed by the 1st Respondent herein by observing that the request of the petitioner for joining duty ought not to have been declined without giving her an opportunity of hearing to put forward her case and without an opportunity to the petitioner for showing cause as to why the provisions of Regulation 36 ought not to have been applied to her case. Therefore this writ petition has to succeed.

Thus the High Court permitted the 1st Respondent to rejoin the duty in PGIMER during the pendency of the CWP No 16212 of 1992. This decision is impugned before us. Pursuant to this decision, PGIMER permitted 1st Respondent to rejoin duty w.e.f 5/4/2001. The impugned decision and the subsequent action of the PGIMER aggrieved the Petitioner. Hence this SLP.

The first question for consideration is the correctness of the decision by High Court. Relying upon the decisions of this Court in Jai Shanker, State of Assam v. Akshaya Kumar, Deokinandan Prasad and Uptron India Ltd (all cited supra) the High Court went on to find that Respondent No 1 was not given an opportunity of hearing. Is the High Court correct in its approach? To judge this issue, primarily, the general nature of cases upon which the High Court placed its reliance need to be looked into. It is pertinent to note that all these cases emanate due to the violation of Article 311 of the Constitution.

At the outset it is to be mentioned that Article 311 cannot be automatically invoked in all the instances where a person is not given an opportunity of hearing. Article 311 confers certain safeguards upon persons employed in civil capacities under the Union of India or a State. Only persons who are holding "civil posts" can claim the protection provided under Article 311. The 1st Respondent could claim the protection of Article 311 only if she holds a 'civil post'. A Constitution Bench of this Court in State of Assam v. Kanak Chandra AIR 1967 SC 884 has explained the meaning of 'civil post'. Here it was held that:

> " There is no formal definition of 'post' and 'civil post'. The sense in which they are used in the Services Chapter of Part XIV of the Constitution is indicated by their context and setting a civil post means a post not connected with defence outside the regular services. A post is a service or employment. A person holding a post under a State is a person serving or employed under the State There is a relationship of master and servant between the State and a person holding a post under it. The existence of this relationship is indicated by the State's right to select and appoint the holder of the post, its right to suspend and dismiss him, its right to control the manner and method of his doing the work and the payment of his wages or remuneration. A relationship of master and servant may be established by the presence of all or some of these indicia, in conjunction with other circumstances and it is a question of fact in each case whether there is a relation between the State and the alleged holder of the post." [Para 9, AIR] In State of Assam v. Kanak Chandra it was also held that "a post is an employment but every employment is not a post." While dealing with the termination of an employee, another Constitution Bench of this Court looked into the applicability of Article 311 in S. L Agarwal v. General Manager, Hindustan Steel Ltd. (1970) 1 SCC 177. Here this Court held that job in Hindustan Steel is not a 'civil post' so as to claim the protection of Article 311. Another issue noted by the Court in Hindustan Steel is nature of independent existence of Hindustan Steel Company. Considering this and other aspects it is ruled that Hindustan Steel Company is not a State of the purpose of Article 311.
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> Reverting back to the case in hand, Section 4 of The Post Graduate Institute of Medical Education & Research, Chandigarh Act, 1966 [PGIMER Act] says that PGIMER is a 'body corporate which is having a perpetual succession and a common seal with power.' This clearly provides that PIGMER is a separate entity in itself. Admittedly the employees of any authority which is a legal entity separate from the State, cannot claim to be holders of civil posts under the State in order to attract the protection of Article 311. There is also no master and servant relationship between the State and an employee of PGIMER, which is a separate legal entity in itself. It is a settled position that a person cannot be said to have a status of holding a 'civil post' under State merely because his salary is paid from the State fund or that the State exercises a certain amount of control over the post. The PGIMER Act might have provided for some control over the institution but this doesn't mean that the same is a State for the purpose of Article 311. Therefore the employees of PGIMER cannot avail the protection of Article 311 since the same can be claimed only by the members

> of a civil service of the Union or of All India Service or of a civil service of a State or by persons who hold a civil post under the Union or a State. PGIMER cannot be treated as a 'State' for the purpose of Article 311 and the employees therein are not holding any 'civil post'. In result, the 1st Respondent is not holding a 'civil post' and she cannot claim the guard of Article 311.
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> In this background the view subscribed by the High Court, that the 1st Respondent was not given an opportunity of hearing and since her removal is bad under Article 311, is not correct. The premise in which the High Court has proceeded is faulty. High Court has not examined the applicability of Article 311 in the present case. This results in its wrong conclusion. Therefore, the cases relied upon by the High Court - Jai Shanker, State of Assam v. Akshaya Kumar, Deokinandan Prasad and Uptron India Ltd (all cited supra) are not applicable in the present context. All of them are distinguishable.

The last case relied upon by the High Court is Syndicate Bank v. Gen. Sec., Syndicate Bank Staff Association (2000) 5 SCC 65. Here this Court allowing the appeal in favor of the appellant bank and holds that:

> " This undue reliance on the principles of natural justice by the Tribunal and even by the High Court has certainly led to a miscarriage of justice as far as the bank is concerned."

Here the dismissal of an employee by the bank was upheld. Hence it is not clear how High Court placed its reliance on this case to decide the present issue in favor of the 1st Respondent. On the other hand, in our view, the decision in the case of Syndicate Bank justifies the action taken by PGIMER.

Now the only question that remains for consideration is the correctness of PGIMER's stand that the 1st Respondent 'deemed to have permanently left the institute due to her non-joining after the expiry of granted leave period.' This Court dealt with similar situations in Aligarh Muslim University v. Mansoor Ali Khan (2000) 7 SCC

529. In this case an employee of Aligarh Muslim University obtained ex-India leave for two years. Then he applied for an extension of leave for another three years. But University granted an extension of leave for only one year and clearly conveyed to him that no further extension will be allowed. Later he applied for another extension. Rejecting his request the University informed him that in case of overstay he would be deemed to have 'vacated' his post and cease to be in University service. However University extended the joining time. Yet he failed to join. Consequently the University deemed him to have vacated the office. His writ before Single Bench was dismissed but Division Bench allowed the same mainly on the ground of 'non-compliance of natural justice'. University preferred an appeal before this Court. Allowing the Appeal, this Court, following S L Kapoor (1980) 4 SCC 379 holds that "based on admitted and indisputable facts, only one view is possible. In that event no prejudice can be said to have been caused to Mr. Mansoor Ali Kahn

though notice has not been issued."

Elaborating this aspect it was observed that:

> "We may state that the University has not acted unreasonably in informing him in advance while granting one year extension, in addition to the initial absence of 2 years that no further extension will be given. We have noticed that when the extension is sought for three years, the Department has given extension only for one year as he had already availed 2 years extraordinary leave by that time. It has to be noticed that when employees go on foreign assignments which are secured by them at their own instance, in case they do not come back within the original period stipulated or before the expiration of the extended period, the employer in the parent country would be put to serious inconvenience and will find it difficult to make temporary alternative appointments to fill up the post during the period of absence of those who have gone abroad. However, when rules permit and provide for an employee to go abroad discretion must be exercised reasonably while refusing extension. In this case, giving of further extension only for one year out of the further period of three years sought for is not reasonable. In such a situation, if the employee has entangled himself into further commitments abroad, he has to blame himself.
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> On the above facts, the absence of a notice to show cause does not make any difference for the employee has been told that if his further overstay is for continuing in the job in Libya, it is bound to be refused."

(Emphasis supplied) Recently in another case of a very similar nature Dr. Anil Bajaj v. PGIMER JT 2002 (1) SC 245 this Court held:

> " A person who gets an advantage, namely, of a sanction to go abroad on service on the condition that he will come back within two years and if does not come back, his lien will automatically be regarded as being terminated, he cannot turn around and challenge the said condition on the basis of which sanction to go abroad was granted but where the facts are not in dispute, the inquiry would be an empty formality. In any case principle of estoppel would clearly apply and the High Court was right in dismissing the writ petition filed by the appellant wherein he had challenged his termination. "

(Emphasis supplied) Similarly, in the case in hand the 1st Respondent was originally granted an ex-India leave for two years on the express condition that she will be deemed to have vacated the post if she opts not to join after the leave period. But she preferred to remain in the greener pastures for a pretty long time in spite of the repeated reminders from PGIMER. She employed the case before the High Court as a dilatory tactic to continue with her foreign assignment and evaded herself from joining under some pretext or other.

Crucial aspect to be noted in this case is that the Respondent No 1, on 6/9/1994 obtained a stay of disciplinary action against her vide an Application bearing No. 8535 of 1994 in CWP No. 16212 of 1992. In the face of law, such a stay ought not to have been granted by the High Court since the prayer in that CWP cannot have any bearing upon the Ex-India leave obtained by R-1 or on its subsequent extensions or on the out come of disciplinary action. The disciplinary proceedings against her and the case filed by her are separate actions. It could proceed separately. Thus that stay is liable to be vacated. But the judgment impugned in this case arises from CWP No. 8504 of 2000 wherein R-1 essentially challenges her rejection of her Application to join duty under Rule 36 of the PGIMER Rules on the ground of violation of the principles of Natural Justice. In the facts of this case that issue will not arise if the original disciplinary proceedings are completed. Therefore, exercising our extraordinary powers, we vacate the stay granted by the High Court in CWP No. 16212 of 1992 and direct the PGIMER authorities to proceed with the disciplinary proceedings against R-1 regarding her unauthorized absence from duty. Since R-1 is allowed to rejoin her duty under the Orders of High Court, in the meanwhile she may continue in service subject to the outcome of disciplinary enquiry. PIGMER may complete the enquiry as expeditiously as possible. If necessary the PGIMER is at liberty to consider whether her continuance in the service during pendency of the inquiry is appropriate or not, and place her under suspension, if necessary, and in which event also consider whether the appellant before us should be given appointment in her place and pass appropriate orders, if necessary.

This appeal is allowed accordingly.