

STATE OF ODISHA & ORS.

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v.

GANESH CHANDRA SAHOO

(Civil Appeal No. 9514 of 2019)

JANUARY 10, 2020

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**[DR. DHANANJAYA Y. CHANDRACHUD
AND HRISHIKESH ROY, JJ.]**

Service Law:

Discharge from service – Pursuant to departmental proceedings on the charge of overstay of leave for about 7 years – Non-participation in the proceedings, despite repeated communication from the Department – Delinquent produced medical Certificate as to his mental illness – Departmental appeal dismissed – Application before Administrative Tribunal – Doubting the veracity of the Medical Certificate, Tribunal rejected the case of the delinquent – High Court on the basis of Medical Certificate, substituted the punishment of ‘Discharge’ to ‘Compulsory Retirement’ – Appeal to Supreme Court – Held: The delinquent remaining away from duty since 1991-1998 without producing contemporaneous medical record has not only been irresponsible and indisciplined, but tried to get away with, by producing medical certificate of Specialist Doctor – Tribunal, in the facts of the case, rightly doubted to veracity of the Medical Certificate – High Court should not have invoked the self-serving medical certificate, overlooking the gravity of misconduct – Orissa Code – r .72.

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Allowing the appeal, the Court

HELD: 1. The High Court failed to notice that the respondent did not present himself for the official verification of his medical status by the CDMO and thereby prevented confirmation of his pleaded medical condition. In this manner, the respondent not only defied the Commandant’s direction but remained absent without authorization, for about seven years. Later, he tried to justify his long absence without producing any contemporaneous medical records. [Para 15][762-D]

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- A 2. The primary basis for the High Court to have intervened in favour of the respondent was the medical certificate issued by then Professor & HoD of Psychiatric Department, SCB, Medical College and Hospital, Cuttack. But the certifying Doctor does not categorically mention that the respondent was under his treatment since 1991. Most unusually, the certificate reflects that on reference by the local MLA, the respondent reported before the specialist Doctor on 21.1.1998. Therefore the respondent's was not a referral case by a Doctor, who might have been treating the respondent during 1991 to 1998. [Para 16][762 E-H]
- B 3. In granting relief to the respondent, the High Court should have considered that the respondent was absent from duty for seven long years and he was aware of the discharge order passed against him on 30.12.1993. As regards the plea of mental illness which might have incapacitated the respondent from either reporting for duty or to participate in the disciplinary proceeding,
- C D the Court should have borne in mind the failure of the respondent to make himself available before the CDMO to crosscheck his pleaded medical condition. This was in defiance of the repeated communications addressed to the absentee-employee by the Commandant of the Battalion. It is also of significance that neither the Tribunal nor the High Court found any infirmity with the disciplinary proceeding which led to the issuance of the discharge order against the delinquent on 30.12.1993. [Para 17][763 A-C]
- D 4. The respondent by remaining away from duty since 1991 to 1998 without producing contemporaneous medical record has not only been irresponsible and indisciplined but tried to get away with it by producing the certificate of a specialist Doctor who may not have treated the respondent. Significantly, although the respondent produced a certificate of a psychiatric specialist, he never claimed that he received treatment from any psychiatric Doctor. In such backdrop, the High Court should not have
- E G invoked the self serving medical certificate. The doctrine of proportionality is not attracted in the present facts. [Para 20][764 A-C]
- F 5. Under *Rule 72* of the *Orissa Code* which deals with leave for Government servant remaining absent for over five years.
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Under Rule 72, no leave of any kind is admissible for period exceeding five years unless the Government determines the case to be one of exceptional circumstances. The situation in the present case is not one of exceptional circumstances. In fact the veracity of the self-serving medical certificate to justify the seven years absence, was correctly doubted by the Tribunal. [Paras 21][764-D-H] A
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6. Therefore, the High Court should not have granted relief to the respondent solely on the basis of the medical certificate of the specialist Doctor who may not have personally treated the patient. In the absence of relevant and contemporaneous medical records, the High Court should not have interfered with the disciplinary action and ordered for a lesser penalty. The gravity of the misconduct of the respondent was overlooked and unmerited intervention was made with the Tribunal's rightful decision to decline relief to the respondent. [Para 22][765-A-B] C

Rajinder Kumar v. State of Haryana & Another AIR 2015 SC 3780 : [2015] 9 SCR 429 – distinguished. D

Case Law Reference

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| [2015] 9 SCR 429 | distinguished | Para 12 |
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CIVIL APPELLATE JURISDICTION: Civil Appeal No. 9514 E of 2019.

From the Judgment and Order dated 02.05.2018 of the High Court of Orissa, Cuttack in Writ Petition (Civil) No. 7053 of 2011.

Ms. Anindita Pujari, Om Narayan, Adv. for the Appellants. F

Manoj K. Das, Nikilesh Ramachandra, S.K. Singh, Advs. for the Respondent.

The Judgment of the Court was delivered by:

HRISHIKESH ROY, J.

1. The State of Odisha, the Director General & Inspector General of Police and others in the police department have filed this appeal to challenge the judgment and order dated 2.5.2018 in Writ Petition (C)No.7053/2011. In the impugned judgment, the High Court of Orissa G

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- A has substituted the punishment of discharge for the respondent, to compulsory retirement and to this extent modified the order dated 2.12.2010 whereunder, the Orissa Administrative Tribunal¹ had dismissed the O.A.No.1459(C)/2003 filed by the discharged Orderly.
2. Before disciplinary action was taken, the respondent was serving
- B as a Follower Orderly, in the OSAP 4th Battalion, Rourkela. He secured leave from 25.5.1991 to 4.6.1991 to visit his ailing mother and proceeded to his native village. While on leave, he suffered from cerebral malaria and was admitted in the C.T. Hospital, Cuttack on 31.5.1991 and thereafter he was medically advised to take rest for 2 months. When the respondent
- C applied for leave extension, on 12.6.1991 (Annexure P1), the Commandant directed the respondent to appear before the CDMO, Cuttack for medical examination/treatment and the likely period needed for treatment, was to be intimated to the Commandant. When the respondent failed to appear for the medical test, a second communication was issued on 22.10.1991 in the same line. But since the respondent did
- D not heed those communications and his whereabouts were not intimated even after months of leave expiry, the respondent was sternly directed on 13.3.1992 to have his medical examination done by the CDMO, Cuttack within 7 days of receipt of the letter, to establish the genuineness of his sickness plea or else, he will face departmental action for unauthorized leave overstay.
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3. Following the failure of the respondent to have himself medically examined and resume his duties, the departmental proceeding was initiated against him and the charge memo (26.10.1992) and other relevant documents were duly served upon the respondent, at his native place. The respondent, however, did not submit any explanation and thereafter
- F he refused to accept the notice and the depositions that were sent to him. Because of the non-participation of the delinquent, the proceeding had to be conducted *ex parte* and the inquiry officer found the respondent guilty of the charge. Accepting the finding of the inquiry officer, the Commandant issued the 2nd show cause notice proposing the penalty of
- G dismissal and eventually, the respondent was discharged from service vide the Battalion order No.4189 dated 30.12.1993 (Annexure P6). The discharge order indicates that the delinquent did not respond to the second show cause notice and in fact the postal department's endorsement on the body of the envelope indicated that the respondent refused to accept the notice sent by the disciplinary authority.
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¹ Tribunal

4. Four years after the discharge order (30.12.1993), the respondent addressed an appeal to the appellant no.2 herein and although the appeal was time barred, the Authority considered the same on merit but rejected the appeal on the ground that disciplinary action was in pursuant to a fair inquiry without any procedural irregularity and the penalty awarded is justified. Following the rejection of his appeal, the respondent addressed a grievance petition to the Chief Minister of Orissa which however was rejected by the Government letter dated 19.9.2000.

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5. A decade after the discharge order and three years following the rejection of the grievance petition, the respondent approached the Orissa Administrative Tribunal with O.A. No.1459 (C)/2003 to challenge the disciplinary action. The respondent contended before the Tribunal that he was suffering from mental ailment and therefore he was not in a position to respond to the departmental notices sent to him. In support of his plea of mental incapacity, the respondent furnished the medical certificate dated 21.1.1998 of Dr. G.C. Kar, Professor & Head of the Department, Psychiatry, SCB Medical College, Cuttack, which is in the following terms:

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“This is to certify that Shri Ganesh Chandra Sahu, 40 years, S/o Shri Sanatan Sahu, Village Gopalpur, P.O. Raghunathpur, P.S./ District Jagatsinghpur reported before me with history of mental illness since 3.6.1991 being referred by his area M.L.A.

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He has been treated for a long period because of repeat cyclic attack of Maniac Depression Psychosis following cerebral malaria from 03.06.91 till date. During the period under treatment he was incapable of taking responsibility and was advised rest.

Reviewing all my past and present examination finding, I F am of the opinion that he is fit to take up duty from 22.01.98.

Leave for the period of his absence from Government duty from 03.06.91 till 21.01.98 may please be recommended to him on medical ground.”

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6. The Tribunal noted the relevant facts and while adverting to the above medical certificate the Tribunal noticed that the certifying Doctor has not specifically mentioned that for the period covered by his certificate (3.6.1991 - 21.1.1998), the respondent was under his treatment. It was also found to be significant that respondent has not pleaded that he was under treatment of psychiatrist at any time prior to issuance of

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- A the medical certificate by the psychiatry specialist. Since the Doctor's opinion on the patient's mental health covered about 7 years period, the veracity of the medical certificate was doubted by the Tribunal.

7. In their order, the Tribunal adverted to the manner of conducting the disciplinary proceeding and also the letters and notices addressed to B the delinquent-respondent and the refusal by the respondent to receive the communication sent to him by the disciplinary authority. It was then noted that the respondent had unsuccessfully approached the appellate authority about four years after the discharge order.

8. Considering the aforesaid circumstances, the Tribunal held C that adequate reasonable opportunity was afforded to the delinquent and there were no procedural flaws in the departmental action. The Tribunal also felt that the case of the respondent was not an exceptional one covered under Rule 72 of the *Orissa Service Code*². With such reasoning the respondent's OA was dismissed by the Tribunal on 2.12.2010 (Annexure P13).

- D 9. Aggrieved by the rejection of his OA by the Tribunal, the respondent approached the High Court of Orissa with the W.P(C) No. 7053/2011 where again, he projected that when he proceeded on leave to his native village, he suffered from cerebral malaria and was admitted in the C.T. Hospital, Cuttack on 31.5.1991. Following the attack of E cerebral malaria, the respondent developed psychiatric problem and with these explanations he tried to justify his lack of response and non-participation in the disciplinary proceeding. According to the respondent, soon after he recovered from his ailments, armed with the medical certificate dated 21.1.1998 he reported to resume his duty but he was F not allowed to re-join the Battalion.

- G 10. The appellant-State on the other hand projected before the High Court that on receiving the request for leave extension on medical ground, the Commandant of the 4th Battalion had directed the respondent vide consecutive memos (dated 12.6.1991 and 22.10.1991), to appear before the CDMO, Cuttack but he failed to present himself for medical assessment of his health condition. In fact specific communication was sent to the respondent on 13.3.1992 that unless he appears before the CDMO, departmental proceeding would be initiated against him. The respondent however defied the Commandant's direction for his medical

H ² Orissa Service Code, 1939

examination and resumption of duty and accordingly he was subjected to departmental proceeding where he was found guilty of the charge by the inquiry officer. The Commandant agreed with the finding recorded against the delinquent and issued him the second show cause notice proposing the dismissal penalty but faced with no response, the respondent was discharged from service vide order dated 30.12.1993.

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11. The High Court however noted that the respondent has no past history of unauthorized absence. Then the medical certificate issued by the Professor & HoD of Psychiatric Department, SCB, Medical College and Hospital, Cuttack was adverted to and the Division Bench felt that such medical certificate issued by an expert cannot be brushed aside lightly. The Court also made the off the cuff observation to the effect that patient suffering from cerebral malaria develop mental illness. Proceeding with such perception, the punishment was found to be excessive and accordingly the High Court substituted the penalty of discharge with compulsory retirement.

12. In support of its decision to substitute the penalty, the High Court relied on the ratio in *Rajinder Kumar v. State of Haryana & another*³ wherein Justice Kurian Joseph speaking for a two judge Bench of this Court opined that since different punishments are prescribed under the Rules, the disciplinary authority should exercise its discretion to decide on the appropriate punishment, taking note of the gravity of the misconduct and its impact on the service.

13. Representing the appellants, the learned Government Counsel Ms. Anindita Pujari submits that the High Court had erred in applying the ratio of a dissimilar case to grant relief to the errant employee. On the other hand, Mr. Nikilesh Ramachandran, the learned counsel argues that the respondent's mental condition during 1991 to 1998 must be borne in mind to understand why he failed to participate in the disciplinary proceeding and/or why, he did not re-join the battalion after expiry of leave.

14. In order to decide on the applicability of the ratio in *Rajinder Kumar* (supra), we must advert to the facts in this case. Here the respondent after availing leave for nine days (from 25.5.1991 to 4.6.1991), did not report back to his Battalion until 1998. But long before that, the respondent having not presented himself before the CDMO, for his

³ AIR 2015 SC 3780

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- A medical examination, was proceeded departmentally and was discharged from service on 30.12.1993. Therefore, unlike in the case of *Rajinder Kumar* (supra) where the concerned delinquent was absent only for 37 days, the respondent herein did not report back for duties for about seven years. Significantly, he thwarted his medical examination by disregarding the direction of the Commandant to present himself before the CDMO,
- B Cuttack. In the cited case where delinquent was absent for 37 days, the punishment of discharge was found to be disproportionate and it was altered to compulsory retirement. But in the present case, the respondent failed to report back for duty for about seven years after availing leave for 9 days. Therefore, the nature and degree of misconduct in the two cases are not of the same category and hence the two cases with different facts could not have been decided, in our opinion, with the same judicial standard.

- 15. It is also significant that the High Court failed to notice that the respondent did not present himself for the official verification of his medical status by the CDMO and thereby prevented confirmation of his pleaded medical condition. In this manner, the respondent not only defied the Commandant's direction but remained absent without authorization, for about seven years. Later, he tried to justify his long absence without producing any contemporaneous medical records.
- E 16. The impugned judgment reflects that the primary basis for the High Court to have intervened in favour of the respondent was the medical certificate (dated 21.9.1998), issued by Dr. G.C. Kar, who was the then Professor & HoD of Psychiatric Department, SCB, Medical College and Hospital, Cuttack. But interestingly, the certifying Doctor does not categorically mention that the respondent was under his treatment since 1991. Most unusually, the certificate reflects that on reference by the local MLA, the respondent reported before the specialist Doctor on 21.1.1998. Therefore the respondent's was not a referral case by a Doctor, who might have been treating the respondent during 1991 to 1998. If the respondent was a patient under Dr. Kar, there would have no need for the MLA's reference and the Doctor could have issued the certificate based on his own line of treatment and medication. It is for such logical fallacy, the Tribunal doubted the veracity of the medical certificate, which reported on the respondent's purported mental incapacity, between 1991 and 1998.

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17. In granting relief to the respondent in his writ petition, the High Court should have considered that the respondent was absent from duty for seven long years and he was aware of the discharge order passed against him on 30.12.1993. As regards the plea of mental illness which might have incapacitated the respondent from either reporting for duty or to participate in the disciplinary proceeding, the Court should have borne in mind the failure of the respondent to make himself available before the CDMO to crosscheck his pleaded medical condition. This was in defiance of the repeated communications addressed to the absentee-employee by the Commandant of the Battalion. It is also of significance that neither the Tribunal nor the High Court found any infirmity with the disciplinary proceeding which led to the issuance of the discharge order against the delinquent on 30.12.1993.

18. In the above circumstances, when factual finding was recorded by the Tribunal on fairness of the disciplinary proceeding with due opportunity to the delinquent, the substitution of the penalty of discharge, was not warranted. This is more so as the High Court found support for their decision from *Rajinder Kumar (supra)* where the concerned constable was unauthorizedly absent for 37 days whereas the respondent herein had failed to report back for duty for long 7 years, from 1991 to 1998.

19. If the respondent had actually suffered from cerebral malaria since 3.06.1991 and was subjected to frequent cyclic attack of Maniac Depression Psychosis, as claimed, necessary proof of such suffering from the concerned Doctor/Hospital who were providing him the treatment, ought to have been produced. Moreover, he never allowed for cross verification of his pleaded medical condition by presenting himself before the CDMO in 1991 or thereafter. Instead, the respondent only produced the 21.1.1998 certificate of the HoD, Psychiatry who may have had no role in the treatment of the respondent. It therefore appears to be a case of certificate of convenience on the purported symptoms and mental ailment of the respondent from 1991 to 1998, without support of any contemporaneous medical records. Most curiously, the Doctor had issued the certificate on the basis of reference made by the local MLA but not on the basis of referral by Doctor/Hospital which might have been involved with the respondent's treatment during 1991 to 1998.

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- A 20. In the present case, we are inclined to think that the respondent by remaining away from duty since 1991 to 1998 without producing contemporaneous medical record has not only been irresponsible and indisciplined but tried to get away with it by producing the certificate of a specialist Doctor who may not have treated the respondent. Significantly, B although the respondent produced a certificate of a psychiatric specialist, he never claimed that he received treatment from any psychiatric Doctor. In such backdrop, the High Court should not have invoked the self serving medical certificate. The Court wrongfully relied on *Rajinder Kumar* (supra) where this Court's intervention was in entirely different circumstances. Besides the doctrine of proportionality is not attracted in C the present facts.

21. There is another aspect which will require our consideration. Before the Tribunal, the counsel for the respondent submitted that for an employee suffering from mental ailment, his situation should be treated as an exceptional case under *Rule 72* of the *Orissa Code* which deals D with leave for Government servant remaining absent for over five years. Under *Rule 72*, no leave of any kind is admissible for period exceeding five years unless the Government determines the case to be one of exceptional circumstances. The *Rule 72* is quoted below for ready reference:

- E “**72.** (1) No Government servant shall be granted leave of any kind for a continuous period exceeding five years.
(2) Where a Government servant does not resume duty after remaining on leave for a continuous period of five years, or where a Government servant after the expiry of his leave remains absent F from duty otherwise than on foreign service or on account of suspension, for any period which together with the period of the leave granted to him exceeds five years, he shall, unless Government in view of the exceptional circumstances of the case otherwise determine, be removed from service after following the procedure laid down in the Orissa Civil Services G (Classifications, Control and Appeal) Rules, 1962.”

On careful reading of the above provision we are quite sure that the situation here is not one of exceptional circumstances. In fact the veracity of the self-serving medical certificate to justify the seven years absence, was correctly doubted by the Tribunal.

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22. In the above circumstances, the High Court should not have granted relief to the respondent solely on the basis of the medical certificate of the specialist Doctor who may not have personally treated the patient. In the absence of relevant and contemporaneous medical records, the High Court should not have interfered with the disciplinary action and ordered for a lesser penalty. The gravity of the misconduct of the respondent was overlooked and unmerited intervention was made with the Tribunal's rightful decision to decline relief in the O.A.1459(C)/2003 filed by the respondent. A

23. In view of the foregoing, we set aside the impugned judgment and order of the High Court and allow the appeal. There shall be no order as to cost. B C

Kalpana K. Tripathy

Appeal allowed.