Aligarh Muslim University

Vs

Mansoor Ali Khan etc.

Civil Appeal No. 4780 of 2000 etc.

(M.Jagannadha Rao and Y.K.Sabharwal, JJ.)

28.08.2000

JUDGMENT

M. Jagannadha Rao, J.:— Leave granted.

1.These two appeals have been preferred by the Aligarh Muslim university, Aligarh. In the Civil Appeal arising out of SLP(c) No.12700/99, the respondent is Mr. Mansoor Ali Khan, whose Special appeal 483/95 was allowed by the Divison Bench of the High Court of Allahabad on 8.4.99, reversing the judgment of the elearned Single Judge in W.P. 15574/87 dated 14.7.1995. In the Civil appeal arising out of SLP(c) No. 12981.99, the respondent is Mr. Murshad Hussain Khan, whose Special alleal appeal No. 484/95 was allowed on 8.4.99 by the Division Bench, following the judgment in Special appeal No. 483/95 in the case of Mr. Mansoor Ali Khan. The Service Rules relied upon in these two cases are common but there is some distinction on facts between the two cases and we shall refer to those facts separately. The result of the judgment of the Division Bench was that the impugned orders of termination of services for alleged unauthorized absence were quashed. They were set aside and the Vice Chancellor of the University was directed to consider the matter afresh keeping in view the provision of Rule 10(C)(ii) of the Aligarh University Non-Teaching Employees (Terms and Conditions of Services) Rules, 1972 (hereinafter called the 1972 Rules) and Rule 5(8)(i) of the Aligarh University Revised Leave Rules, 1969 relied upon by the University (hereinafter called the 1969 Rules).

2.We shall first state the facts in Mr. Mansoor Ali Khan’s case. He was working as a Laboratory Assistant and he applied for two years extra-ordinary leave for joining Al-Fatah University, Tripoli, Libya. The Vice-Chancellor sanctioned leave for two years from 18.4.79. Before the expiry of the period, Mr. Khan applied on 18.4.81 for extension of leave by 3 years. On 12/23-9-81, the University granted extension only for one year from 18.4.81. The leave stood thus extended upto 18.4.82. It was, however, clearly stated by the University, in its letter as follows:

> "…. You are required to resume duties by 18.4.1982. Please note that no further extension in the period of your leave will be possible and you are advised to make preparation for resuming duty positively by 18.4.82.".

3.But, without waiting for the receipt of the above order dated 12/23-9-81, Mr. Khan entered into a fresh contract in Libya which, according to him, was to be for a minimum period of 2 years. The fresh contract was upto 17.4.83. Thereafter, he wrote a further letter to the University on 18.1.82 for grant of extension of leave for 1 more year upto 17.4.83 and stated that he would definitely joint duty on 18.4.83. The University sent a telegram on 21.4.82

stating that his request for further extension was refused and that he would resume duties by 15th May, 1982, failing which "he would be deemed to have vacated" the post and "ceased" to be in University service. On 1.6.82, the University sent a cable extending the joining time upto 30.6.82 and stated that he must join on 1.7.82 failing which he would be deemed to have "vacated" the post and cease to be in University service from 18.4.82. Subsequently, by letter dated 7/9-6-1982, the substance of the telegram was confirmed. Mr. Khan failed to join by 1.7.82. Result was that the University deemed that he had vacated office w.e.f. 18.4.82. The appeal to the visitor was rejected on 5.9.85. Then Mr. Khan filed the writ petition on 24.8.87 for quashing the two telegrams and the order dated 5.9.85 of the visitor.

4.The learned Single Judge dismissed the writ petition of Mr. Mansoor Ali Khan holding that he had not expressed any intention to join till his assignment in Libya was over and that without waiting for extension, he had entered into a fresh contract in Libya, that he did not avail of the joining time as extended period and that his conduct did not justify and relief. The writ petition was dismissed on 17.2.95.

5. In the Appeal filed by Mr. Mansoor Ali Khan, the Division Bench held that on a harmonious reading of Rule 5(8)(ii) of the Leave Rules, 1969 and Rule 10(C) of the Service Rules, 1972, Mr. Khan ought to have been given notice because before the extension was refused, he had entered into afresh contract in Libya. The Bench also held that according to Leave Regulations (as amended by the Executive Council on 12.2.70), the non-teaching staff were governed by the same regulations applicable to teaching staff and the said regulations visualised extra-ordinary leave being granted ‘ordinarily’ for 3 years if leave was necessary for accepting employment outside and that the total period of extension of leave permitted was 5 years. In the case of an officer who had availed leave for foreign employment, he could avail leave again for 5 years after re-joining. Mr. Khan had not resumed duty by 1.7.82 in terms of Rule 5(8) of the Leave Rules, 1969 and therefore a show cause under Rule 5(8)(i) should have been issued to him. Nor was there anything on record to indicate that the absence of the appellant from duty after expiry of leave was taken to be ‘misconduct’ within clause (ii) of Rule 5(8) of the Leave Rules, 1969. In any case, automatic cessation from service would not take place before expiry of 5 years as would be seen from Rule 10(c) of the Service Rules, 1972. Here, the total period did not exceed 5 years including period of sanctioned leave and hence there was no automatic cessation of service. Mr. Mansoor Ali Khan’s service did not, therefore, cease automatically on 18.4.82. The appeal was allowed and the impugned orders were quashed. The division Bench directed the vice-Chancellor to consider the matter afresh keeping in view Rule 10(C)(ii) of Service Rules, 1972.
6. The facts in the case of Mr. Murshad Hussain Khan were similar but for the fact that before deeming that he had vacated office he was given notice and his reply was considered and rejected under Rule 5(8((i) or the 1969 Rules. In the writ appeal filed by Mr. Murshad Hussain Khan, the judgment in the case of Mr. Mansoor Ali Khan was followed by the Division Bench and a similar order was passed. It was not noticed that in this case a show cause notice was issued under Rule 5(8)(i) of the 1969 Rules before the order of termination was passed.
7. In these appeals, we have heard learned Senior counsel Sri B.D.Aggarwal for the appellant and Sri Rajeev Dhawan for the respondents.

The following points arise for consideration:

1. What are the situations in which Rule 5(8)(i) or Rule 5(8)(ii) of the Aligarh Muslim

University Revised Leave Rules 1969 apply?

2. What are the situations in which Rule 10(C)(i) and Rule 10(C)(ii) of the Aligarh Muslim University Non-Teaching Employees (Terms and Conditions of Service) Rules, 1972 apply?

3. Under which Rule do the cases of Mr. Mansoor Ali Khan and Murshad Hussain Khan fall?

4. If Rule 5(8)(i) of the Leave Rules, 1969 alone applied, is there any violation of principles of natural justice in each of these cases?

5. Whether on the facts of the case, Mr.Mansoor Ali Khan can invoke the principles of natural justice and whether it is a case where, even if notice had been given, the result would not have been different and whether it could be said that no prejudice was caused to him if on the admitted or proved facts, grant of an opportunity would not have made any difference?

Point 1:

For the purpose of this point, we shall refer to Rule 5(8) of the 1969 Rules.

It reads as follows:

Overstayal of Leave: —

Rule 5(8)(i)— If an employee absents himself from duty without having previously obtained leave or fails to return to his duties on the expiry of leave without having previously obtained further leave, the Head of Department/Office concerned in cases where is the Appointing Authority, after waiting for three days, shall communicate with the person concerned asking for an explanation and shall consider the same. In cases where the Head of the Department/Office is not the Appointing Authority, he shall, after waiting for three days from the date of unauthorized absence without leave or extension of leave, inform the Registrar/Finance Officer, and the Registrar (Finance Officer, and the Registrar (Finance Officer, and the Registrar (Finance Officer in the case of staff borne on the Accounts Cadre) shall communicate with the person concerned asking for an explanation which shall be submitted to the Vice-Chancellor/Executive Council.

Unless the Appointing Authority regards the explanation satisfactory, the employee concerned shall be deemed too have vacated the post, without notice, from the date of absence without leave.

Rule 5(8)(ii) — An Officer or other employee who absents himself without leave or remains absent without leave after the expiry of the leave granted to him, shall if he is permitted to rejoin duty, be entitled to no leave allowance or salary for the period will be debited against his leave account as leave without pay unless his leave is extended by the authority empowered to grant the leave. Willful absence from duty after the expiry of leave may be treated as misconduct for the purpose of clause 12 of Chapter IV of the Executive Ordinances of the A.M.U. and para 10 of Chapter IX of Regulations of the Executive Council.

It will be seen that Rule 5(8)(i) applies to an employee who absents himself from duty without having previously obtained leave or where the has failed to return to his duties on the expiry of leave without having previously obtained further leave. Then Rule 5(8)(i) refers to the manner in

which the employee is to be given an opportunity. If the Appointing Authority regards the explanation as not satisfactory, the employee concerned shall be deemed to have vacated his post, without notice, from the date of absence without leave. In the context of Rule 10 of the 1972 Rules, which deems vacation of Post if the absence was 5 years, it must follow that the above Rule 5(8)(i) applies to absence for a period less than 5 years.

Rule 5(8)(ii) deals with a different situation. It relates to a case where such an officer is permitted to rejoin duty. It says that if he is so permitted, he will be entitled to no leave allowance or salary for the period of such absence and such period shall be debited against his leave account as leave without pay. The rule says that these consequences will not, however, follow if the authority empowered to grant leave extends his leave. Then in its latter part, Rule 5(8)(ii) refers to another situation enabling disciplinary action to be taken has been absent without leave being sanctioned, he could be proceeded against for misconduct.

These are the different situations in which Rule 5(8)(i) and (ii) apply. Point 1 is decided accordingly.

Point 2:

Rule 10(c)(i)(ii) of the 1972 Rules reads as follows:

Rule 10: Employee absent from duty:

(a) .....

(b) .....

(c) (i) No permanent employee shall be granted leave of any kind for a continuous period exceeding five years;

(ii) When an employees does not resume duty after remaining on leave for a continuous period of five years, or whether an employee after the expiry of his leave remains absent 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 the Executive Council in view of the exceptional circumstances of the case otherwise determine, be deemed to have resigned and shall accordingly cease to be in the University service".

It will be seen that Rule 10 deals with a different aspect. Now Rule 10(c)(i) states that no permanent employee shall be granted leave of any kind for a continuous period of more than 5 years. However, Rule 10(c)(ii) states that when an employee does not resume duty after remaining on leave for a continuous period of 5 years, or where an employee - after the expiry of his leave — remains absent 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 5 years, — he shall, (unless the Executive Council in view of the exceptional circumstances of the case otherwise determine), be deemed to have resigned and shall accordingly cease to be in the University Service. This is the purport of Rule 10(c). Point 2 is decided accordingly.

Point 3:

In the case of both these employees i.e. Mr. Mansoor Ali Khan as well as Mr.Murshad Hussain Khan, the total period of absence before the date of the order of termination did not exceed 5 years.

Hence, obviously Rule 10(C)(ii) of the 1972 Rules cannot apply for that deals with cases where the absence is beyond 5 years.

In the facts of these appeals, in our view, only Rule 5(8)(i) of the 1969 Rules can apply because that deals with a situation where the absence is less than 5 years. So far as Rule 5(8)(ii) is concerned, it does not apply because we are not concerned here with the case of a person who has been ultimately allowed to join - inspite of absence without leave - and of his joining. In the present cases, both officers never rejoined. So far as the latter part of Rule 5(8)(ii) is concerned, that too does not apply as no disciplinary action has been taken.

Thus, in the case of both these officers Rule 5(8)(i) of the 1969 Rules alone can apply the absence being less than 5 years. In that event, a show cause notice and reply are necessary as explained below. Point 3 is decided accordingly.

Point 4:

Now, in the second case of Sri Murshad Hussain Khan, admittedly, notice had been issued and reply furnished and the impugned order of deeming vacation of office was passed. As Rule 5(8)(i) had been complied with in his case, there was no infirmity in deeming his vacation from the post. Unfortunately, the Division Bench of the High Court mechanically allowed the appeal following the judgment in Mansoor Ali Khan's case which was decided earlier and in which no show cause was issued under Rule 5(8)(i) of the 1969 Rules. The judgment in his case is liable to be set aside on this ground alone.

Coming back to the first case of Mr. Mansoor Ali Khan, admittedly, no notice under Rule 5(8)(i) of the 1969 Rules has been given. There is, therefore, violation of principles of natural justice as notice contemplated in Rule 5(8)(i) has not been given. Question as to whether the order deeming that he vacated office is correct or not, will have to be then decided. We shall decide that point under point 5. We decide accordingly against Mr. Murshad Hussain Khan and partly in favour of Mr. Mansoor Ali Khan under point 4.

Point 5:

This is the crucial point in this case. As already stated under point 4, in the case of Mr. Mansoor Ali Khan, notice calling for an explanation ha not been issued under Rule 5(8)(i) of the 1959 Rules. Question is whether interference is not called for in the special circumstances of the case?

As pointed recently in M.C.Mehta vs. Union of India (1988 (6) SCC 237), there can be certain situations in which an order passed in violation of natural justice need not be set aside under Article 226 of the Constitution of India. For example where no prejudice is caused to the person concerned, interference under Article 226 is not necessary. Similarly, if the quashing of the order which is in breach of natural justice is likely to result in revival of another order which is in itself illegal as in Gadde Venkateswara Rao vs. Government of Andhra Pradesh [1965 (2) SCR 172 = AIR 1966 SC 828], it is not necessary to quash the order merely because of violation of principles of natural justice.

In M.C. Mehta it was pointed out that at one time, it was held in Ridge vs. Baldwin (1964 AC 40) that breach of principles of natural justice was in itself treated as prejudice and that no other 'defacto' prejudice needed to be proved. But, since then the rigour of the rule has been relaxed not only in England but also in our country. In S.L.Kapoor vs. Jagmohan (1980 (4) SCC 379,

Chinnappa Reddy, J. followed Ridge vs. Baldwin and set aside the order of suppression of the New Delhi Metropolitan Committee rejecting the argument that there was no prejudice though notice was not given. The proceedings were quashed on the ground of violation of principles of natural justice. But even in that case certain exceptions were laid down to which we shall presently refer.

Chinnappa Reddy, J. in S.L.Kapoor's case, laid two exeptions (at p.395) namely, "if upon admitted or indisputable facts only one conclusion was possible", then in such a case, the principle that breach of natural justice was in itself prejudice, would not apply. In other words if no other conclusion was possible on admitted or indisputable facts, it is not necessary to quash the order which was passed in violation of natural justice. Of course, this being an exception, great care must be taken in applying this exception.

The principle that in addition to breach of natural justice, prejudice must also be proved has been developed in several cases. In K.L.Tripathi vs. State Bank of India (1984 (1) SCC 43), Sabyasachi Mukherji, J. (as he then was) also laid down the principle that not mere violation of natural justice but de facto prejudice (other than non-issue of notice) had to be proved. It was observed: quoting Wade Administrative Law, (5th Ed. PP.472-475) as follows: (para 31)

".... it is not possible to lay down rigid rules as to when principles of natural justice are to apply, nor as their scope and extent... There must have been some real prejudice to the complainant; there is no such thing as a merely technical infringement of natural justice. The requirements of natural justice must depend on the facts and circumstances of the case, the nature of the inquiry, the rules under which the tribunal is acting, the subject matter to be dealt with and so forth".

Since then, this Court has consistently applied the principle of prejudice in several cases. The above ruling and various other rulings taking the same view have been exhaustively referred to in State Bank of Patiala vs. S.K.Sharma (1996(3) SCC 364). In that case, the principle of 'prejudice' has been further elaborated. The same principle has been reiterated again in Rajendra Singh vs. State of M.P. (1996(5) SCC 460).

The 'useless formality' theory, it must be noted, is an exception. Apart from the class of cases of "admitted or indisputable facts leading only to one conclusion" referred to above, — there has been considerable debate of the application of that theory in other cases. The divergent views expressed in regard to this theory have been elaborately considered by this Court in M.C.Mehta referred to above. This Court surveyed the views expressed in various judgments in England by Lord Reid, Lord Wilberforce, Lord Woolf, Lord Bingham, Megarry, J. and Straughton L.J. etc. in various cases and also views expressed by leading writers like Profs. Garner, Craig, De. Smith, Wade, D.H.Clark etc. some of them have said that orders passed in violation must always be quashed for otherwise the Court will be prejudging the issue. Some others have said, that there is no such absolute rule and prejudice must be shown. Yet, some others have applied via-media rules. We do not think it necessary, in this case to go deeper into these issues. In the ultimate analysis, it may depend on the facts of a particular case.

It will be sufficient, for the purpose of the case of Mr. Mansoor Ali Khan to show that his case will fall within the exceptions stated by Chinnappa Reddy, J. in S.C.Kapoor vs. Jagmohan, namely, that on the admitted or indisputable facts - only one view is possible. In that event no prejudice can be said to have been caused to Mr. Mansoor Ali Khan though notice has not been issued.

Our reasons for saying that the case of Mr. Mansoor Ali Khan within the exception can be stated as

follows:

Admittedly, leave was sanctioned only for 2 years from 18.4.79. When before the expiry of the period, Mr. Mansoor Ali Khan applied on 18.4.81 for extension of leave by 3 more years, the University wrote to him on 17/23.9.91 granting extension only for one year from 18.4.81 and also stated that he was required to resume duties by 18.4.82. It did not stop there. It further forewarned Mr. Khan as follows:

"Please note that no further extension in the period of your leave will be possible and you are advised to make preparation for resuming duty, positively by 18.4.82."

In other words, he was put on advance notice that it would not be possible to give any further extension i.e. beyond one year on the ground of continuance in the job at Libya and he was to resume duty by 18.4.82. In fact, thereafter some special consideration was still shown in his favour by way of granting him joining time upto 1.7.82. It was clearly said that otherwise he would be deemed to have vacated the post. If he had, in spite of this warning, gone ahead by accepting a further contract in Libya, it was, in our view, his own unilateral act in the teeth of the advance warning given. That conduct, the learned Single Judge thought and in our view rightly to be sufficient to deny relief under Article 226.

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 him 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 unreasonable. In such a situation, if the employee has entangled himself into further commitments abroad, he has to blame himself.

On the above facts, the absence of a notice to show cause does not make any difference for the employee has already been told that if his further overstay is for continuing in the job in Libya, it is bound to be refused.

Should notice have been given before he is deemed to have vacated office under Rule 5(8) (i)? Was no prejudice caused?

Now the question of deeming the vacation of the post is mentioned both in Rule 10 which deals with 5 years absence and also by rule 5(8)(ii) where absence is for a period less than 5 years. In the latter case, it that that rule 10 has no application to the case before us since the absence of Mr. Mansoor Ali Khan’s absence is less than 5 years. Now even under rule 5(8)(i), there is a deeming provision of vacation of the post where the explanation offered by the employee, consequent upon a notice, is found not satisfactory.

Let us then take two situations. An employee who is permitted to be abroad for two years on a job

seeks extension for 3 years but is granted extension only for 1 year and is also told in advance that no further extension will be given and if does not join after the 1 years extended period, he will be deemed to have vacated office. Let us assume that he does not join as advised and, in a given case, notice is given calling for his explanation. He replies stating that he had entered into a further commitment for 2 years and wants one more year of extension. The University refuses extension treating the explanation unsatisfactory and under Rule 5(8)(i) deems that he has vacated his job. No fault can be found in the procedure. Let us take another situation where the officer does not join in identical circumstances but is not given notice under Rule 5(8)(i). He has no other explanation - from what is revealed in his writ petition filed later - other then his further commitment abroad for 2 more years. In the latter case, it is, in our opinion clear that even if no notice is given, the position would not have been different because what particular explanation would not be treated as satisfactory had already been intimated to him in advance. Therefore, the absence of a notice in the latter situation must be treated as having made no difference. That is precisely the position in the case of Sri Mansoor Ali Khan.

Another important aspect of the matter is that no new reason has been pre-rejected in the Writ petition of Mr. Khan for his seeking further extension earlier while in Libya. The only reason stated is that he had obtained further extension in job. It is not a case where there is a plea in the Court that there were different grounds or reasons which he could have put in his explanation, if called for, such as ill health etc. Indeed, if the reasons could have been somewhat different, — as may perhaps be disclosed or proved in subsequent writ petition — such as his own failing health, one can understand. But so far as leave for purposes of job continuance in Libya, is concerned, he has been fully put on advance notice that no further extension will be given. It must be held that no prejudice has been caused even though no notice is given under Rule 5(8)(1).

We may add a word of caution. Care must be taken, wherever that Court is justifying a denial of natural justice, that its decision is not described as a ‘pre-conceived view’ or one in substitution of the view of the authority who would have considered the explanation. That is why we have taken pains to examine in depth whether the case fits into the exception.

Thus, in our view, in the above peculiar circumstances, the only conclusion that can be drawn is that even if Mr. Mansoor Ali Khan had been given notice and he had mentioned this fact of job continuance in Libya as a reason, that would not have made any difference and would not have treated as a satisfactory explanation under Rule 5(8)(i). Thus, on the admitted or undisputed facts, only one view was possible. The case would fall within the exception noted in S.L.Kapoor’s case. We, therefore, hold that no prejudice has been caused to the officer for want of notice under Rule 5(8)(i). We hold against Mr. Mansoor Ali Khan under Point 5.

For the aforesaid reasons, we allow the appeals, set aside the judgments of the Divison Bench of the High Court in the case of both employees and dismiss the writ petitions. There will be no order as to costs.