

**SUPREME COURT OF INDIA**

Union of India (UOI)

Vs.

Ashok Kumar Sharma

C.A.No.568 of 2011

(G.S.Singhvi and Asok Kumar Ganguly,JJ.,)

14.01.2011

**ORDER**

1. Leave granted.

2. This appeal is directed against the judgment of the Division Bench of the Jammu and Kashmir High Court whereby the appeal filed by the Appellants against the order of the learned Single Judge directing grant of the benefit of second financial up-gradation to the Respondent in accordance with Assured Career Progression Scheme (for short, 'the Scheme') circulated by the Government of India vide G.O. dated 9.8.1999 was dismissed.

3. The Respondent was appointed as Sub-Inspector in the Border Security Force on 01.03.1974. He was dismissed from service vide order dated 16.02.1984 on the charge of overstaying the sanctioned leave by a period of 210 days. On a representation made by the Respondent, the competent authority ordered his reinstatement with the direction that the period of absence from duty will be converted into leave of the kind due which may be admissible to the Respondent. Thereafter, Commandant, 13 Battalion, Border Security Force, passed order dated 20.10.1989 whereby he regularised the period during which the Respondent remained out of service by granting Half Pay Leave of 198 days' and Extraordinary Leave of 5 years, 7 months and 27 days with a clear stipulation that his date of increment shall stand shifted from 01.03.1984 to 29.10.1989.

4. The Respondent did not challenge the aforementioned two orders including the direction contained in order dated 20.10.1989 for grant of Extraordinary Leave of 5 years, 7 months and 27 days and consequential shifting of the date of increment despite the fact that the second order adversely affected his service career. He was promoted as Inspector with effect from 24.07.1993 and as Assistant Commandant with effect from 13.3.2001., After three years of his second promotion, the Respondent filed SWP No. 1241/of 2004 for grant of the benefit of second financial up-gradation in accordance with the scheme framed by the Government of India. He pleaded that once the period between the dates of dismissal and reinstatement was regularized by grant of Half Pay Leave and Extraordinary Leave, the competent authority was bound to give him the benefit of second financial up-gradation from

the date of completion of 24 years' service i.e., 1.3.1998 and its failure to do so has resulted in violation of his right to equality before law.

5. The Appellants contested the writ petition by asserting that Extraordinary Leave was granted to the Respondent with a view to prevent break in his service, but that period cannot be treated as spent on duty and taken into consideration for the purpose of computation of 24 years service, necessary for grant of the benefit of second financial up-gradation under the Scheme framed by the Government of India.

6. The learned Single Judge referred to Rule 25 of the Central Civil Services (Pension) Rules, 1972 (for short, 'the Rules') and held that as a consequence of grant of Extra Ordinary Leave of 5 years, 7 months and 27 days during which the Respondent had not worked will be treated as part of qualifying service for the purpose of computation of 24 years' service and he is entitled to get the benefit of second financial up-gradation with effect from 1.3.1998.

7. The Division Bench of the High Court also relied upon Rule 25 of the Rules and held that once the period of absence was regularised, the Respondent became entitled to get the benefit of second financial up-gradation from the date of completion of 24 years' service. The Division Bench also observed that postponement of the date of increment did not have the effect of depriving the Respondent of his legitimate right to get benefit under the Scheme.

8. We have heard learned Counsel for the parties and perused the record. We have also gone through the Scheme, which envisages grant of two promotions to all eligible employees by way of financial up-gradation on completion of 12 years and 24 years service subject to the condition that if an employee gets regular promotion, then he cannot claim the benefit of financial up-gradation in terms of the Scheme.

9. Rules 21, 25 and 40(5) of the Rules, which have bearing on the decision of this appeal read as under:

“21. Counting of periods spend on leave. All leave during services for which leave salary is payable (and all extraordinary leave granted on medical certificate) shall count as qualifying service. Provided that in case of extraordinary leave (other than extraordinary leave granted on medical certificate) the appointing authority may, at the time of granting such leave, allow the period of that leave to count as qualifying service if such leave is granted to a Government servant:(i) Omitted;

(ii) Due to his inability to join or rejoin duty on account of civil commotion; or

(iii) For prosecuting higher scientific and technical studies.

25. Counting of past service on reinstatement.

(i) A Government servant who is dismissed, removed or compulsorily retired from service, but is reinstated on appeal or review, is entitled to count his past service as qualifying service. (ii) The period of interruption in service between the date of dismissal, removal or compulsory retirement, and the period of suspension, if any, shall not count as qualifying service unless regularized as duty or leave by a specific order of the authority which passed the order of reinstatement. 40(5). A Government Servant on extraordinary leave is not entitled to any leave salary.”

10. A reading of the plain language of Rule 21 makes it clear that all kinds of leave for which leave salary is payable and all extraordinary leave granted on medical certificate are treated as qualifying service. In case of extraordinary leave other than the one granted on medical certificate, the competent authority can at the time of grant make it clear that the period of that leave shall count as qualifying service if the leave is granted due to the government servant's inability to join or rejoin duty on account of civil commotion or for prosecuting higher scientific and technical studies. What is important to note is that the period spent on leave can count as qualifying service only if leave salary is payable during that period. The only exception to this is when extraordinary leave is granted on medical certificate or the Competent Authority, while granting extraordinary leave, makes it clear that such period shall count as qualifying service because the Government servant could not join duty on account of civil commotion or he had gone for prosecuting higher scientific and technical studies. Rule 25 provides for counting of past service on reinstatement. It lays down that if a person dismissed, removed or compulsorily retired from service is reinstated, then he is entitled to have his past service counted as qualifying service. The expression "past service" used in Clause (i) of Rule 25 refers to the service prior to dismissal, removal or compulsory retirement. However, the period of interruption in service between the date of dismissal, removal or compulsory retirement during which an employee did not perform duty and the date of reinstatement as also the period during which an employee remained under suspension does not count as qualifying service unless the same is regularized as duty or leave by specific order of the competent authority. Rule 40(5) makes it clear in so many words that a government servant on extraordinary leave is not entitled to leave salary.

11. We may now advert to order dated 19.9.1989 issued by Deputy Director (Personnel), Government of India, Ministry of Home Affairs for reinstatement of the Respondent and consequential order dated 20.10.1989 passed by Commandant, 13 Battalion, Border Security Force. The relevant portions of these orders are extracted below:

“Order dated 19.9.1989 No. F-12035/23/890-STAFF/BSF Government of India Ministry of Home Affairs Dte. General Border Security Force (Staff Section) CGO Complex, Block-10, Lodhi Road, New Delhi-2, Dated: 19 Sep,' 89

ORDER

1. The Competent Authority is pleased to set aside the dismissal order in respect of No. 745220002 SI/Steno Ashok Kumar passed by DIG, BSF Rajouri vide his No. D. IX/4/ESTT-I/84/1766 dated 16 Feb, 84.

2. On his reinstatement individual should report to his unit i.e. 13 Bn B.S.F.

3. Period of absence from duty will be converted in the leave of kind due and admissible to the individual.

(P. Pillai)

Deputy Director (PERS)

Order dated 20.10.1989 Office of The Commandant 13 Battalion Bsf Bikaner (RAJ)//Office Order//

In pursuance to FHQ Staff Section O.M. No. F. 12035/23/89- Staff/BSF/1647 of 19th Sept, 1989, No. 745220002 SI/Steno Ashok Kumar, joined this Unit after reinstatement on 3rd October, 1989 (FN) on direction of FHQ vide above order and in continuation to DIG, BSF, Rajouri O/No. 1766 of 16th Feb, 1984 absence period w.e.f. 16.2.84 in respect of the SO is regularized as under:

16.2.84 to 31.08.84-By granting 198 days HPL due on account of the SO upto 31.08.84  
1.9.84 to 02.10.89-By granting EOL of 5 years 07 months and 27 days.

2. Consequent upon the EOL of 5 years 07 months and 27 days, date of increment of the SO shifted from 01.3.84 to 29.10.1989.

No. Estt/13/Order/89/14112-15

Dated: 20th Oct, 89.

-Sd-

COMMANDANT”

13 BN BSF

12. A conjoint reading of the above-mentioned orders shows that even though the period between his dismissal from service and reinstatement was regularized by grant of Half Pay Leave and Extraordinary Leave, the Respondent was neither paid salary for the period of Extraordinary Leave nor that period was treated as duty. In its very nature, the decision of the competent authority to grant Extraordinary Leave to the Respondent was intended to avoid break in service which would have entailed the consequence of depriving him of all the benefits of his past service from 1974 to 1984. However, the period of Extraordinary Leave was not and cannot be treated as period spent on duty. If that was not to be so, the Respondent would have claimed salary for the period of 5 years, 7 months and 27 days and questioned the decision of Commandant, 13 Battalion to postpone the date of his increment.

However, the fact of the matter is that the Respondent did not question the order passed by Commandant, 13 Battalion for shifting the date of increment by a period of 5 years, 7 months and 27 days. Therefore, that period cannot be counted as part of 24 years' service, which is sine qua non for grant of the benefit of second financial up-gradation in terms of the Scheme.

13. As a sequel to the above discussion, we hold that the direction given by the learned Single Judge, which has been upheld by the Division Bench of the High Court for grant of the benefit of second financial up-gradation to the Respondent with effect from 1.3.1998 cannot be sustained.

14. In the result, the appeal is allowed. The impugned judgment of the Division Bench of the High Court and the order passed by the learned Single Judge are set aside and the writ petition filed by the Respondent is dismissed. The parties are left to bear their own costs.