

**BEFORE THE UTTARAKHAND PUBLIC SERVICES TRIBUNAL
AT DEHRADUN**

CLAIM PETITION NO. 192/SB/2023

Sumit Kumar, s/o Sri Ramesh Chandra Khugsal, Sub Inspector, r/o
House no. 91, Shivpur, Kotdwar, Garhwal, Uttarakhand.

.....Petitioner

versus

1. State of Uttarakhand through Secretary, Home Department, Government of Uttarakhand, Dehradun.
2. Director General, Police, Headquarters, Dehradun, Uttarakhand.
3. Deputy Inspector General of Police, Garhwal Range, Dehradun, Uttarakhand.
4. Senior Superintendent of Police, District Chamoli.

..... Respondents

Present: Dr. N.K. Pant, Advocate, for the Petitioner
Sri V.P. Devrani, A.P.O., for the Respondents

JUDGEMENT

DATED: 23RD NOVEMBER, 2023

Justice U.C. Dhyani (Oral)

Earlier, a petition being claim petition no. 78/SB/2018, Sumit Kumar vs. State of Uttarakhand & others, was decided by this Tribunal on 09.01.2019, in which, a finding of 'misconduct' given by the disciplinary authority, as affirmed by the appellate authority, was maintained, but the Tribunal, in the peculiar facts of the case, observed that minor punishment of 'censure entry' awarded to the petitioner be substituted with 'warning'. In the subsequent decisions, this Tribunal, on the strength of a decision of Hon'ble Supreme Court in Rajasthan Tourism Development Corporation Limited and Another vs. Jai Raj Singh Chauhan, (2011)13 SCC 541, observed that the Tribunal cannot usurp the jurisdiction of disciplinary authority and

cannot substitute its own discretion for the discretion of departmental authority in the matters of disciplinary proceedings. The Tribunal, in claim petition no. 78/SB/2018 had observed that the censure entry should be diluted, rigour of the rule should be mellowed down and petitioner should be 'warned to be careful in future'.

2. When the aforesaid claim petition no. 78/SB/2018 was decided, the petitioner did not press challenge to Annexure: A2 dated 29.01.2018, whereby 'leave without pay' was sanctioned to him on the principle of 'no work no pay'. In other words, learned Counsel for the petitioner did not press relief no. (ii) in the midst of that judgment. Relief (ii) was as follows:

"(ii) To quash and set aside impugned order dated 29.01.2018 (Annexure: A-2 to the claim petition) passed by Respondent No.2, for non- payment of salary for the period 2 years and 143 days on the ground of 'no work no pay' and special leave may kindly be granted to the petitioner at half pay for the period he was unable to report on duty."

3. Petitioner's salary of 2 years and 143 days was withheld on the principle of 'no work no pay'. The Advocate, who was representing the petitioner in claim petition no. 78/SB/2018 had submitted that the petitioner is ready to forgo the salary for the period he remained absent from duty. In his reply to the show cause notice, the petitioner stated that he has no objection, if the salary for two years, 143 days is withheld on the principle of 'no work no pay'. This has been observed by the Tribunal in para 5 of the judgment dated 09.01.2019 in Claim petition no. 78/SB/2018.

4. In a nutshell, as has been observed by this Tribunal in para 6 of the judgment dated 09.01.2019, the petitioner did not press challenge to Annexure No. A-2 dated 29.01.2018 whereby 'leave without pay' was sanctioned to him on the principles of 'no work no pay', which is now challenged in present claim petition.

5. Learned A.P.O. submitted that when a particular relief has been relinquished by the petitioner in earlier claim petition, he is barred from pressing the same through fresh claim petition on the

principle of 'constructive res-judicata'. In reply, Dr. N.K.Pant, learned Counsel for the petitioner submitted that it was not relinquishment and it is cardinal principle of law that a litigant should not be allowed to suffer on account of mistake, even if willful, committed by his lawyer.

6. The fact remains that a particular relief, which was not pressed earlier, is being pressed in present claim petition. Learned Counsel for the petitioner submitted that the petitioner will make a representation to the Senior Superintendent of Police, Chamoli (respondent no. 4), who should be directed, in the peculiar facts of the case, to consider adjusting the leave available in the account of the petitioner, against his period of absence. He submitted that Financial Rules provide for the same. In reply, learned A.P.O. submitted that since the absence by the petitioner was deliberate, he had already forgone his claim earlier, therefore, such relief should not be granted to him. Learned A.P.O., however, has no objection, if a direction is given to respondent no. 4 to consider representation of the petitioner, in accordance with law.

7. Leave account of the employees is usually maintained in the Govt. departments. Leave is granted to a government servant only when the report regarding its admissibility is obtained from the authority maintaining leave account. The order sanctioning leave, indicates the balance Earned Leave, Medical Leave etc. at the credit of a government servant. Leave is not granted to a government servant, to whom a competent punishing authority decides to dismiss, remove or compulsory retire from the government service. Leave account of the petitioner also must have been maintained by the respondent department. The respondent no. 4 may, therefore, consider adjusting leave available in the account of the petitioner, as per rules.

8. Since the facts of the case are undisputed, therefore, claim petition is disposed of, at the admission stage, by requesting

respondent no. 4 to consider adjusting leave available in the account of the petitioner, when he moves a representation to this effect, in accordance with law.

9. Till such representation is decided, which the petitioner should move within three weeks from today, the respondent no. 4 may also consider staying recovery from the salary of the petitioner, in the peculiar facts of the case, as per the decision rendered by the Hon'ble Apex Court in State of Punjab and others vs. Rafiq Masih, 2015(8) SRL SC, 234, which runs as below:

"12. It is not possible to postulate all situations of hardship, which would govern employees on the issue of recovery, where payments have mistakenly been made by the employer, in excess of their entitlement. Be that as it may, based on the decisions referred to herein above, we may, as a ready reference, summarise the following few situations, wherein recoveries by the employers, would be impermissible in law:

(i) Recovery from employees belonging to Class-III and Class-IV service (or Group 'C' and Group 'D' service).

(ii) Recovery from retired employees, or employees who are due to retire within one year, of the order of recovery.

(iii) Recovery from employees, when the excess payment has been made for a period in excess of five years, before the order of recovery is issued.

(iv) Recovery in cases where an employee has wrongfully been required to discharge duties of a higher post, and has been paid accordingly, even though he should have rightfully been required to work against an inferior post.

(v) In any other case, where the Court arrives at the conclusion, that recovery if made from the employee, would be iniquitous or harsh or arbitrary to such an extent, as would far outweigh the equitable balance of the employer's right to recover."

[Emphasis supplied]

10. The claim petition thus stands disposed of, at the admission stage. No order as to costs.

(JUSTICE U.C. DHYANI)
CHAIRMAN

DATE: 23RD NOVEMBER 2023
DEHRADUN
KNP