
(2007) 06 RAJ CK 0002
In the Rajasthan High Court

Bishavjeet Jat

APPELLANT

Vs

State of Rajasthan and Others

RESPONDENT

Date of Decision : 01-06-2007

Acts Referred:

Constitution of India, 1950 — Article 14, 21, 226

Citation : (2007) 4 RLW 3566

Hon'ble Judges : Prem Shanker Asopa, J

Bench : Single Bench

Judgement

Prem Shanker Asopa, J.—By this writ petition, the petitioner has prayed that the impugned order of removal dated 16.7.2003 (Annexure-4) and order dated 8.10.2003 (Annex.5) passed by the appellate authority whereby the appeal has been dismissed, be quashed and set aside, with a further direction that the petitioner may be exonerated of all charges and reinstated in service with all consequential benefits as if the impugned orders have not been passed.

2. The facts, in brief of the case, as per the petitioner, are that the petitioner was initially appointed on 9.9.1982 as Constable and posted at Police Line, Jaipur City where he worked up to 16.7.2003. On 9.7.2002, charge sheet under Rule 16 of the Rajasthan Civil Services (Classification, Control and Appeal) Rules, 1958 (in short "the CCA Rules") as amended in 1983, was served upon the petitioner by the Supdt. of Police, Jaipur City. By the aforesaid charge-sheet, two charges (i) of willful absence of 168 days and (ii) not intimating the department during the aforesaid absence period which is gross negligence, indiscipline and dereliction in duties were levelled. The petitioner denied the charges and hence, departmental enquiry was conducted against the petitioner. In support of the aforesaid charges, the department produced four witnesses and exhibited six documents which have been marked as PW-1 to 4 and Ex.1 to 6 respectively. Out of the aforesaid documentary evidence Ex.4 is the joining report of the petitioner dated 22.5.2002 along with 29 illness certificates and one fitness certificate with receipts of all intimation sent to the department were produced. The petitioner

submitted his defence that he was ill and submitted medical certificates therefore, both the charges are not established. Enquiry Officer after considering the aforesaid documents gave report that both the aforesaid charges are established. On receipt of the enquiry report, an opportunity of submitting objection was given by the department which was availed of by the petitioner by submitting detailed representation wherein he has made it clear that documents marked Ex.4 containing illness certificates and fitness certificate were produced by the department, which categorically revealed that the department has accepted the same and further the petitioner was not disputing the same therefore, the Enquiry Officer has seriously erred in not relying on the same. The Disciplinary Authority has also disputed illness certificates of the petitioner on two grounds by observing that i) the same have been issued by Shri Naimuddin, a private Vaidya and (ii) the same have not been certified by the Medical Board. Apart from the above, even if the petitioner was to take treatment by private doctor then he ought to have applied medical leave for treatment and got it extended from time to time from the higher authorities. But the delinquent has deliberately not given intimation and without getting the leave sanctioned remained wilfully absent. Further, the delinquent has not produced the prescription slips and medical slips along with the illness certificates. The second charge has also been found proved by the Disciplinary Authority. Past conduct of major and minor punishments inflicted upon the petitioner was also considered without any notice to him and harsh penalty of removal from service was imposed against which the petitioner filed appeal but without success.

3. The State Government has filed reply to the writ petition and submitted that from the evidence charges have been fully established and the order of removal of the petitioner has been passed after due application of mind by the competent authority to the contents of the enquiry report and material on record. In reply it has also been disclosed by the State Government that medical certificate of illness of more than 45 days is required to be verified by Medical Board as per the Government circular dated 21.1.1998.

4. Submission of the counsel for the petitioner is that his absence was not willful but was occasioned on account of illness which has not been considered by the Disciplinary Authority. As regards, medical certificates to be verified by the Medical Board, on account of the period of absence being more than 45 days, the petitioner has submitted that he has submitted the said certificate much before initiation of the enquiry i.e. 22.5.2002 and in case of doubt, the same could have been verified by the authority itself by constituting Medical Board which is not usually done by hospital authorities at the request of the delinquent. Further submission of the counsel for the applicant is that as there is no rule which bound an employee to take treatment only from Government doctor on the contrary he is free to get treatment from any registered medical practitioner which may be private or government in any system of treatment - Allopathy, Ayurvedic, Unani and Homeopathy. He has also submitted that for taking treatment from even private doctor of the aforesaid system one has to have faith

on account of having specialization or experience in curing the ailment and earning name/fame in the same. Since the petitioner was suffering from Sciatica and got improvement and total relief of the same on account of the continued treatment of Vaidya and further asking him to get the medical certificate from the medical board is violative of Article 21 of the Constitution of India. Further submission of the petitioner is that the appellate authority has placed the burden of proving the genuineness of the medical certificates to establish his innocence which is contrary to the CCA Rules according to which it is for the department to establish the charge. The petitioner has also submitted that no notice was given before consideration of the past punishment. Therefore, the impugned orders are violative of the principles of natural justice.

5. Lastly, it was submitted that in view of the above, the charge of willful absence has been wrongly taken as proved. It was the absence which was justified on account of illness therefore, punishment is disproportionate to the gravity of the second charge for which although he had submitted the receipts of the intimation. On the aforesaid alternative submission of disproportionality of punishment, the counsel for the petitioner has cited the judgment of the Supreme Court in Ranjit Thakur Vs. Union of India (UOI) and Others,

6. Submission of the counsel for the State Government is that the medical certificates have rightly not been relied and therefore, charge No. 1 of willful absence is proved and as regards second charge, there is no evidence that intimation of remaining absent on account of illness was received by the clerk concerned. Therefore, the said charge is also proved. The Disciplinary Authority as well as the Appellate Authority rightly held that the charges are proved and further the punishment of removal in the facts and circumstances is justified.

7. I have gone through the record of the writ petition and considered rival submissions of the counsel for the parties.

8. Before proceeding further, the gist of the two charts served by charge-sheet dated 9.7.2002 is as follows:

vkjksi uEcj %&1

vki Jh fo"othr dfu- ua0 3597 o"kZ 2000 ls iqfyl ykbu t;iqj "kgj esa dfu- in ij inLFkkfir gSA tgkW ij fnukad 7-2-2000 dks 7-30 ih-,e- ij vki jksydkSy esa mifLFkr ugh gq, ftl ij jiV ua- 191 ij vkidh vuqifLFkfr vafdr dh xbZ A rRi"pkr~ vkidks bl dk;kZy; ds dzekad 6194 fnukad 2579&2001 ,oa 6435 fnukad 12-10-2001 ds }kjk 3 ;kse es mifLFkr gksus gsrq lwfpr djok;k x;k] ijUrq vki mifLFkr ugh gq, A vki 865 ;kse LosPNkiwoZd vuqifLFkr jgdj fnukad 22-5-2002 dks 5-30 ih-,e- ij iqfyl ykbZu t;iqj "kgj es mifLFkr gq,] jiV uEcj 160 ij vkidh mifLFkfr vafdr dh xbZ A

vkjksi uEcj %&2

vkius mDr vuqifLFkfr vof/k ds nkSjku fdLh izdkj dh dksbZ lwpuk mPpkf/kdkjh;ks dks ugh nh uk gh vkius vodk"k Lohd`r djus dh ps"Vk dh A

9. Para 4 of the circular dated 21.1.1998 issued by the Medical and Health Department, Govt. of Rajasthan reads as follows:

Order dated 21.1.1998 _____

bl foHkkx ds lela[;d vkns"k fnukad 28-6-94 esa fuEukuqlkj vkaf"kd la"kks/ku djrs gq, fuEu O;oLFkk rqjUr izHkko ls ykxw dh tkrh gS A ewy vkns"k es vafdr vU; "krsZ ;Fkkor~ jgsxh%

1---

2---

3---

4- 45 fnol ls vf/kd vof/k ds fy, fpfdRlk izek.k i= dsoy esfMdy cksMZ }kjk gh fn;k tk;sxk bls ewy vof/k "kkfey gksxh A

10. Relevant portion of para 4 of the circular dated 28.6.94 issued by the Dy. Secretary to Govt. Medical and Health (Group-1) Department, Govt. of Rajasthan also reads as under:

Order dated 28.6.1994

jktLFkku lsok fu;eks ds vUrZxr fpfdRlk izek.k i= ds vk/kkj ij vodk"k dk miHkksx djus ds izko/kkuks dk nq:i;ksx dh izd`fr ij vadq"k yxkus ds mn~ns"; ls funs"kd] fpfdRlk ,oa LokLF; lsok;as vFkok vU; LFkkuks ls fn;s x; lHkh vkns"kks dks vf/kf"Br djrs gq, fuEu funsZ"k fn;s tkrs gS%

1---

2---

3---

4---30 fnol ls vf/kd vof/k ds fy, fpfdRlk izek.k i= dsoy esfM+dy cksM+Z }kjk gh fn;k tk;sxk bls ewy vof/k Hkh "kkfey gksxh A

5---

6---

7---

8- jkT; deZpkjh;ks ds fy, izkbosV fpfdRld dk fpfdRlk izek.k i= ekU; ugh gksxk A

9---

11. In *Ranjit Thakur v. Union of India and Ors.* (supra) wherein it has been held that judicial review generally speaking is not attracted against the decision but it is attracted against the decision making process and further discussed the doctrine of proportionality in the matter of punishment. Para 9 of the judgment reads as under:

9. Re: contention (d): Judicial review generally speaking is not directed against a decision, but is directed against the "decision making process". The question of the choice and quantum of punishment is within the jurisdiction and discretion of the Court-martial. But the sentence has to suit the offence and the offender. It should not be vindictive or unduly harsh. It should not be so disproportionate to the offence as to shock the conscience and amount in itself to conclusive evidence of bias. The doctrine of proportionality, as part of the concept of judicial review, would ensure that even on an aspect which is, otherwise, within the exclusive province of the Court-Martial, if the decision of the Court even as to sentence is an outrageous defiance of B logic, then the sentence would not be immune from correction. Irrationality and perversity are recognized grounds of judicial review. In *Council of Civil Service Unions v. Minister for the Civil Service* (1984) 3 WLR 1174 (HL) Lord Diplock said:

...Judicial Review has I think developed to a stage today when without reiterating any analysis of the steps by which the development has come about, one can conveniently classify under three heads the grounds upon which administrative action is subject to control by judicial review. The first ground 1 would call "illegality", the second "irrationality" and the third "procedural impropriety". That is not to say that further development on a case by case basis may not in course of time add further grounds. I have in mind particularly the possible adoption in the future of the principle of "proportionality" which is recognised in the administrative law of several of our fellow community....

In *Bhagat Ram Vs. State of Himachal Pradesh and Others*, this Court held:

It is equally true that the penalty imposed must be commensurate with the gravity of the misconduct and that any penalty disproportionate to the gravity of the misconduct would be violative of Article 14 of the Constitution of India.

The point to note and emphasis is that all powers have legal limits.

In the present case, the punishment is so strikingly disproportionate as to call for and justify interference. It cannot be allowed to remain uncorrected in judicial review.

12. The said doctrine of proportionality in the matter of punishment was subsequently considered by a three Judges Bench in *B.C. Chaturvedi Vs. Union of India and others*, wherein the Supreme Court has considered the issue of disproportionate punishment and further laid down the principle of either directing the disciplinary/appellate authority to reconsider the penalty imposed, or to shorten the litigation, it may itself, in exceptional and rare cases, impose appropriate punishment with cogent reasons in support thereof. Para 18 of the aforesaid judgment reads as under:

18. A review of the above legal position would establish that the disciplinary authority, and on appeal the appellate authority, being fact finding authorities have exclusive power to consider the evidence with a view to maintain discipline.

They are invested with the discretion to impose appropriate punishment keeping in view the magnitude or gravity of the misconduct. The High Court/Tribunal, while exercising the power of judicial review, cannot normally substitute its own conclusion on penalty and impose some other penalty. If the punishment imposed by the disciplinary authority or the appellate authority shocks the conscience of the High Court/Tribunal, it would appropriately mould the relief, either directing the disciplinary/appellate authority to reconsider the penalty imposed, or to shorten the litigation, it may itself, in exceptional and rare cases, impose appropriate punishment with cogent reasons in support thereof

13. The said judgment of B.C. Chaturvedi (supra) was again considered by the Supreme Court in *Shri Bhagwan Lal Arya Vs. Commissioner of Police Delhi and Others*, wherein particularly with reference to the case of a Constable and absence from service for two months 7 days and 17 hours, punishment of removal was set aside with some directions. Paras 10 to 12 of the aforesaid judgment read asunder:

10. In the instant case, the appellant had absented himself for 2 months, 7 days and 17 hours on medical grounds. The above two rules provide that penalty of removal can be imposed only in cases, if grave misconduct and continued misconduct indicate incorrigibility and complete unfitness for police service. The absence of the appellant on medical grounds with application for leave as well as sanction of leave can under no circumstances, in our opinion, be termed as grave misconduct or continued misconduct rendering him unfit for police service.

11. The order dated 16.1.1995 passed by the respondents was produced by the respondents themselves in their reply to C.W.P. before the High Court of Delhi that they had sanctioned leave without pay for the period from 7.10.1994 to 15.12.1994, the period of alleged unauthorised absence. The High Court has failed to appreciate and evaluate this aspect of the matter. The High Court also did not appreciate that after issuing sanction for leave for the period in question, the employees' legitimate expectation would be that no stern action would be taken against him with respect to the alleged act of misconduct which by no stretch of imagination can be considered an act of gross misconduct or continued misconduct indicating incorrigibility and complete unfitness for police service. It is not the case of the respondents that the appellant is a habitual absentee. He had to proceed on leave under compulsion because of his grave condition of health and, therefore, the punishment of removal from service is excessive and disproportionate. We are of the view that the punishment of dismissal/removal from service can be awarded only for acts of grave nature or as cumulative effect of continued misconduct proving incorrigibility or complete unfitness for police service. Merely one incident of absence and that too because of bad health and valid and justified grounds/reasons cannot become basis for awarding such a punishment. We are, therefore, of the opinion that the decision of the disciplinary authority inflicting a penalty of removal from service is ultra vires of Rule 8(1) and 10 of the Delhi Police (Punishment & Appeals Rules, 1980) and is liable to be

set aside. The appellant also does not have any other source of income and will not get any other job at this age and the stigma attached to him on account of the impugned punishment. As a result of which, not only he but his entire family totally dependant on him will be forced to starve. These are the mitigating circumstances which warrant that the punishment/order of the disciplinary authority is to be set aside.

12. The disciplinary authority without caring to examine the medical aspect of the absence awarded to him the punishment of removal from service since their earlier order of termination of the appellant's service under the Temporary Service Rules did not material. No reasonable disciplinary authority would term absence on medical grounds with proper medical certificates from government Doctors as grave misconduct in terms of the Delhi Police (Punishment & Appeal) Rules, 1980 and is liable to be set aside. The appellant also does not have any other source of income and will not get any other job at this age and the stigma attached to him on account of the impugned punishment. As a result of which, not only he but his entire family totally dependant on him will be forced to starve. These are the mitigating circumstances which warrant that the punishment/order of the disciplinary authority is to be set aside.

12. The disciplinary authority without caring to examine the medical aspect of the absence awarded to him the punishment of removal from service since their earlier order of termination of the appellant's service under the Temporary Service Rules did not materialise. No reasonable disciplinary authority would term absence on medical grounds with proper medical certificates from government Doctors as grave misconduct in terms of the Delhi Police (Punishment & Appeal) Rules, 1980. Non-application of mind by quasi-judicial authorities can be seen in this case. The very fact that respondents have asked the appellant for re-medical clearly establishes that they had received the applicant's application with medical certificate. This can never be termed as willful absence without any information to competent authority and can never be termed as grave misconduct.

14. I am of the considered view that Ex.4 was produced by the Department which contains 29 illness certificates and one fitness certificate, four receipts of sending intimation to the department from time to time and the said documents were submitted by petitioner on 22.5.2002 along with joining report almost one month and a half before the service of the charge sheet on 9.7.2002. Had there been any doubt about the genuineness of the said certificate then the respondents could have pointed out the reasons for doubt and provided an opportunity to the petitioner to prove the same or refer the matter to the Medical Board but the same was not done. Thereafter, the said document was produced by the department itself in support of the charge which was not disputed by the petitioner and in such circumstances, the Disciplinary Authority/Enquiry Officer who were doubting genuineness of the medical certificates/illness certificate then at that stage also he could have asked the petitioner to appear before the

Medical board but that was not done. If there was any doubt about the genuineness of the ailment the petitioner could have been asked to appear before the Medical Board. Another doubt which was expressed by the Enquiry Officer/Disciplinary Authority was with regard to the issuance of the same by a private Vaidya -medical practitioner. No rule has been pointed out by the respondents that medical certificate issued only by a government medical practitioner will be accepted. However, reliance has been placed on Clause 8 of the circular dated 28.6.1994 according to which for government servant medical certificate issued by private doctor will not be recognized. Compelling a government servant to take treatment for the government doctor only to avail medical leave facility and exclusion of a private registered medical practitioner howsoever, renowned, he may be, placed an unreasonable restriction on his right to take treatment from any established/recognised system of treatment by government - Ayurved, Allopathy, Unani etc. which is a matter of faith and name on account of having specialization of experience of the registered medical practitioner, apart from being arbitrary also, the same is violative of Article 14 of the Constitution of India. Once the medical practitioner is registered, it is not open to the government to say that he is not authorized to treat and issue medical certificate. Of course, genuineness of the same can be examined by the government. Otherwise, circular will be violative of Article 21 of the Constitution of India for the reasons that many a times, private doctors are more efficient than government doctors. In the aforesaid facts and circumstances of the case, absence was willful has not been proved. Only the absence part is proved. Thus, finding of charge No. 1 of willful part of absence is perverse and the same is quashed. There was no evidence to the effect that any intimation has been received from the petitioner, therefore, finding on Charge No. 2 is upheld.

15. While considering the past punishment, no notice was given and therefore, the said part also cannot be sustained. The normal course in such circumstance is to pass order of remand but since the charge sheet was issued on 9.7.2002 and the medical certificates are of the year 2002 remand will not serve any useful purpose on account of the fact that no evidence will be available to the department to examine the genuineness of the said medical certificates by asking the petitioner to appear before the Medical Board after lapse of five years. Therefore, in order to shorten the litigation it would be appropriate to examine the material on record within the ambit of Article 226 of the Constitution of India. On examination of the material on record, I find that Charge No. 1 is partly proved as indicated above and Charge No. 2 is proved. Considering the fact that the petitioner was removed from service without proving the willful part of absence, in such circumstances, the punishment has become disproportionate to the gravity of the charge,

16. I am conscious of the fact that the petitioner was Constable in police which is a disciplined force and therefore, his absence of 2 years without intimation renders him unfit to continue in service. However, considering the fact that willful part of the charge No. 1 not proved, is one of the relevant mitigating

circumstance apart from the fact that the petitioner has rendered service from 9.9.1984 to 16.7.2003 which qualify him for grant of pension, I think it proper to substitute the penalty of removal from service by the punishment of compulsory retirement with proportionate pension, which will keep the petitioner out of service. The impugned order passed by the appellate authority dated 8.10.2003 (Annex.5) is quashed and set aside and the order of the disciplinary authority dated 16.7.2003 (Annex.4) is ordered to be revised as per aforesaid direction.

17. The writ petition is partly allowed as indicated above. Three months time is granted to the respondents for passing appropriate orders as per the aforesaid directions.