

**(2008) 05 DEL CK 0074**

**In the Delhi High Court**

**Case No :** Writ Petition (C) No. 4370 of 1992

B.K. Sharma

APPELLANT

Vs

Union of India (UOI) and Others

RESPONDENT

**Date of Decision :** 21-05-2008

**Acts Referred:**

Pension Regulations for Army, 1961 — Rule 113, 124

**Citation :** (2008) 104 DRJ 161

**Hon'ble Judges :** Sanjay Kishan Kaul, J; Mool Chand Garg, J

**Bench :** Division Bench

**Advocate :** Bharti Kochhar, for the Appellant; Bharti Kochhar, for the Respondent

**Final Decision :** Allowed

## Judgement

Mool Chand Garg, J.—ASI/Executive B.K. Sharma, the petitioner joined CISF on 3rd January, 1970. He was promoted as ASI/Executive in the year 1984. While in service and being posted as ASI, 'F' Company, Durgapur Steel Plant, the petitioner availed casual leave of 15 days. He was to join the duties on 16th June, 1986, but he failed to do so and was proceeded departmentally for his unauthorized absence when a Memo was sent to him directing him to submit his written statement of defense by Registered post on 13th August, 1986. Such an absence of the petitioner was without permission/sanction for overstaying for more than 57 days unauthorisedly. Since no response was received from the petitioner to the charge sheet as also that the petitioner failed to participate, an ex parte inquiry report was given by the Inquiry Officer against the petitioner proving the charge. The Commandant (Plant) after agreeing with the finding of the Inquiry Officer awarded punishment of dismissal from service to the petitioner with effect from 16th October, 1986.

2. An appeal preferred by the petitioner to the DIG, CISF Unit, DSP, Durgapur, was dismissed vide order dated 28th February, 1987. He, thereafter, submitted a revision petition to the Director General, CISF which was disposed of by the Inspector General (ES), CISF, Calcutta. The Inspector General found that there

were some procedural irregularities in holding the inquiry against the petitioner, inasmuch as, the petitioner was not even supplied with a copy of the inquiry report and the punishment imposed upon him had not been imposed by a competent authority. Accordingly, while setting aside the order of dismissal and directing re-instatement of the petitioner in service, he also ordered holding of a de novo proceeding against the petitioner from the stage of supply of copy of the finding to the individual concerned. The petitioner was directed to report to his last Unit posting, i.e., CISF, DSP, Durgapur within 15 days from the receipt of the said order. The period of absence from duty from the date of his dismissal from service to the date of joining duty on reinstatement was proposed to be 'dies non' and it was held that he would not be paid allowances for the said period, but at the same time was given an opportunity to submit his representation within 15 days from his joining the Unit, if any, against the aforesaid proposal on reinstatement.

3. The petitioner, reported for duty in the Unit on 26th November, 1991. He was reinstated in service vide order dated 28th November, 1991 and thereafter a de novo inquiry was started from the stage of supply of copy of the finding to the petitioner. The petitioner was also called upon to submit a representation in terms of the order passed by the revisional authority.

4. The petitioner submitted his representation on 28th December, 1991 which was considered by IG/CISF/(DS) Calcutta on 21st April, 1992. While dismissing his representation, it was ordered that the period of absence of the petitioner from duty from the date of his dismissal from service till the date of reinstatement in service would be treated as 'dies non' for all purposes and he shall not be paid any pay or allowances for the said period.

5. It may be observed here that the DIG, CISF, who held de novo inquiry and also considered the representation made by the petitioner before him aggrieved from the finding of the Inquiry Officer regarding overstay for a period of 123 days from 16th June, 1986, made the following observations:

In his representation dated 28.12.91, he denied the charge and has challenged the findings of the Enquiry Officer on grounds amongst others that he was not given opportunity to deny his guilt and prove his innocence. Further his main contention in his representation is that his home is within Ghaziabad District (U.P.); whereas the notices of the enquiry were sent to him to Ghaziabad District (U.P.) within the jurisdiction of Meerut District. Since 1977 District Ghaziabad has been established upon bifurcation of the erstwhile Meerut District and his home fell within the jurisdiction of Ghaziabad. Therefore, the district anomaly in the matter of postal address remained uncared by the authority for which he is not responsible. Also, he contended in his representation to consider his prayer for extension of leave sent by him from time to time on the grounds of illness of his son and himself supported by medical certificates.

On going through the case records of the delinquent and considering the

submission made by the delinquent, I find that the delinquent ASI/Exe. B.K. Sharma, who went on leave and overstayed unauthorisedly for 123 days from 16.6.1986 (F/N) to till the date of earlier disposal of the case i.e. 16.10.86 and did not bother to inform the department about the reasons for OSL and also did not even bother to attend the enquiry in spite of several notices sent to him. All the notices were sent to him to his home address which he has given in his service records. Further, he had also not informed the department about the change of his address. The Enquiry Officer did not consider it proper to delay the proceedings for an indefinite period, as such the enquiry was held ex parte.

6. Consequently, the charge of overstay after 16th June, 1986 was accepted as proved and by treating this as an act of serious misconduct and grave indiscipline, punishment was imposed upon the petitioner of dismissal from service from the date of receipt of the order dated 4th March, 1992. However, by the said order, the period of OSL (overstay of leave) was treated as under:

EL from 26.5.86 to 15.6.86

EOL from 16.6.86 to 15.10.86

7. The petitioner then filed a fresh appeal challenging the orders dated 31st October, 1991, 4th March, 1992 and the order dated 21st April, 1992. A perusal of the appeal goes to show, that the only ground to justify his absence from duty after 16th June, 1986 taken by the petitioner was his own illness during the period of leave. Even though there is a mention about sending of a medical certificate, the record goes to show that no such document was placed on record by the petitioner either along with his appeal or along with the writ petition.

8. The Inspector General, CISF, Eastern Sector, Calcutta, dismissed the appeal by observing that on perusal of the relevant records, he was satisfied that the charge of OSL leveled against the petitioner was duly proved during the course of inquiry and the plea taken by the petitioner in his appeal was having no merits. Consequent to the passing of this order, the petitioner has filed the present writ petition.

9. The writ petition has been contested by the respondents who have also filed a counter affidavit. According to the respondents the appeal filed by the petitioner was considered by the Competent Authority on merits. It is stated that since there was nothing to substantiate the plea taken by the petitioner to justify his absence from duty after the sanctioned leave period, it was rightly dismissed vide order dated 1st April, 1992.

10. The petitioner thereafter, also preferred a revision petition which was also dismissed vide order dated 21st February, 1993, passed by the Second Respondent whereby the petitioner was even allowed 50% of wages as admissible u/s 30(4) of the CISF Rule for the period between the date of dismissal to reinstatement. Respondents have also stated that mere regularization of period of absence from 16th June, 1986 till 16th October, 1986

by treating the said period as the extraordinary leave cannot have any effect on the order of dismissal which has been passed due to misconduct of the petitioner i.e. over stay of leave without sanction of more than 123 days. It is the case of the respondents that unauthorized absence that too willfully is a serious misconduct and as such punishment awarded to the petitioner is fully justified. It has been stated that the plea to justify his unauthorized absence due to his illness has not been substantiated in as much as, there is nothing on record to support the plea taken by the petitioner. It is thus pleaded that in the aforesaid circumstances, the competent authority rightly presumed that the petitioner overstayed the leave granted to him which proves the charges leveled against the petitioner. As regards the change of postal address the respondents have stated that it was the duty of the petitioner to inform about the change of address which was not done. Moreover, had the petitioner sent any application of extension of leave/medical certificate to his unit Commandant, his address could have been identified thus it is contended that the petitioner cannot find fault with the enquiry proceedings attached by the respondents.

11. The learned Counsel for the petitioner was unable to point out any deficiency either in the procedure or the conclusion drawn by the competent authority holding the petitioner guilty of unauthorized absence by over staying the leave period w.e.f. 16th June, 1986.

12. The only submissions made by the learned Counsel is that it was an isolated act of absence on the part of the petitioner, that also after he was granted leave and on account of his own sickness. It is submitted that the petitioner who has served CISF for a period of more than 20 years needs indulgence at least qua the punishment awarded to him which is highly excessive and is disproportionate to the guilt of the petitioner. It is submitted, that except for the solitary incident of the petitioner having overstayed his leave w.e.f. 16th June, 1986 till 16th October, 1986, there is nothing on record which can be taken adversely against the petitioner. Thus, it is not a case where the petitioner could be presumed to be a habitual offender or a habitual absentee.

13. The learned Counsel for the petitioner has also relied upon a judgment of the Hon'ble Supreme Court delivered in the case of Shri Bhagwan Lal Arya Vs. Commissioner of Police Delhi and Others, . On the strength of this judgment it is contended that this Court can interfere and change the punishment awarded to the petitioner as the punishment of the dismissal from service can only be awarded for acts of grave nature or cumulative effect of continued misconduct proving his incorrigibility and complete unfitness for service. It may be appropriate to extract the relevant paragraph of the aforesaid judgment which is as under:

the punishment of dismissal/removal from service can be awarded only for acts of grave nature 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. 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 and Appeal) Rules, 1980. Non-application of mind by quasi-judicial authorities can be seen in this case. The very fact that the 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 the competent authority and can never be termed as grave misconduct. After issuing sanction for leave for the period in question, the employee's 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.

14. In the aforesaid case, the Hon"ble Supreme Court while setting aside the punishment awarded to the petitioner on account of overstaying his leave, directed reinstatement in service without any financial benefit. A reference can also be made to paragraph 13 and 14 in this regard.

In B.C. Chaturvedi v. Union of India (three Judge Bench) the question posed for consideration was as to whether the High Court/Tribunal can direct the authorities to reconsider punishment with cogent reasons in support thereof or reconsider themselves to shorten the litigation. In this case, at para 18, this Court has observed as under: (SCC p. 762)

18. A review of the above legal 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 of 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.

14. Thus, the present one is a case wherein we are satisfied that the punishment of removal from service imposed on the appellant is not only highly excessive and disproportionate but is also one which was not permissible to be imposed as per the Service Rules. Ordinarily we would have set aside the punishment and sent the mater back to the disciplinary authority for passing the order of

punishment afresh in accordance with law and consistently with the principles laid down in the judgment. However, that would further lengthen the life of litigation. In view of the time already lost, we deem it proper to set aside the punishment of removal from service and instead direct the appellant to be reinstated in service subject to condition that the period during which the appellant remained absent from duty and the period calculated up to the date on which the appellant reports back to duty pursuant to this judgment shall not be counted as a period spent on duty. The appellant shall not be entitled to any service benefits for this period. Looking at the nature of partial relief allowed hereby to the appellant, it is now not necessary to pass any order of punishment in the departmental proceedings in lieu of the punishment of removal from service which has been set aside. The appellant must report on duty within a period of six weeks from today to take benefit of this judgment.

15. Even though on facts this judgment does not apply squarely to this case yet, the principle laid down in the aforesaid judgment gives guidelines to deal with the proportionality of the punishment awarded to the incumbent in the peculiar facts of this case.

16. One more judgment of some relevance delivered by the Apex Court in the case of V. Ramana Vs. A.P.S.R.T.C. and Others, needs our attention. In the aforesaid judgment in paragraph 11 it has been observed:

11. The common thread running through in all these decisions is that the court should not interfere with the administrator's decision unless it was illogical or suffers from procedural impropriety or was shocking to the conscience of the court, in the sense that it was in defiance of logic or moral standards. In view of what has been stated in Wednesbury case the court would not go into the correctness of the choice made by the administrator open to him and the court should not substitute its decision for that of the administrator. The scope of judicial review is limited to the deficiency in decision-making process and not the decision.

12. To put it differently unless the punishment imposed by the disciplinary authority or the Appellate Authority shocks the conscience of the court/tribunal, there is no scope for interference. Further to shorten litigations it may, in exceptional and rare cases, impose appropriate punishment by recording cogent reasons in support thereof. In a normal course if the punishment imposed is shockingly disproportionate it would be appropriate to direct the disciplinary authority of the Appellate Authority to reconsider the penalty imposed.

17. Taking into consideration the law as discussed above and the facts of this case, we do not find any reason to interfere with the order of the enquiry officer or the Appellate Authority in so far as the guilt of the petitioner on the point of over staying on leave for a period commencing from 16th June, 1986 to 16th October, 1986 is concerned but we certainly feel that in a case of solitary incident of absence where the incumbent served CISF for a period of more than 20 years

out of which more than 17 years service consists of active duty, the punishment of dismissal is unjustified and shockingly disproportionate.

18. We have scanned through the judgments delivered by various Courts and find that in case of absence, the punishment awarded to the incumbent varies from dismissal to compulsory retirement. However, the reason to impose such harsh punishment is the incorrigibility and the habitual nature of absence of the incumbent. We rarely find a case where a person with only one instance of absence has been dismissed from service nor has any such judgment been brought to our notice. We have also examined the provisions as contained under Rules 113 and 124 of the Pension Regulations for the Army, 1961, which again provides discretion to the competent authority to even treat a case of dismissal as a case of discharge for enabling the incumbents to, at least, earn his pension once he serves the Department for qualifying year of service for enabling him to obtain the pension. The provisions are as under:

#### Condonation of an interruption of service

113. Upon such conditions as it may think fit to impose, a competent authority may condone interruptions of service in the case of person whose pension is sanctionable by an authority subordinate to the President as under:

(a) When proposed pension exceeds Rs. 25 p.m. - interruptions not exceeding a period of 12 months in all.

(b) When proposed pension is Rs. 25 p.m. or less - all interruptions whatever their duration.

Individuals remustered within the same group, from a higher to a lower group, or vice versa

124. (a) An individual who was remustered from a higher to a lower group on being declared redundant after rendering 15 years or more of qualifying service may be granted, if more favourable than the pension the otherwise admissible, the service pension for which he would have been eligible had he been discharged on the date he was declared redundant.

(b) An individual who was remustered to a new trade in the same or higher group but in a lower rank for service reasons other than inefficiency or medical unfitness, but who is discharged either (i) without restoration of the rank held prior to remustering, or (ii) if such rank was restored, without completion of two years of service in that rank after restoration will be granted, where more favourable than the pension otherwise admissible, the pension based on the qualifying service rendered up to the date of discharge but assessed on the group and the substantive rank held on the date of remustering provided such rank and group had been held for two years in all (the period of service rendered after remustering counting for this purpose).

19. We, Therefore, set aside the order dated 19th August, 1992 passed by the

Appellate Authority, i.e., respondent No. 2 only on the point of sentence and direct them to re-consider the punishment imposed upon the petitioner and to pass appropriate orders by taking into consideration that it was a solitary act of overstay of leave in his career of more than 17 years as also taking into consideration the provisions contained under Rules 113 and 124 of the Pension Regulations for the Army, 1961. While passing the order, the authorities will also consider that the petitioner has not only served the CISF for a period of more than 17 years on active duty but was reinstated in service with effect from 28th November, 1991 after setting aside the punishment of dismissal earlier awarded to him by the authority who was not competent to do so till 19th August, 1992 by which order, the petition was again dismissed and also been granted suspension allowance for the intervening period as per the order passed in the revision petition dated 21st February, 1993 which makes his service of more than 20 years.

20. A speaking order be passed by the appellate authority within a period of three months from today and the said order be duly communicated to the petitioner within 15 days thereafter. Needless to say that the petitioner shall be entitled to all consequential benefits as a consequence of the order passed by the Appellate Authority.

21. The writ petition is allowed in terms aforesaid leaving the parties to bear their own costs.