

(2017) 12 OHC CK 0002

In the Orissa High Court

Case No : 8161 of 2009

Janmejaya Nayak

APPELLANT

Vs

Union of India and orthers

RESPONDENT

Date of Decision : 01-12-2017

Acts Referred:

Constitution of India, Article 226, Article 227 - Power of High Courts to Issue certain writs - Power of superintendence over all courts by the High Court
Indian Penal Code

Citation : (2017) 12 OHC CK 0002

Hon'ble Judges : Sujit Narayan Prasad

Bench : SINGLE BENCH

Advocate : Bibekananda Nayak, B.M. Bhuyan, Biplab Mohanty, T.K. Patnaik, A. Patnaik, S. Patnaik, B.S. Rayaguru & S. Mohapatra, Jaganath Patnaik, Lalatendu Jena, Sangram Kumar Singh, Gyanaloka Mohanty

Judgement

1. This writ petition under Article 226 and 227 of the Constitution of India has been filed against the order of punishment dated 26.8.2005 passed by the Sr. Commandant, Disciplinary Authority, Central Industrial Security Force R.S.P., Rourkela-11 (Annexure-1), the appellate order dated 30.6.2006 passed by the Dy. Inspector General, CISF Unit RSP, Rourkela (Annexure-7) and the revisional order dated 20.02.2007 passed by the Inspector General, Eastern Sector, CISF (Annexure-9) whereby and whereunder the order of removal from service passed by the original authority has been affirmed by the Appellate Authority as well as Revisional Authority.

2. The brief fact of the case of the petitioner as per pleading in the writ petition is that while working as Constable in the Central Industrial Security Force at Rourkela Unit, Rourkela Steel Plant, received the charge sheet dated 26.8.2005 alleging therein the following charges:- "That No.904660161 Constable J. Nayak (U/S) of C.I.S.F. Unit, R.S.P. Rourkela on 04.01.2005 while performing "B" shift duty w.e.f. 1300 hrs to 2100 hrs at work shop. Water treatment plant/JPH had

made vulgar postures to a lady residing in Quarter No.B-555, Sector 20, R.S.P. on her complaint, Sector-19 police station registered a case under section 4551/353/509 of IPC. As a result, Constable J. Nayak had deserted Unit line w.e.f. 01.02.2005 for 172 days. These acts of the said Constable tantamounts to gross misconduct indiscipline and unbecoming of a member of a disciplined Force like C.I.S.F."

3. The petitioner in response to the said charge, has replied on 7.9.2005 denying the allegations. The authority, being not satisfied with the finding, has asked to the petitioner to participate in the inquiry. The petitioner has participated in the inquiry, but when inquiry was pending, another charge was issued on 12.4.2005 alleging therein the allegation of desertion from the Unit w.e.f. 1.2.2005 unauthorizedly. The Inquiry Officer has found the charge proved as per the allegation leveled vide Annexure-1 dated 26.8.2005 related to make vulgar postures to a lady residing in Quarters No.B-555, Sector-20, R.S.P. as also the unauthorized absence for 172 days. The Disciplinary Authority after accepting the finding given by the Inquiry Officer has inflicted the petitioner with the punishment of removal from service. The petitioner has assailed the said order before the Appellate Authority or the Revisional Authority, who has affirmed the decision taken by the Disciplinary Authority. The petitioner is before this Court against finding of Inquiry Report, the order passed by the Disciplinary Authority, the Appellate Authority and the Revisional Authority. The petitioner assailed the finding as well as the decision to remove him from service on the ground that the article of charge dated 26.8.2005 contains two charges, i.e., making vulgar posters to a lady residing in residing in Quarters No.B-555, Sector-20, R.S.P. resulting into institution of a case under Sections 451/354/509 of the Indian Penal Code, as a result, the petitioner has deserted Unit line w.e.f. 1.2.2005 for 172 days.

4. Learned counsel representing the petitioner submits that the Inquiry Officer has not given a specific finding regarding the proving of the charge related to making vulgar postures, rather he has only corroborated the said charge with the fact of going the petitioner to the police station which has been instituted against him for the offences under Sections 451/354/509 of the Indian Penal Code, rather the Inquiry Officer has only proved the charge of unauthorized absence i.e. desertion for 172 days. Hence, the Disciplinary Authority ought to have taken into consideration this aspect of the matter, but instead doing so, the Inquiry Officer has accepted the finding whereby and whereunder both the charges have been said to be proved in the conclusion part and thereafter, passed by the order of punishment for removing from the service, which according to her, is not sustainable in the eye of law because of the reason that when specific charges have been leveled against the petitioner, then it is the duty of the Inquiry Officer being the quasi-judicial authority to prove the charge, especially as per the charge leveled in the memorandum of charge and it cannot be interfered by connecting the circumstances in order to prove the charge. The second ground has been taken that even the charge of desertion cannot be said to be proved

because the petitioner has tried to satisfy the authorities in his defence by producing the medical certificates to explain the reason of not presenting himself in duty, but that certificates have been disbelieved merely on presumption by saying that the medical prescriptions/cash memos have not produced. She further submits that the Appellate Authority and the Revisional Authority has not appreciated this aspect of the matter.

5. On the other hand, learned counsel, who represents the CISF submits that the Annexure-1 dated 26.8.2005 only relates to one charge relating to making vulgar postures to a lady residing in Quarters No.B-555, Sector-20, R.S.P. and the said charge is not related to desertion/unauthorized absence for a period of 172 days. The Inquiry Officer came across with the finding that the petitioner has appeared before the Investigating Officer related to the F.I.R. instituted under Sections 451/354/509 of the Indian Penal Code. As such, the investigating Officer by taking note of these circumstances of going to the police station has rightly proved the charge related to making vulgar postures to a lady residing in Quarters No.B-555, Sector-20, R.S.P. Hence, there is no illegality. He submits that the Disciplinary Authority, while accepting the Inquiry Report, has followed the entire procedures and thereafter, taking the allegation serious, has inflicted the punishment for removal from service. Hence, all due procedure have been followed while inflicting the punishment by the Disciplinary Authority and thereafter, the Appellate Authority and Revisional Authority has passed the order. Hence, this Court sitting under Article 226 of the Constitution of India may not interfere with the concurrent finding made by the departmental authorities.

6. Heard the learned counsel for the parties and on appreciation of their rival submissions, this Court thought it proper the deal with the factual aspect first before going into the legality and propriety of the finding given in the Inquiry Report or the decision taken by the Disciplinary Authority.

7. The fact which is not in dispute in this case is that the authorities have issued a memorandum of charge on 12.4.2005 alleging therein an allegation of commission of gross misconduct and indiscipline committed by the petitioner, who deserted himself from the Unit w.e.f. 1.2.2005 afternoon unauthorizedly. Charge No.2 is related to his habitual absentee which is gross indiscipline and even after punishing him 7 times, he failed to improve upon his conduct thus proving himself to be incorrigible. Thereafter another memorandum of charge was issued on 26.8.2005 under Annexure-1 alleging therein the allegation of making vulgar postures to a lady in Quarters No.B- 555, Sector-20, R.S.P. On her complaint, Sector-19 Police Station registered a case under Sections 451/354/509 of the Indian Penal Code. As a result, Constable J. Nayak had deserted Unit line w.e.f. 1.2.2005 for 172 days. These acts of said Constable tantamounts to gross misconduct, indiscipline and unbecoming of a member of the disciplined Force like CISF.

8. The petitioner has given his reply in defence, but denying the allegation, but the authority, having not been satisfied with the said reply, has proceeded

departmentally by appointing an Inquiry Officer as also asking the petitioner to participate in the inquiry wherein altogether 7 witnesses have been examined.

9. It is evident from the deposition made by the P.W.1, namely Sri D.K. Chaturvedi, Assistant Commandant as it then was, who has said that he has got no report of desertion of the petitioner on 1.2.2005, but he came to know about his desertion, as it was found by investigating from Shri S.K. Mishra, Inspector. He submits that no complaint was lodged in writing neither by Smt. Sumi Manjhi nor by her husband Narasingha Manjhi. The petitioner was released from police station on the same day night. He then informed the matter to the Senior Officers. It is evident from deposition that the petitioner has also cross-examined the witness. Shri S.K. Mishra, holding the post of Inspector, was examined as P.W.2 by the Inquiry Officer. He said that while he was working as Incharge, he received a telephone call from Sector-19 Police Station on the basis of an allegation that he has made vulgar gesture to a lady residing in Quarters No.B-555, Sector-20. He informed the matter immediately to his Senior Officers and was instructed to ask to Assistant Commandant and Company Commandant to go to the Sector-19 Police Station to look into the matter. Accordingly, he passed the message to both the officers and he himself proceeded to Sector-19 Police Station and on reaching, he found that the petitioner in the police station. In the meantime, the Assistant Commandant and the Inspector also reached. The request was made to the In-Charge Police Station to ask the complainant to made a complaint to the CISF authority, if any, so that drastic action would be taken against the Constable J. Nayak, the petitioner, if found guilty and accordingly, complaint was instituted which is marked as Ext.1. It is further evident from his evidence that the lady has made an oral complaint at Sector-19 Police Station against the petitioner and subsequently he came to know that a written complaint was also made on 5.1.2005 basing on which F.I.R. was lodged. Inspector B.N. Das has been examined as P.W.3, who has reiterated the thing which was stated by P.W.2. Likewise, one Head Constable N.K. Singh has been examined as P.W.4, who has said that the petitioner was taken to the police station. Constable R.C. Lenka has been examined as P.W.5, Constable N.K. Pandey has been examined as P.W.6 and ASI Shiv Singh has been examined as P.W.7. They have stated same thing as P.W.4.

10. The Inquiry Officer has made out a question as to whether the Charge Official while on "B" Shift on 4.1.2005 has made vulgar postures to Smt. Sumi Manjhi, wife of Narasingha Manjhi. He has taken note of the evidences of the depositions of the witnesses, who have said that an F.I.R. was instituted and the petitioner was taken to the police station, but subsequently he was released in the night in the same day. It is evident that the petitioner was found to be unauthorizedly absence from 31.1.2005 to 17.7.2005 prior to that he was on medical rest from 6.1.2005 to 30.01.2005. It is also evident that the Inquiry Officer has proved the charge leveled against the petitioner.

11. This Court, after going across the Inquiry Report, has found that the Inquiry

Officer has not given any concrete finding regarding making of vulgar postures of the said lady, rather he has only connected the incident by the circumstance of going of the petitioner to the police station and subsequently, releasing from the police station since this aspect has only been said by the various witnesses as discussed above.

12. This Court, after going across the material available on record, is of the view that actually the opposite party- Force has formulated one charge against the petitioner under Annexure-10 dated 12.4.2005 regarding unauthorized absence from 1.2.2005 and during charge, another charge was leveled on 26.8.2005 related to making vulgar posters as also the unauthorized absence from duty for the period of 172 days.

13. The opposite party-Force has filed the counter affidavit wherein it has been stated that after the order of removal having been passed by the authority, the charge contained Annexure-10 dated 12.4.2005 has been held to be dormant. Learned counsel appearing for the CISF has submitted that the charge dated 26.8.2005 is related to only making of vulgar postures and not related to the unauthorized absence for the period of 172 days.

14. This Court has considered his submission, but has not agreed to such submission for the reason that in the charge dated 26.8.2005, the same related to two charges, i.e., one related to making of vulgar postures and second related to unauthorized absence. It is for the reason since it is evident from the charge that there is two charges and in the same ultimate line of the article of charges it has been stated "these acts of the said constable tantamounts gross misconduct, indiscipline and unbecoming of a member of disciplined Force like CISF" The words "these acts" indicates that there is not a single allegation, rather more than one and that is making of vulgar postures as also the unauthorized absence stated to be the desertion for a period of 172 days. Hence, the argument advanced on behalf of the Central Government Counsel is not tenable, rather this Court is of the view that the Annexure-1 dated 26.8.2005 is concerned with two charges.

15. It is settled proposition of law that in the departmental proceeding, the principle of preponderance of probabilities prevails not the charge to be proved beyond all reasonable doubts which warrants only in criminal proceeding, but even if the charges are to be proved on the basis of principle of preponderance of probabilities, it has to be proved on the basis of at least some cogent evidence.

16. It is evident from the charge, as has been indicated hereinabove that the petitioner has been proceeded with two charges. One making of vulgar postures and second desertion for a period of 172 days and it is the duty of the Inquiry Officer to come to a definite finding regarding proving of both the charges, i.e., making of vulgar postures as well as the desertion, but this Court has found from the Inquiry Report that the charge is related to making of vulgar postures has not been proved, rather it has only been connected by taking instance of going of

the petitioner to the Sector-19 Police Station. It is also evident that the Inquiry Officer has not bothered to call upon the complainant, who has made a complaint against the petitioner.

17. It has been informed that in the criminal case the petitioner has also been acquitted. However, this Court is conscious of the proposition of law that acquittal in the criminal case has got no nexus with the finding of the Inquiry Officer or the punishment inflicted by the Disciplinary Authority, but this is imported to be noted herein that even the Inquiry Officer has not conclusively proved the charge making of vulgar postures, rather it would be evident that only it has been connected by the instance of going of the petitioner to the police station. Hence, the finding given by the Inquiry Officer in this regard for proving the charge cannot be held to be proper. However, so far as the allegation of desertion is concerned, the same has conclusively been proved and has also not been disputed by the petitioner, rather the petitioner was absent for a period of 172 days. The defence taken by the petitioner is of made medical claim in his support and he has produced medical certificates, but the Inquiry Officer has not accepted the medical certificates considering the fact that the petitioner has not produced the medical prescriptions/cash memos. In this regard, the conscious view of this Court is that initially the petitioner was given leave for a period of one month and when he has not recovered, he remained absent as per the defence plea taken by the petitioner, but the question is that when he has been granted medical leave for a period of one month and if disease has not cured in that situation, being a public servant and a member of discipline force, he ought to have made a communication to the controlling authority regarding position of his physical status for extension of leave.

18. Learned counsel for the petitioner at this juncture submits that even if the application would have been filed by the petitioner for extension of the leave, no positive result could have come. But merely on presumption of the employee, no order can be passed, rather it is incumbent upon the employee to show his bona fide by making appropriate application before the authority without caring for its result, but he has not done so. In view of such a situation, the finding of the Inquiry Officer regarding prove of charge of desertion will be said to be conclusively proved.

19. The petitioner herein was the member of discipline force and as such, remaining out of service for a period of 172 days amounts to misconduct and for that, the employee working in the CISF can be punished.

20. This Court, after considering the finding of the Inquiry Officer related to making of vulgar postures as well as finding of the desertion, is of the view that the Disciplinary Authority should have been taken into consideration this aspect of the matter.

21. It is not in dispute that the Disciplinary Authority can differ with the finding of the Inquiry Officer instead of accepting it mechanically of course by assigning

the reason of difference in the facts and circumstances of the case, since the first charge related to making vulgar postures to a lady has not conclusively been proved. The Disciplinary Authority ought to have been taken note of this fact and thereafter should have passed the order of punishment, but instead of doing so, he mechanically has accepted the Inquiry Report and inflicted punishment of removal from service. It is equally settled that the Inquiry Officer while exercising the power of quasi-judicial authority is supposed to act with application of mind and should not act mechanically. It is settled that the Disciplinary Authority should have taken into consideration this aspect of the matter for the reason that if any inquiry is being contemplated and initiated, it has to be done in accordance with law that is charge has to be proved conclusively and in the case in hand, charge related to vulgar postures have not been proved conclusively, hence the punishment imposed is improper. Further, the Appellate Authority as well as the Revisional Authority has confirmed this, but when the foundation itself is improper, its subsequent order can also not to be said to be proper, rather it will also be held to be improper.

22. Considering the facts and circumstances of the case into entirety and taking into consideration the power of judicial review conferred under Article 226 of the Constitution of India which is very limited that is only in the case of perversity of finding as has been held by Hon'ble the Supreme Court in the case of Union of India and Others Vrs. P. Gunasekaran, reported in AIR 2015 SC 545 wherein the Hon'ble Apex Court has been pleased to laid down a guideline in order to make interference with the order of punishment which is being quoted herein below:-

"13. Despite the well-settled position, it is painfully disturbing to note that the High Court has acted as an appellate authority in the disciplinary proceedings, reappreciating even the evidence before the enquiry officer. The finding on Charge No.1 was accepted by the disciplinary authority and was also endorsed by the Central Administrative Tribunal. In disciplinary proceedings, the High Court is not and cannot act as a second court of first appeal. The High Court, in exercise of its powers under Art.226/227 of the Constitution of India, shall not venture into reappreciation of the evidence. The High Court can only see whether:

- a. the enquiry is held by a competent authority;
- b. the enquiry is held according to the procedure prescribed in that behalf;
- c. there is violation of the principles of natural justice in conducting the proceedings;
- d. the authorities have disabled themselves from reaching a fair conclusion by some considerations extraneous to the evidence and merits of the case;
- e. the authorities have allowed themselves to be influenced by irrelevant or extraneous considerations;
- f. the conclusion, on the very face of it, is so wholly arbitrary and capricious that no reasonable person could ever have arrived at such conclusion;

g. the disciplinary authority had erroneously failed to admit the admissible and material evidence;

h. the disciplinary authority had erroneously admitted inadmissible evidence which influenced the finding;

i. the finding of fact is based on no evidence. Under Article 226 / 227 of the Constitution of India, the High Court shall not:

(i) re-appreciate the evidence;

(ii) interfere with the conclusions in the enquiry, in case the same has been conducted in accordance with law;

(iii) go into the adequacy of the evidence;

(iv) go into the reliability of the evidence;

(v) interfere, if there be some legal evidence on which findings can be based.

(vi) correct the error of fact however grave it may appear to be;

(vii) go into the proportionality of punishment unless it shocks its conscience."

23. This Court, after taking into consideration the factual aspect as discussed above and the proposition laid down by Hon''ble the Supreme Court in the case indicated hereinabove, it is the view of this Court that the interference by this Court under Article 226 of the Constitution of India is required to be made, since the conclusion arrived at by Inquiry Officer regarding proving of charge of making vulgar postures to a lady has not been proved, rather the Inquiry Officer has reached to the conclusion on the basis of facts and circumstances in proving the said charge which no reasonable person could ever have arrived at such conclusion. Hence, for the reasons aforesaid, it is the considered view of this Court that the matter needs to be remitted before the authorities for passing fresh order in accordance with law.

24. In view thereof, the order passed by the Disciplinary Authority dated 26.8.2005 under Annexure-1 and the Appellate Authority dated 30.6.2006 under Annexure-7 as well as the Revisional Authority dated 20.02.2007 under Annexure-9 respectively are quashed. The matter is remitted before the Disciplinary Authority for passing fresh order in accordance with law. The further contention of the petitioner will depend upon the final decision taken by the authorities. The writ petition is accordingly disposed of.