

(2011) 04 OHC CK 0030
In the Orissa High Court
Case No : Writ Petition (C) No. 17416 of 2007

Laxmidhar Nayak

APPELLANT

Vs

Union of India and Others

RESPONDENT

Date of Decision : 06-04-2011

Acts Referred:

CRPF Act, 1949 — Section 11(1)
CRPF Rules — Rule 31

Citation : (2011) 04 OHC CK 0030

Hon'ble Judges : S.K. Mishra, J;L. Mohapatra, J

Bench : Division Bench

Advocate : Kali Prasana Mishra, S. Mohapatra, T.P. Tripathy and L.P. Dwivedy, for the Appellant; A. Deo (C.G.C.), for the Respondent

Final Decision : Dismissed

Judgement

S.K. Mishra, J.—The petitioner in this writ petition assails the order of his removal from service dated 25.6.2004 passed by the Commandant, 10 Battalion, Central Reserve Police Force, opposite party no.3, pursuant to an ex-parte enquiry, on the ground of unauthorized absence.

2. The petitioner pleads that he was working as a Constable(G.D.) under the Deputy Inspector General of Police, Central Reserve Police Force, opposite party No.2, bearing Force No.871261159. He was granted casual leave w.e.f. 30.11.2000 to 7.12.2000. During leave period, the mother of the petitioner died, therefore the petitioner applied for extension of leave for one month. He further pleads that thereafter he became sick and continued under medical treatment with effect from 15.12.2000. He further pleads that the Central Reserve Police Force (hereinafter referred to as "CRPF" for brevity) doctor treated him on 17.2.2001, but due to serious illness of the petitioner, the CRPF doctor referred the case of the petitioner to Bhubaneswar Government Hospital. Due to such continued illness and financial problem the petitioner could not stay at Bhubaneswar for a long period and was compelled to move his native place for

treatment of rheumatic arthritis at Bhanpur Hospital. He further pleads that he had been regularly communicating the authorities regarding his illness and submitted the leave application for extension on medical ground along with the medical certificate.

3. While matter stood thus, opposite party no.2 initiated a Departmental Proceeding against the petitioner without affording reasonable opportunity to the petitioner to show cause and before submission of any show cause to the charge sheet, the Enquiry Officer was appointed. On 26.8.2003 the petitioner was declared as an absconder under Rule 31 of the CRPF Rules by opposite party No.3 exercising the power arbitrarily. It is further pleaded that the proceeding was initiated against the petitioner u/s 11(1) of the CRPF Act, 1949 which provides for award of minor punishment in lieu of or in addition to the major penalty.

4. After knowing that he has been declared as an absconder and a Departmental Proceeding had been initiated against him, the petitioner approached this Court by filing a writ petition bearing W.P.(C) No.11781 of 2003 for quashing of the Departmental Proceeding. During pendency of the said writ petition, opposite party no.3 passed the order of removal. Hence, the petitioner had to withdraw the aforesaid writ petition to approach the appellate authority. It is further pleaded that while granting withdrawal of the writ petition, this Court permitted the petitioner to approach the appellate authority within a period of one month from the date of passing the order and further stipulated that if such an appeal is filed, the appellate authority shall entertain it and dispose of the same in accordance with law.

5. As directed the petitioner submitted an appeal before opposite party no.2, but the said authority without considering the grounds taken by the appellant in its true perspective rejected the prayer of the appellant and thereby confirmed the order of removal passed by opposite party no.3. The petitioner submits that opposite party no.2 has not followed the principles of natural justice in the aforesaid Departmental Proceeding and conducted the same in preconceived and predetermined manner. He was ill and suffering from rheumatic arthritis and was not able to move. Therefore, the plea of the opposite parties that the petitioner did not come for the second medical board is arbitrary and contrary to the facts. He further pleads that the medical certificate issued by the doctors of the Government Hospital cannot be ignored by the authorities. The petitioner further claimed that Section 11(1) of the CRPF Act does not provide for imposition of a major penalty by the authorities. Hence, a major penalty like removal from service can never be awarded under the said Section and therefore is liable to be set aside. It is further pleaded that the penalty imposed is disproportionate to the misconduct alleged. On such pleadings the petitioner pleads that the order of removal, which has been confirmed by the appellate authority, should be quashed.

6. The opposite parties have filed their counter affidavit, inter alia, admitting that

the petitioner was sanctioned fifteen days of casual leave w.e.f. 20.11.2000 to 7.12.2000 with permission to avail the Sundays and journey period. He was due to report for duty on 8.12.2000(AN), but he failed to report and since then he was over staying without any permission/sanction of leave by the competent authority. While on casual leave he sent a simple application dated 6.12.2000 for extension of one month leave. Further, he again sent an application on 30.6.2001 for extension of leave on medical ground. On scrutiny of medical certificate enclosed with the application it revealed that he was taking treatment as Out Door Patient from RFWC.CHC, Bhapur reportedly for chronic rheumatic arthritis. He was unauthorizedly absent for the last three years and during that period neither he remained hospitalized in any hospital for a single day(as per medical certificate produced by him) nor took any specialized treatment. He was directed by the Unit several times to appear before the Medical Officer-in-charge, GC CRPF, Bhubaneswar Hospital being nearer to his home town for better treatment and second medical opinion and also to take better treatment free of cost. The petitioner did not report to the Medical Officer-in-Charge, GC, CRPF Bhubaneswar Hospital. Dr. A.K. Tripathy, M.O.(RFWC) CHC, Nayagarh also requested to refer the patient to GC, CRPF Bhubaneswar Hospital for second medical opinion vide letter dated 27.7.2002.

7. In spite of clear directions neither the petitioner reported at GC CRPF Bhubaneswar Hospital for second medical opinion nor the said medical officer referred the case to any other hospital/specialist for better treatment. He was also given option to report at Unit HQR of 10 Battalion, CRPF at Delhi where all facilities for better treatment at AIIMS, Sardarjung Hospital are available. Since he was not hospitalized and reportedly received treatment as OPD patient, it was felt essential to ascertain his health condition and the matter was investigated by Superintendent of Police, Nayagarh, Orissa, as per letter dated 27.7.2002. The Superintendent of Police, Nayagarh, as per letter dated 28.3.2003 intimated that during enquiry it came to light that the individual was not sick and found absent from the village. Further, the S.P. reported that he had engaged himself in collecting money from local youngsters by motivating them to get appointment in CRPF and was reported to be staying at Bhubaneswar and at times he was visiting his native village Chakradharprasad.

8. Taking cognizance on the complaint lodged by the Officer Commanding D/10 Battalion, CRPF, the Chief Judicial Magistrate-cum-Commandant, 10 Battalion, CRPF, issued warrant of arrest against him on 6.5.2001 and sent the same to the S.P., Nayagarh, for execution. Neither the warrant of arrest was executed by the civil police nor the petitioner reported back for duty on his own. As such, a court of inquiry was ordered to ascertain the circumstances under which the petitioner overstayed from sanctioned leave. As a result of the court of inquiry, the petitioner was declared "deserter" from the force as per Rule 31 (c) of CRPF Rule, 1955 w.e.f. 8.12.2000 as per order dated 26.8.2003. Since the petitioner failed to report for duty as such a Departmental Proceeding enquiry was ordered on 1.10.2003. The opposite parties further plead that the memorandum and

article of charges with its enclosures were sent to his declared home town through Registered Post with A.D. The A.D. slip shows that he received the memorandum on 7.10.2003. He was given ample opportunity to appear before the Enquiry Officer to complete the enquiry. Since no representation was received from him, Sri Satya Prakash, Asst. Commandant of 10 Battalion, CRPF, was appointed as an Enquiry Officer to enquire into the charges framed against the individual. The Enquiry Officer as per letter dated 4.11.2003 directed the petitioner to appear before him within ten days, latest by 19.11.2003, for preliminary hearing. In reply to the said memorandum, office order and Enquiry Officer's letter, the petitioner submitted a legal notice dated 11.11.2003 regarding deferment of DE through his advocate for which reply was given to the concerned advocate by the letter dated 19.11.2003. Since the petitioner failed to report within the stipulated time as directed by the Enquiry Officer he was left with no option except to conduct the DE ex-parte as per the existing Rules. In such ex-parte proceedings both the charges framed against the officer were found to be proved. The Enquiry Officer's report was also served through Registered Post with A.D. vide letter dtd.7.6.2004 to the petitioner with a direction to submit representation, if any, within fifteen days. Thereafter also as no reply was received from the petitioner even after expiry of the stipulated time, the disciplinary authority after going through the entire proceedings came to the conclusion that dismissal from service shall be the appropriate punishment and awarded the same.

9. Aggrieved by the said order he filed a writ petition before this Court. The same was allowed to be withdrawn on 9.2.2006 giving him liberty to prefer an appeal before the appellate authority. Thereafter the petitioner preferred an appeal to the DIGP, CRPF, Durgapur (WB). After considering the case, the appellate authority came to the conclusion that the appeal is without merit, hence he passed an order dated 10.10.2006 to that effect dismissing the appeal of the petitioner. The petitioner has not filed any revision before the competent authority as provided in the CRPF Rules.

The opposite parties further plead that the D.E. was initiated against the petitioner for grave misconduct as a member of the Force was proved beyond any doubt and the punishment was imposed to meet the ends of justice. It is further pleaded that being a member of the Force overstay from sanctioned leave for more than three and half years is not justifiable at all. Though he was directed to report at the GC Hospital, Bhubaneswar, or at Unit HQR, New Delhi, for better treatment, he did not respond to the same. During enquiry it came to light that the individual was not sick and found absent from the village. Thus, after a properly conducted DE he was found not fit to be retained in a disciplined Force like CRPF for such a long absence considering the nature of duties for which he was enlisted for. The authority therefore took the decision that the petitioner deserves stringent punishment keeping in view the requirement of the high standard of discipline and nature of duty he was supposed to perform. Considering this vital aspect, the appellate authority has also rejected the appeal

of the petitioner. Thus, on such pleading, the opposite parties prayed to dismiss the writ petition being devoid of any merit.

10. In a rejoinder affidavit the petitioner claimed that the report of the local Police was totally false and baseless as he was under treatment during the relevant period. The local Police without enquiring the facts falsely submitted the report. Without any enquiry or without affording any opportunity to the petitioner, the allegations cannot be proved. 11. The opposite parties have also filed an additional affidavit to the rejoinder filed by the petitioner.

12. In course of hearing of the writ petition, Mr. K.P.Mishra, learned counsel for the petitioner, submitted that there has been gross violation of principles of natural justice in this case as the petitioner was not given proper and adequate opportunity of putting forth his case and defend the allegations made against him. Alternatively, learned counsel for the petitioner relying upon the ratio decided in the case of Jagdish Singh v. Punjab engineering college and others; (2009) 2 SCC L&S 569 contended that mere unauthorized absence from duty is not enough to inflict the punishment of removal from service and such punishment is shockingly disproportionate to the misconduct alleged. Therefore, learned counsel for the petitioner prayed that the orders impugned be set aside.

13. Learned Asst. Solicitor General, on the other hand, produced the Departmental Enquiry file, wherein the appellate authorities have taken up the case of the petitioner and contended that adequate opportunities were given to the petitioner in the sense that notice of the date of enquiry, notice to file show cause etc. sent, were received by the petitioner. In spite of such notices, he failed to appear before the DE and, therefore, he cannot claim that the principles of natural justice has been violated in this case. Learned Asst. Solicitor General also contended that keeping in view the nature of duty to be performed by the petitioner and the disciplined behaviour required from a Member of a Force, the punishment inflicted in this case is appropriate and it requires no interference. Therefore, he prayed to dismiss the writ petition.

14. From the records, it is clear that on 17th October, 2003 the Commandant, 10 Battalion, CRPF appointed the Enquiry Officer. A copy of the order was sent to the petitioner at his home address, through Registered Post with A.D. On 23.10.2003 the D.E was placed before the Enquiry Officer. Thereafter, on 4th November, 2003 the E.O. again ordered for issuing notice to the petitioner through registered post. On 28th November, 2003 the case was again taken up, but the petitioner was absent. Hence another letter was issued on that day to him to report in person before the E.O. On 13th February, 2004 also another notice was sent to the petitioner. On 4th March, 2004 he did not appear, but the E.O. records that finding no other alternative the D.E. was to proceed ex-parte and enquiry on day to day basis was taken up. On 21.3.2004 copies of the statement of witnesses so recorded by the E.O. along with the copies of the exhibits was sent to the delinquent vide registered post dated 21.3.2004 giving him three weeks time to appear before the undersigned in person to defend

himself of the charges levelled against him. After expiry of three weeks, on 14th April, 2004, as the petitioner did not appear before the Enquiry Officer, the Enquiry Officer proceeded to prepare the report. On 15.4.2004 he submitted his report to the competent authority.

15. The principles *audi alteram partem* requires that a person should not be condemned before giving an adequate and reasonable opportunity of hearing. If in spite of sufficient notice, the charged employee do not appear before the Enquiry Officer, then there cannot be any violation of principles of natural justice. In this case two decisions have been relied upon by the learned counsel for the petitioner. In the case of *State of U.P. and Others Vs. Saroj Kumar Sinha*, , the Hon''ble Court has examined the question when an *ex-parte* enquiry can be conducted. The Hon''ble Supreme Court has held that it is only in case when the Government servant despite notice of the date fixed fails to appear, the Enquiry Officer can proceed with the enquiry *ex parte*. Even in such circumstances, it is incumbent on the Enquiry Officer to record the statement of witnesses mentioned in the charge sheet. Since the Government Servant was absent he would clearly lose the benefit of cross-examination of the witnesses, but on the other hand, in order to establish the charges, the department is required to produce necessary evidence before the enquiry officer. This is so as to avoid the charge that the inquiry officer has acted as a prosecutor as well as a judge. The Hon''ble Supreme Court further held that an inquiry officer acting in a quasi-judicial capacity, is in the position of an independent adjudicator. He is not supposed to be a representative of department/disciplinary authority/Government. His function is to examine the evidence presented by the Department, even in the absence of the delinquent official to see as to whether the unrebutted evidence is sufficient to hold that the charges are proved.

In the case of *State of Uttaranchal and Others Vs. Kharak Singh*, , the Hon''ble Supreme Court has held that a witness should not be the enquiry officer and the evidence should be led in presence of charged employee. The Hon''ble Supreme Court further held that there are some basic principles regarding conducting departmental enquiries, which are as follows:-

(i) The enquiries must be conducted *bona fide* and care must be taken to see that the enquiries do not become empty formalities;

(ii) If an officer is a witness to any of the incidents which is the subject matter of enquiry or if enquiry was initiated on a report of an officer, then in all fairness he should not be the enquiry officer. If the said position becomes known after appointment of enquiry officer, during the enquiry, steps should be taken to see that the task of holding an enquiry is assigned to some other officer;

(iii) In an enquiry, the employer/department should take steps first to lead evidence against workman/delinquent charged and give an opportunity to him to cross-examine witnesses of the employer. Only thereafter, the workman/delinquent be asked whether he wants to lead any evidence and asked to give an

explanation about the evidence led against him;

(iv) On receipt of enquiry report, before proceeding further, it is incumbent on the part of disciplinary/punishing authority to supply a copy of enquiry report and all connected materials relied on by the enquiry officer to enable him to offer his views, if any.

In applying these principles to the case in hand, it is seen that the petitioner was given a notice to appear before the Enquiry Officer. Thereafter also the E.O. has sent several notices. Even after proceeding ex parte, the Enquiry Officer has sent the statement of witnesses recorded along with the copies of the exhibits to the petitioner as per letter No.M.V-1/04 C/10 dt.21.3.2004 giving him three weeks time to appear before the E.O. to defend the charges levelled against him.

16. Having gone through the records, it is seen that not only the petitioner has been given enough opportunity/notice to defend himself in the departmental enquiry, the enquiry officer has also carefully recorded the evidence of as many as six witnesses from the side of the employer. All these documents were also sent to the present petitioner. Having considered the materials placed before him, the Enquiry Officer has come to a proper conclusion. It cannot be said that the Departmental Enquiry is conducted in a casual manner with a closed mind. The Enquiry Officer was definitely acting as a quasi-judicial authority in this case and this Court finds no infirmity in the procedure adopted by the Enquiry Officer.

17. Furthermore, it is not disputed by the petitioner that he has not received notice in this case. All he pleads that he was ill during that period. However, he has failed to establish his crippling illness, which prevented him to move the HQR or to appear before the E.O. by showing that he was hospitalized for a long period or was being treated in a highly specialized manner for the entire period. It is also not disputed that after receipt of the enquiry report before proceeding further, the Disciplinary Authority did not supply the copy of the enquiry report. However, all the connected materials, i.e. evidence of the witnesses as well as the exhibits were not supplied by him by the D.A. But in this case it will not cause any prejudice to the petitioner because the Enquiry Officer has sent all these documents as per the letter dtd.21.3.2004. Thus, there is no violation of any of the settled principles guiding departmental enquiries in this case.

18. The contentions raised by the learned counsel for the petitioner is that the punishment inflicted is shockingly disproportionate to the misconduct alleged/proved. It is not disputed that the petitioner was unauthorized absent from 8.12.2000 till 1.10.2003(on which date the charges were framed). Thus, he was absent from more than two years nine months and there is no cogent explanation for the same. Learned counsel for the petitioner relied upon the reported case of Jagdish Singh v. Punjab Engineering College and others (supra) wherein the Hon''ble Supreme Court has held that penalty of removal from service for unauthorized absence on a part of a sweeper on four spells totaling to fifteen days in all in two months to sort out his daughter's problem with her in-

laws is shockingly disproportionate. In the said case, the Hon''ble Supreme Court has reiterated that 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 or the appellate authority to reconsider the penalty imposed.

19. In view of the aforesaid ratio, this Court considers the punishment awarded to the petitioner in the backdrop of the fact that the petitioner was a member of the Force which is required to maintain an absolute discipline in the matters of performance of duty as well as in the matter of conduct in normal life. The conduct and discipline expected from a member of a Force cannot be equated with other employees like a Sweeper or a Peon or even a Class-III employee of the Government establishment. Thus, keeping in view the unauthorized absence of about three years of the petitioner, it is held to be a sufficient ground to inflict harshest punishment of removal from service and the Court does not consider it expedient to interfere with the same.

20. Accordingly, this Court finds no merit in the writ petition and the same is dismissed.

21. The files produced by the learned Asst. Solicitor General be returned to him.