

(2008) 11 MAD CK 0238

In the Madras High Court

Case No : Writ Petition No. 20779 of 2004

Loganathan

APPELLANT

Vs

The Director General Railway Protection Force, The
Commandant III Battalion, Railway Protection and Special
Force and The Inspector General Railway Protection Special
Force

RESPONDENT

Date of Decision : 27-11-2008

Acts Referred:

Railway Protection Force Rules, 1987 — Rule 104, 104.5, 153, 153.12, 153.9

Citation : (2009) 3 MLJ 272

Hon'ble Judges : R. Banumathi, J

Bench : Single Bench

**Advocate : D. Hariparanthaman, for T. Fenn Walter Associates, for the
Appellant; P.H. Arvinth Pandian, for the Respondent**

Final Decision : Allowed

Judgement

R. Banumathi, J.—The punishment of dismissal from service imposed by the Disciplinary Authority and confirmed by the Appellate Authority is the subject matter in this writ petition.

2. The Petitioner was appointed as Constable in III Battalion of the Railway Protection Special Force on 11.04.1993 on probation for a period of two years with effect from 11.04.1993, but could not complete his probation period as he fell sick and was referred to the Senior Divisional Medical Officer Northern Railway, Lucknow on 27.06.1994 for a Pre Medical Examination from where he was referred to the Divisional Hospital, Northern Railway, Ferozpur on 30.06.1994. He was operated for Hernia at Ferozpur. He was discharged on 18.07.1994 and reported back to the Senior Divisional Medical Officer, Ludhiana on 19.07.1994 who recommended sixty days departmental leave. Petitioner left to his native place in Tamilnadu on 26.07.1994 as he was recommended for leave.

3. Letters dated 09.08.1994, 01.10.1994 and 21.10.1994 were sent to him to report immediately to duty. The Petitioner sent replies dated 20.08.1994, 10.10.1994, 01.11.1994 regarding extension of leave and he stated that he was still taking treatment. According to Petitioner he took treatment in the Railway Hospital, Erode and later from the Government Doctor belonging to the Tamilnadu Government Service.

4. The Petitioner was issued Charge Memo dated 23.11.1994 alleging that he was unauthorisedly absent from 27.07.1994 and disciplinary action was initiated under Rule 153 of the Railway Protection Force Rules, 1987 (RPF Rules). The enquiry was fixed on 02.12.1994 and the Petitioner sought for postponement of the disciplinary proceedings. Stating that the delinquent employee had not turn up for enquiry the disciplinary proceedings was set exparte and the Petitioner was found guilty of the charges. Explanation was called for from the Petitioner by the letter dated 22.12.1994. Grievance of Petitioner is that without affording him sufficient opportunity to offer his explanation punishment of dismissal from service was passed.

5. The Petitioner preferred appeal and the same was dismissed by the order dated 28.02.1996. Thereafter Petitioner made various representations seeking reinstatement. The Appellate Authority again passed an order dated 16.06.1999 dismissing the appeal on the ground that the appeal was preferred after 4 years belatedly. The Petitioner had also preferred revision and the same was also dismissed. In the writ petition, petitioner has challenged the order of dismissal dated 12.01.1995.

6. Subsequently by way of amendment to the prayer in the writ petition, Petitioner has also challenged the order of the Appellate Authority (28.02.1996) and the order in the Revision (09.08.2000).

7. Opposing the petition, Respondents have filed counter stating that Petitioner discontinued the treatment at his own risk and unauthorisedly and also without proper intimation. Case of Respondent Department is that the Petitioner was served with number of call letters directing him to resume his duty; but he failed to respond to the same and continued to remain absent without any authority or information. According to Department, maximum opportunity was offered to the Petitioner to defend his case but the Petitioner never bothered to make use of the opportunity and never bothered to appear before the Enquiry Officer to defend his case. As the stipulated time has lapsed, the Competent Authority passed orders awarding order of punishment of dismissal from service with immediate effect on 12.01.1995 which was duly communicated to the Petitioner.

8. Learned counsel for the Petitioner, Mr. D. Hari Paranthaman, contended that no sufficient opportunity was given to the Petitioner to put forth his defence. Drawing court's attention to various dates, the learned Counsel for the Petitioner contended that on 02.12.1994 Mr. Sahota, was appointed as Enquiry Officer and enquiry was adjourned to 20.12.1994, and the enquiry was held on that date. It

was further submitted that for the enquiry scheduled for 20.12.1994, the Petitioner prayed for adjournment of the enquiry and without providing reasonable opportunity to the Petitioner the enquiry was held and the order passed is clearly violative principles of natural justice and Rule 153.9 of RPF Rules. It was further submitted in the second stage of calling for explanation issuing Show Cause Notice before imposing the punishment no sufficient opportunity was afforded to the Petitioner and the entire proceedings is violative of principles of natural justice.

9. Mr. P.H. Arvinth Pandian, learned Counsel for the Respondents submitted that without obtaining prior sanction or leave certificate the Petitioner unauthorisedly deserted the force. The learned Counsel further submitted that mere submission of leave letter is not sufficient and the Petitioner must have obtained leave certificate/sick memo and without certificate the Petitioner's absence was unauthorised. Learned Counsel further submitted that inspite of several call notices writ petitioner deliberately did not participate in the enquiry. The learned Counsel further submitted that the dismissal order was passed by the Competent Authority after giving due opportunity to the Petitioner to present his case before the departmental proceedings and the Petitioner failed to avail the same and there was no violation of principles of natural justice.

10. Before advertng to the rival contentions, we may briefly refer to various dates and events of the enquiry proceedings. In the Departmental enquiry initiated against the Petitioner one Md. Sharif - Inspector was appointed as the Enquiry Officer. In view of his superannuation of Md. Sharif, Mr. Sahota, Inspector was appointed as the Enquiry Officer. Enquiry Officer Mr. Sahota sent the communication on 04.12.1994 fixing the Departmental enquiry at Ludhiana on 20.12.1994, which was served on the Petitioner on 09.12.1994. Petitioner sent telegram on 15.12.1994, informing his inability to attend enquiry and requested for postponement of the enquiry. Without affording opportunity to the Petitioner the enquiry proceeded and the Petitioner was found guilty of the charge - unauthorisedly absenting from the duty w.e.f 27.07.1994. Accepting the report of the Enquiry Officer the Disciplinary Authority passed the order imposing punishment of dismissal from service observing as under:

All this shows that the party charged intentionally and deliberately flouted and violated the orders and without any sanction from the Competent Authority proceeded to his home and remained by adopting various tactics. It further reflects the clear intentions of the party charged to stay at home under the pretext of self sickness. Had the party charged any interest to continue in service, he would have definitely joined duty by now or would have attended enquiry which was postponed for 15 days on his request.

11. The question falling for consideration is whether the Petitioner was unauthorisedly absent, whether the Disciplinary Authority was right in observing that the delinquent deliberately did not bother to avail the opportunity to defend his case. Further question falling for consideration is whether the disciplinary

proceeding is vitiated due to violation of principles of natural justice.

12. As pointed out earlier, the Petitioner was operated for Hernia and he was recommended for sixty days of departmental leave. The contention of the Respondent is that as per Rule 104.5 of RPF Rules 1987, the Petitioner should have obtained leave certificate from his unit Headquarters, communicating the leave sanctioned to him.

13. RPF Rule 104.5 reads as under:

A leave certificate in the prescribed form shall be issued to every enrolled members of the Force proceeding on leave, other than casual leave and such certificate shall be presented by the member personally on his rejoining from leave to the officer-in-charge of the place at which he rejoins, who shall endorse on the certificate the hour and date of rejoining and forward the same to the office where his leave account is maintained.

Stand of the Respondent is that without obtaining the leave certificate or without any prior intimation or without any authority the Petitioner deserted the force with effect 27.07.1994.

14. Per contra, according to writ petitioner to take treatment for Hernia in his native place, the Petitioner left to his native place. In the letter dated 30.06.1994 by Sr.D.M.O. I/c; Ludhiana has advised the Petitioner to undergo surgery for Hernia. In the said letter Sr.D.M.O.I/c;LDH has recommended for sixty days departmental leave as seen from the following:

He has been advised to undergo surgery for the same (Hernia). The employee is anxious to get departmental leave of sixty days for the same. His leave application is attached herewith/Recommended his sixty days departmental leave w.e.f. 30.06.1994 as applied by him.

15. On 27.07.1994, the Petitioner submitted leave application addressing to Sr.D.M.O.I/c.LDH with leave recommendation enclosing Hernia operation certificate (vide a letter dated 29.07.1994 to C.C. B.Coy). The Petitioner submitted his leave application stating that he would like to proceed to his native place for taking further treatment. Infact, after returning to his native place the Petitioner was still taking treatment. According to Petitioner he took treatment in the Railway Hospital Erode and later from the Government Doctor of Tamilnadu Government Service.

16. Call letters intimations dated 10.08.1994, 01.09.1994, 12.09.1994 and 12.10.1994 were sent to the Petitioner directing him to resume back his duties. The Petitioner was informed that he left the duty without authorisation and calling upon him to report for duty. Stating that he is continuing treatment in his native place and enclosing medical certificate, the Petitioner sent replies dated 20.08.1994, 10.10.1994 and 01.11.1994.

17. Placing reliance upon Mithilesh Singh Vs. Union of India (UOI) and Others, ,

the learned Counsel for Respondent contended that mere making of request of leave is not proper intimation and that as per RPF Rules 104.5, the Petitioner ought to have obtained leave certificate. Observing that mere making for application for leave cannot be construed to be of any consequence. In the said decision the Hon"ble Supreme court has held as follows:

...

8.Rule 147(vi) deals with the case of absence without proper intimation. A mere application for grant of leave cannot be construed to be a proper intimation for absence, Rule 104 indicates various modalities governing grant of leave. There is prohibition on any member of the Force to leave Station even on holidays without specific permission of the Authority empowering to grant casual leave. These modalities have been enumerated in Rule 104 clearly bring out the essence of discipline, which is required to be observed. Absence from duty without proper intimation is indicated to be a grave offence warranting removal from service. Therefore, mere making an application for leave cannot be construed to be of any consequence in the background of the strict requirement of giving proper intimation. Even if it is accepted that there was intimation, that by no such imagination can be construed to be a proper intimation for diluting the requirement of obtaining permission before absenting from duty, stress is on the expression "proper". It means appropriate, in the required manner, fit, suitable, apt. The mere making of a request of leave, which has not been accepted is not a proper intimation. It cannot be said that the said word is a surplusage. The intention of legislature is primarily to be gathered from the language used, and as a consequence a construction which results in rejection of words as meaningless has to be avoided. It is not a sound principle of construction to brush aside word(s) in a statute as being inapposite surplusage; if they can have appropriate application in circumstances conceivably within the contemplation of the statute.

18. In the said case the delinquent employee was posted in terrorist affected area and remained absent from duty without leave. In such facts and circumstances of case Hon"ble Supreme Court has observed that any act of indiscipline of such an employee cannot be lightly taken .

19. Facts of the present case stands entirely on different footing. The Petitioner was operated for Hernia and Sr.D.M.O.I/c.LDH recommended for sixty days of leave. As immediately after operation, as he was away from his family in North India, the Petitioner might have been anxious to go back to his native place for convalescence and further treatment as such no indiscipline could be attributed to the Petitioner.

20. On behalf of Petitioner it was contended that the Petitioner was not given reasonable opportunity and that he was unreasonably set exparte on 20.12.1994, and is violative of principles of natural justice and Rule 153.9 of the RPF Rules. It was further contended that the Enquiry Authority proceeded as if

several adjournment was granted and there by setting Petitioner exparte on 20.12.1994.

21. As pointed out earlier, Charge Memo dated 23.11.1994, was issued to the Petitioner alleging that he was unauthorisedly absent from 27.07.1994. The disciplinary action was initiated under Rule 153 of the RPF Rules. In the said charge memo dated 23.11.1994, alleging that he was unauthorised absent from 27.07.1994, the disciplinary action was initiated under Rule 153 of the RPF Rules of 1987. In the said Charge Memo, it was stated that Mr. Mohd Sheriff, was nominated as Enquiry Officer and also the enquiry was fixed on 02.12.1994 at Lucknow. The nomination of Mr. Mohd Sheriff as Enquiry Officer was cancelled in the order dated 02.12.1994. The Petitioner sought postponement of the enquiry that was fixed on 02.12.1994, through his telegram. But the enquiry was not conducted on 02.12.1994 due to the cancellation of the nomination of the enquiry officer Mr. Mohd Sheriff. By an order dated 02.12.1994. Mr. Sahota was appointed as Enquiry Officer. Mr. Sahota sent a letter dated 04.12.1994 to the Petitioner fixing the enquiry on 20.12.1994 at Lucknow. The Petitioner received the same and sent a telegram expressing inability to participate in the enquiry on 20.12.1994, due to Hernia operation and sickness. He requested extension of leave also. The Enquiry Officer received the telegram on 19.12.1994 as admitted by him. However, the Petitioner was set ex parte.

22. It is thus seen that inspite of Petitioner's request for postponement of enquiry he was set ex parte on 20.12.1994, which is violative of principles of natural justice and the Rule 153.9 of the RPF Rules. Rule 153.9 of the RPF Rules reads as under:

If the enrolled member charged fails to turn up on the day fixed for the start of inquiry and no reasonable excuse is offered for not being present on the fixed time and day, the Inquiry Officer may commence the inquiry ex parte.

23. As rightly contended by the learned Counsel for Petitioner, petitioner had reasonable excuse seeking adjournment on medical grounds. But without considering Petitioner's request, setting him exparte is blatant violation of principles of natural justice. From his native place to reach North India, petitioner has to travel about 1500 kms. When the Petitioner had sent the telegram dated 15.12.1994, sufficient opportunity ought to have been given to the Petitioner. In such facts and circumstances, the Disciplinary Authority was not right in observing that the "Charged employee was deliberately absenting and deliberately flouted and violated the orders". In my considered view there is a clear violation of principles of natural justice in conducting the enquiry proceedings.

24. Also, in the next stage of calling for explanation, before imposing punishment, there is violation of principles of natural justice. Disciplinary Authority sent the report of Enquiry Officer and the deposition of witnesses in Hindi alongwith his letter dated 22.12.1994, calling upon the Petitioner to submit

his explanation on the findings of the Enquiry Officer within 15 days after receipt of the letter. The Petitioner received the said letter (22.12.1994) on 31.12.1994.

25. Learned counsel for the Petitioner contended that furnishing of deposition of witness in Hindi amounts to denial of reasonable opportunity. As per Rule 153.12 of RPF Rules, statement of witness shall be given to the party charged to afford a reasonable opportunity to the Petitioner. Translated version of Hindi statement of witnesses ought to have been furnished to the Petitioner.

26. Learned counsel for the Respondents, Mr. P.H. Arvind Pandian, contended that enquiry report dated 22.12.1994, contains the gist of evidence of each witness in English and therefore, no prejudice could have been caused to the Petitioner by furnishing him Hindi version of statement of witnesses. Enquiry report dated 22.12.1994, contains brief version (in English) of each witnesses. The Hindi version of witnesses runs to number of pages therefore it cannot be contended that the gist of English version of evidence of witnesses would be the translated version of entire statement of each witness. There is no force in the contention that no prejudice was caused by furnishing deposition of witnesses in Hindi.

27. Petitioner received the Enquiry Officer's report and Show Cause Notice on 31.12.1994. In the said letter Petitioner was called upon to submit his explanation within 15 days from the date of receipt of the enquiry report. The said letter reads as under:

A copy of enquiry report of Enquiry Officer is enclosed. The Disciplinary Authority will take suitable decision after considering the report. If you wish to make any representation or submission against the enquiry report you may do so in writing to the Disciplinary Authority within 15 days of the receipt of this letter alongwith the enquiry report.

28. But without waiting for fifteen days from the date of receipt of the letter (i.e., 31.12.1994) the Disciplinary Authority passed the impugned order on 12.01.1995, dismissing the Petitioner from service. Fairness required to afford sufficient opportunity to the Petitioner at least in the next stage of calling for explanation before imposing the Punishment.

29. It is well settled that principles of natural justice will have to be complied with. One of the principles of natural justice is Audi alteram partem (Hear the other side). The State must be a model employer, and must act fairly towards its employees. Only then would good governance be possible.

30. In *Canara Bank v. V.K. Awasthy* 2005 (2) L.L.N. 996, the Hon'ble Supreme court held that the concept of natural justice has undergone a great deal of change in recent years. As observed in Para.8, at page 1001, of the said judgment:

Natural justice is another name for common-sense justice. Rules of natural justice are not codified canons. But they are principles ingrained into the

conscience of man. Natural justice is the administration of justice in a commonsense liberal way. Justice is based substantially on natural ideals and human values...

29. In Para.12 of the said judgment it was observed, at page 1002 of 2005 (2) L.L.N. 996:

What is meant by the term "Principles of natural justice" is not easy to determine. Lord Sumner (then Hamilton. L.J) in *Ray v. Local Government Board* (1914) 1 K.B. 160, described the phrase as sadly lacking in precision. In *General Council of Medical Education and Registration of U.K. v. Sanckman* 1943 A.C. 627, Lord Wright observed that it was not desirable to attempt "to force it into any Procrustean bed.

31. In *State of Maharashtra Vs. Public Concern for Governance Trust and Others*, , it was observed:

In our opinion, when an authority takes a decision which may have civil consequences and affects the rights of a person, the principles of natural justice would at once come into play.

32. The present case is a clear case, where principles of natural justice was violated in as much as the Petitioner was violated. No reasonable opportunity was afforded to the Petitioner to participate in the enquiry nor such opportunity was afforded to him to offer his explanation before imposing the extreme punishment of dismissal from service. At every stage, there was clear violation of principles of natural justice which in my considered view would vitiate the enquiry proceedings.

33. In so far as quantum of sentence is concerned also the punishment of dismissal from service appears to be harsh and disproportionate. In *U.P. State Road Transport Corporation and Others Vs. Mahesh Kumar Mishra and Others*, , the Hon"ble Supreme Court has held that where the punishment inflicted upon the delinquent employee shocks the conscience of the court, the court can interfere with the punishment on the ground that it is disproportionate.

34. Observing that *Wednesbury* principle of unreasonableness has been replaced by doctrine of proportionality, in *State of M.P. and Others Vs. Hazarilal*, , the Hon"ble Supreme Court has held as under:

...

8. An authority which is conferred with a statutory discretionary power is bound to take into consideration all the attending facts and circumstances of the case before imposing an order of punishment. While exercising such power, the Disciplinary Authority must act reasonably and fairly. The Respondent occupied the lowest rank of the cadre. He was merely a contingency peon. Continuation of his service in the Department would not bring a bad name to the State. He was not convicted for any act involving moral turpitude. He was not punished for any

heinous offence.

...

11. Furthermore, the legal parameters of judicial review have undergone a change. Wednesbury principle of unreasonableness has been replaced by the doctrine of proportionality. (See Indian Airlines Ltd. Vs. Prabha D. Kanan, , State of U.P. Vs. Sheo Shanker Lal Srivastava and Others, and M.P. Gangadharan and Another Vs. State of Kerala and Others,)

35. We may also refer to the decision of the Division Bench of this Court in 1997 W.L.R. 626, D. Sainson v. The Chief Security Commissioner and Ors. in the said case for remaining on unauthorised absence for 45 days the Railway Authorities imposed punishment of dismissal from service. Referring to RPF Rules 156(b) (iii), Division Bench has held that the punishment is disproportionate and harsh for the offence alleged and modified the punishment as withholding of increments for three years with cumulative effect.

36. In the present case, there are several mitigating aspects which the Disciplinary Authority did not keep in view. The Petitioner underwent Hernia operation and the Medical Authorities recommended leave for sixty days. In his native place the Petitioner continued his treatment and requested for postponement of the enquiry proceedings. Without affording him reasonable opportunity the punishment of dismissal from service was imposed on him.

37. Appellate Authority as well as the Revisional Authority also did not keep in view the mitigating aspects. Petitioner had been repeatedly sending the representations to the higher officials and the Board to consider his case. Therefore though there was delay on the part of the Petitioner in filing appeal and revision and this writ petition latches cannot be made as a ground for denying the relief to the Petitioner.

38. In the result the order of 2nd Respondent dated 12.01.1995 is set aside and this writ petition is allowed.

The Respondents are directed to reinstate the Petitioner within a period of three months from the date of receipt of a copy of this order.

Petitioner shall not be entitled to back wages.

However the period from 12.01.1995 to till date of joining service shall be taken into account for continuation of service and pensionary benefits.