

(2011) 10 RAJ CK 0055
In the Rajasthan High Court
Case No : Civil Writ Petition No. 1152 of 2003

Mohd. Shafi

APPELLANT

Vs

State and Others

RESPONDENT

Date of Decision : 14-10-2011

Acts Referred:

Rajasthan State Hotels Corporation Employees Standing Orders, 1970 — Clause 108(Xii)

Citation : (2013) 2 RLW 1110

Hon'ble Judges : Ajay Rastogi, J

Bench : Single Bench

Advocate : Ram Kumar Sharma, for the Appellant; S.K. Sharma for Respondents 2 and 3, for the Respondent

Judgement

Ajay Rastogi, J.—Instant petition was initially filed by petitioner himself assailing order of penalty inflicted of dismissal vide order dt. 25.5.2002 (Ann. 4) for the misconduct of alleged wilful absence from duty for 76 days, against which appeal was preferred but it came to be rejected by a non-speaking & cryptic order dt. 28.12.2002; but before the matter came up for hearing, petitioner died pendente lis on 20.4.2008 and on application filed by widow as his legal heirs & representatives that came to be allowed vide order dt. 15.5.2008 and is presently pursued by her. Writ petitioner whose date of birth was 15.4.1947, initially joined as LDC and promoted as UDC on 16.7.1983 and as Asstt. Manager on 02.11.1999. It appears from the record that at one stage, State Government/ Govt. Undertaking introduced voluntary retirement scheme dt. 05.7.1989 known as Golden Hand-Shake Scheme and that came to be introduced by the respondent Corporation vide order dt. 13.7.1990 further circulated vide order dt. 25.5.2000 inviting applications; pursuant to which, such of employees having rendered Ten years" service or attained 40 years age, were eligible for seeking voluntary retirement. Writ petitioner claiming himself to be eligible applied for seeking voluntary retirement under VRS Scheme to be effective from 01.10.2000 but in furtherance of telephonic directions of respondents, writ petitioner

submitted another application on 24.6.2000 for VRS being given effect immediately and when no orders came to be passed by the authority, representations were sent followed by legal notice dt. 03.5.2001 for early disposal of application seeking VRS with immediate effect.

2. But to his utter dismay, respondent authority did not accept his application seeking VRS but at the same time, passed order of compulsory retirement on 07.5.2001, which was challenged in CWP-2354/2001 and the same came to be allowed vide order dt. 09.8.2001 *ad infra*:

...The petitioner was born on 15.4.1947. The petitioner was compulsorily retired vide order dated 07.5.2001. Under the Standing Order No. 57, an employee could be retired from service compulsorily only on his attaining age of fifty five years. The order of compulsory retirement against petitioner has been issued on 07.5.2001 i.e. Before the petitioner has attained the age of fifty five years. Powers under Standing order No. 53 could have only been exercised after giving proper opportunity to the petitioner. Under these circumstances, the impugned order dated 07.5.2001 is quashed. However, it shall be open for respondents to take appropriate action against petitioner on his attaining the age of fifty five years.

However, despite order of compulsory retirement being quashed in the writ petition (*supra*), petitioner preferred Special Appeal (Writ)-887/2001 wherein his grievance was that order of compulsory retirement has been quashed but as regards his application for VRS, no order has been passed and to that limited extent, special appeal was preferred, which was admitted on 28.9.2001 and finally came to be disposed of vide order dt. 16.2.2004 *ad infra*:

Be that as it may, as long as the termination order stands, the plea of the appellant based on Voluntary Retirement Scheme, cannot be considered.

In the circumstances, therefore, this appeal is disposed of with the liberty to the appellant to move an appropriate petition, if so advised, for seeking benefit under the voluntary retirement scheme in case the order of termination of the appellant is quashed.

However, *pendente* special appeal, writ petitioner was served with charge sheet dt. 16.10.2001 for the alleged wilful absence from 25.1.2001 to 10.4.2001 (76 days), for which sickness certificates furnished by him were not considered to be in conformity with relevant rules; and as a matter of record, much before initiation of disciplinary action, alleged absence period of 76 days was duly sanctioned as leave without pay by the competent authority vide order dt. 01.8.2001 (Ann. 2).

3. But for the alleged absence of 76 days inquiry was held by respondent-Corporation where sickness certificates furnish by petitioner - details whereof are stated in the statement of allegation appended to the charge sheet for the period from 25.1.2001 to 10.4.2001 (76 days) but the inquiry officer held the charge

proved and copy of the report was sent to the writ petitioner along with tentative opinion of disciplinary authority and since no reply or objection was submitted by him, while accepting the finding of guilt recorded by inquiry officer, the disciplinary authority held him guilty and inflicted with penalty of dismissal from service vide order dt. 25.5.2002 - against which appeal preferred by him came to be rejected by appellate authority vide non-speaking & cryptic order dt. 28.12.2002. Hence instant petition.

4. Counsel for petitioner submits that period of alleged absence of 76 days was regularised by the authority since there was leave to his credit after being sanctioned vide order dt. 1.8.2001 (Ann. 2) wherein there was a note endorsed that if salary has been paid to him for 76 days, the same may be recovered/adjusted out of future salary; and taking aid whereof, Counsel submits that once period of alleged absence stood regularised, there was no justification available to consider such period of absence to be misconduct and the procedure adopted by serving him charge sheet and holding him guilty besides inflicting impugned penalty of dismissal from service was wholly arbitrary and without application of mind and deserves to be quashed. Counsel further submits that petitioner became victim only for the reason that his application seeking VRS was arbitrarily rejected and since he was pressing hard for taking decision on his application seeking VRS, the authority for one reason or the other, was not inclined and without any basis, he was compulsorily retired and when order of compulsory retirement came to be assailed and set aside by the Court in CWP-2354/2001, the only way out available with the Corporation was to initiate disciplinary action for shunting him out from service and indeed they achieved their goal by the procedure being adopted in holding him guilty and inflicting penalty of dismissal from service.

5. As regards order of appellate authority Counsel submits that appellate authority was supposed to re-appreciate the finding and examine as to whether penalty inflicted upon delinquent was in consonance with the charges found proved against him and whether there were good & sufficient reasons recorded by disciplinary authority while inflicting penalty of dismissal but by non-speaking & cryptic order dt. 28.12.2002 (Ann. 5), the appellate authority dismissed the appeal, which is wholly arbitrary and in violation of Art. 14 & 21 of Constitution.

6. Counsel finally submits that apart from other objections raised, looking to the nature of charges found proved against him, penalty of dismissal from service was shockingly disproportionate and that requires to be interfered by this Court.

7. However, in the reply to the petition filed by respondent, what has been emphasized is that the procedure provided under Rajasthan State Hotels Corporation Employees Standing Orders, 1970 ("Standing Orders, 1970") has been followed and after affording opportunity of hearing to the delinquent, he has been held guilty and inflicted with penalty of dismissal from service.

8. Counsel for respondents submits that even if the period of absence has been

regularized that could not absolve the delinquent from misconduct being committed of wilful absence from duty for 76 days and no error was committed by the authority in initiating disciplinary action against him and further submits that petitioner was holding the post of Asstt. Manager at relevant point of time and if officers will remain absent from duty at their own whims and for maintaining proper discipline in the institution, it would be necessary to take hard decision and if such indiscipline is tolerated, it may disrupt functioning of the organisation & penalty inflicted upon the delinquent certainly commensurates with penalties provided under law and does not require interference.

9. This Court has considered rival contentions of the parties and with their assistance, examined material on record. From chronological facts having come on record, this fact cannot be ruled out that later decision taken by respondents for taking disciplinary action against petitioner was not for the reason that he remained absent from duty but it appears to be for the reason that since order of compulsory retirement of petitioner could not be sustained in the eye of law and was set aside by the Court vide order dt. 09.8.2001 in CWP-2354/2001. Only option left for respondents was to initiate disciplinary action against him. There is nothing adverse on record regarding services rendered by petitioner since 1967 till order impugned being passed by the respondent, inflicting penalty of dismissal from service, which could depict that he was not holding satisfactory service since 1967 for 35 years and the disciplinary action being initiated for the misconduct of wilful absence for 76 days from 25.1.2001 to 10.4.2001, which appears to be for the reason that petitioner was transferred from Udaipur to Jaipur vide order dt. 22.1.2001 pursuant to which he was relieved vide order dt. 24.1.2001 to report for duty at Jaipur where indisputably reported for duty on 11.4.2001 and during intervening period of his absence, certain medical certificates were furnished - details are stated in statement of allegations ad infra:

10. It has come on record that very period for which he was served with memo of charge treating him on wilful absence from duty for 76 days much before the charge-sheet being served, was regularised by leave without pay vide order dt. 01.8.2001 (Ann. 2) with a specific note endorsed that in case the salary has been paid, it would be recoverable/adjustable from future salary and it is true that mere regularisation of the period of absence would not absolve from the misconduct under the Scheme of Regulation, 1970.

11. But in course of inquiry, inquiry report was submitted on 23.1.2001 (Ann. R/3) - copy of which was furnished by disciplinary authority to delinquent, discloses that medical certificates furnished by delinquent were not acceptable and there were certain discrepancies noticed by the inquiry officer noticed in his report and the finding was recorded that the period of wilful absence imputed was the misconduct which delinquent committed under Cl. 107(1), (5), (7), (22), (25) & (28) of Standing Orders, 1970.

12. Inquiry report alongwith tentative opinion was sent to the petitioner vide

communication dt. 12.2.2002 (Ann. R/3) and disciplinary authority while upholding finding of guilt recorded by inquiry officer, inflicted penalty of dismissal from service vide order dt. 25.5.2002 and the appeal against which also came to rejected vide order dt. 28.12.2002. A bare perusal of order rejecting the appeal discloses that the appellate authority despite under obligation to examine and re-appreciate the record of inquiry; and whose power being co-extensive with that of disciplinary authority; was supposed to examine and to look into as to whether, there are good & sufficient reasons available to uphold the penalty inflicted upon delinquent or it at all commensurates with the proved misconduct imputed against delinquent; but having failed to do, appellate authority rejected the appeal by a non-speaking/cryptic order, which cannot be held to be sustainable in the eye of law.

13. As regards order passed by disciplinary authority, copy of the inquiry report has been noticed but there should be independent application of mind of disciplinary authority in appreciating the material, which the inquiry officer looked into and found the charges proved against delinquent. But that apart, even if the charge was found proved and disciplinary authority came to the conclusion while affirming the finding of guilt recorded by inquiry officer, there was yet a legal obligation upon disciplinary authority to look into while inflicting penalty upon delinquent to record good & sufficient reasons provided under Cl. 108 (Xii) of the Standing orders, 1970.

14. It is relevant to take note of Cl. 108 of Standing Orders, 1970 under its Chapter XV relating to disciplinary action for misconduct and Penalties ad infra:

Penalties.

Xii. One or more of the following penalties may for good & sufficient reasons, be imposed on an employee by a Competent Authority. Penalties from (v) to (viii) shall be appealable.

i. Censure - Three censures in a period of one year will involve withholding of one increment.

ii. With-holding of increments or promotion.

iii. Recovery from pay/wages of the whole or part of any pecuniary loss caused to the employer by negligence or breach of any law.

iv. Forfeiture of wages during the period of suspension.

v. Reduction to a lower post or grade.

vi. Termination of service which shall not be a disqualification for future employment.

vii. Dismissal from service, which shall be a disqualification for future employment.

(Emphasis added)

15. From a bare perusal of the provisions it clearly emerges that obligation has been casted upon disciplinary authority that such of penalties could be inflicted for good & sufficient reasons. The reason behind providing such a Clause in the Standing Orders appears to be that merely because charges being proved against delinquent, that would not be considered to be sufficient to invoke only penalty of dismissal from service out of the penalties provided thereunder and penalty must commensurate with the proved misconduct.

16. The order must disclose application of mind of the authority as to whether penalty of dismissal alone has to be inflicted upon delinquent for the proved misconduct and is commensurate with nature of charges imputed; but that is completely missing in the instant case, and in absence of good & sufficient reasons being recorded by disciplinary authority, apart from procedure of inquiry being adopted, atleast penalty finally inflicted upon delinquent cannot be upheld.

17. Doctrine of proportionality of penalty and scope of judicial review U/Art. 226 of the Constitution while interfering with quantum of punishment have been examined by Apex Court in B.C. Chaturvedi Vs. Union of India and others, and observed ad infra:

18. A review of the above legal position would establish that the disciplinary authority, and on appeal the appellate authority, being fact-finding authorities have exclusive power to consider the evidence with a view to maintain discipline. They are invested with the discretion to impose appropriate punishment keeping in view the magnitude or gravity of the misconduct. The High Court/Tribunal, while exercising the power of judicial review, cannot normally substitute its own conclusion on penalty and impose some other penalty. If the punishment imposed by disciplinary authority or appellate authority shocks the conscience of the High Court/Tribunal, it would appropriately mould the relief, either directing 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.

It is settled by judgment of Apex Court that the High Court in its jurisdiction U/ Art. 226 of the Constitution in exercise of powers of judicial review would not normally interfere with quantum of punishment in disciplinary inquiry and doctrine of proportionality can be invoked unless penalty impugned is found to be disproportionate and shocks the conscience of Court. At the same time, while examining quantum of penalty inflicted upon delinquent, several factors are also to be taken note of including conduct of delinquent as well as nature of the charges imputed, which plays vital role.

18. In Dev Singh Vs. Punjab Tourism Development Corporation Ltd. and Another, , Apex Court observed ad infra:

6. A perusal of the above judgments clearly shows that a court sitting in appeal against a punishment imposed in the disciplinary proceedings will not normally substitute its own conclusion on penalty, however, if the punishment imposed by

the disciplinary authority or the appellate authority shocks the conscience of the court, then the court would appropriately mould the relief either by directing disciplinary/appropriate authority to reconsider the penalty imposed or to shorten litigation its may make an exception in rare cases and impose appropriate punishment with cogent reasons in support thereof. It is also clear from the above noted judgments of this Court, if the punishment imposed by disciplinary authority is totally disproportionate to the misconduct proved against the delinquent officer, then the court would interfere in such a case.

In *Kailash Nath Gupta Vs. Enquiry Officer, (R.K. Rai), Allahabad Bank and Others*, , Apex Court observed *ad infra*:

11. In the background of what has been stated above, one thing is clear that the power of interference with the quantum of punishment is extremely limited. But when relevant factors are not taken note of, which have some bearing on the quantum of punishment, certainly the Court can direct re-reconsideration or in an appropriate case to shorten litigation, indicate the punishment to be awarded.

19. It has also been considered by Apex Court in recent judgment in *State of Gujarat Vs. Anand Acharya @ Bharat Kumar Sadhu*, *ad infra*;

15. The well-settled proposition of law that a court sitting in judicial review against the quantum of punishment imposed in disciplinary proceedings will not normally substitute its own conclusion on penalty is not in dispute. However, if the punishment imposed by the disciplinary authority or the appellate authority shocks the conscience of the court, then the Court would appropriately mould the relief either by directing the disciplinary/appropriate authority to reconsider the penalty imposed or to shorten the litigation it may make an exception in rare cases and impose appropriate punishment with cogent reasons in support thereof [see *Bhagat Ram Vs. State of Himachal Pradesh and Others*, ; *Ranjit Thakur Vs. Union of India (UOI) and Others*, ; and *U.P. State Road Transport Corporation and Others Vs. Mahesh Kumar Mishra and Others*,].

From the above principles laid down by Apex Court, it is trite that under limited scope of judicial review U/Art. 226 of the Constitution of India, the High Court, ordinarily should not substitute its own conclusion on penalty, However if the punishment imposed by the disciplinary or the appellate authority shocks the conscience of the Court, it would appropriately mould the relief, either by directing the disciplinary authority/appellate authority to reconsider the penalty imposed or to shorten the litigation, it may itself in exceptional & rare cases impose appropriate punishment obviously after assigning cogent reasons in support thereof.

20. In instant case, root cause resulting into infliction of penalty of dismissal against petitioner was that upon his transfer from Udaipur to Jaipur vide order dt. 22.1.2001 he was relieved vide order dt. 24.1.2001 to report for duty at Jaipur where indisputably he reported for duty on 11.4.2001, and his absence during intervening period for 76 days was considered to be a gross disobedience;

and considered to be alleged wilful absence from duty; but much before thereto, when voluntary retirement Scheme came into force as introduced by respondents, the writ petitioner submitted application on 24.6.2000 followed by reminders one after the other for accepting his request for voluntary retirement, besides legal notice being served, but the respondents were adamant not to grant him voluntary retirement, rather passed order compulsorily retiring him from service on 07.5.2001 which came to be quashed by the Court vide order dt. 09.8.2001 in CWP-2354/2001, and immediately on being reinstated, memo of charge dt. 16.10.2001 impugned was served upon delinquent for alleged wilful absence from duty for 76 days which was indisputably regularised by the respondents much before issuance of the charge sheet, while sanctioning leave without pay vide, order dt. 01.8.2001 which endorsed a specific note that if salary having been paid to delinquent, it would be recoverable/adjustable in future (sic).

21. That apart, in the memo of charge sheet served for alleged wilful absence for 76 days, medical certificates for whole of the period was furnished by the delinquent but in course of inquiry, inquiry officer noticed that there was overlapping period under the certificates issued by Ayurved medical officer/CMHO and since the certificates could not be acceptable by inquiry officer, finding was recorded that the charges stood proved of wilful absence for 76 days.

22. There is nothing on record which can reflect previous conduct of the petitioner and that being so, this Court has to presume that the petitioner had a satisfactory record of service of almost 35 years to his credit.

23. In the instant case, after narration of facts & what has been observed by inquiry officer, disciplinary authority has not applied its mind as to whether in case charges imputed against delinquent stand proved, penalty of dismissal can only be a proper punishment and the authority has failed to examine or record good & sufficient reasons as required under Cl. 108(Xii) of Standing Orders 1970 while inflicting penalty impugned.

24. It has to be noted that while Standing Orders were being approved, the authority was conscious while enumerating Schedule of penalties under Cl. 108 (Xii) that first four of penalties from (i) to (iv) are not appealable whereas other penalties from (v) to (vii) including dismissal from service disqualifying for future employment as well, being major penalties, are appealable. Thus, different measures of penalties being available under Schedule appended to Cl. 108 of Standing Orders.

25. It certainly casts obligation upon competent authority to disclose "good & sufficient reasons" while either of major penalties provided under Cl. 108(v) to (vii) is to be inflicted upon delinquent. In other words, Cl. 108 casts an obligation upon the authority to consider quantum of punishment rationally while exercise its discretion judiciously and whether the punishment to be inflicted is just, fair and reasonable and that appears to be a reason that rule making authority has

made it obligatory upon the authority to disclose "good & sufficient reasons" while selecting & inflicting a particular out of either of penalties upon delinquent provided under Cl. 108.

26. This fact cannot be ruled out that main object of penalty being inflicted upon delinquent is to correct his fault by making him more alert in future and to hold out a warning to other employees to be careful in discharge of their duties so that they do not expose themselves to similar punishment. But, if an employee against whom fault is established with infliction of penalty of dismissal and to get rid of him, it would certainly be counter productive to do so for which it would be futile to expect to recruit so perfect employees that they would never commit any fault; and to avoid arbitrariness, it is always to be ensured that the penalty to be imposed must commensurate with magnitude of fault of delinquent; and that is the reason that the rule making authority has provided different categories of penalties for being imposed having regard to the alleged faults - one of which is dismissal from service.

27. But, as observed (supra), merely because an employee has committed fault, it is not that he shall always to be inflicted with the penalty of dismissal from service alone. In instant case, writ petitioner has rendered 35 years" service and the allegation imputed against him was that he remained absent from duty for 76 days for which medical certificates were produced in course of inquiry & after getting fitness certificates, reported for duty on 11.4.2001.

28. However, medical certificates might not have been acceptable to the authority but this fact was also not noticed that so-called alleged absence was regularised while sanctioning leave without pay vide order dt. 01.8.2001 much before disciplinary action being initiated against him and it was also not looked into that regarding alleged absence whether there could be any other penalty than dismissal from service. In the opinion of this Court, the authority has failed to ascertain as to what will be just penalty in the facts & circumstances whereas it was enjoined upon it under Cl. 108 of Standing Orders, to record "good & sufficient reasons" while inflicting appropriate penalty.

29. That apart, on appeal being preferred by writ petitioner, which too has been rejected by a non-speaking/cryptic order, appellate authority was also expected to examine record of inquiry and has to apply its mind independently as to whether major penalty of dismissal from service inflicted upon delinquent was within the spirit of Standing Orders, 1970 and commensurate with the guilt found proved against him. In the opinion of this Court, order of penalty inflicted upon delinquent (writ petitioner) does not in any manner commensurate with nature of charges proved against him inasmuch as it touches conscience of the Court and requires to be interfered with.

30. It brings this Court to avert to question of penalty. Ordinarily, matter has to be remanded back to disciplinary authority for consideration on the point of quantum of punishment in the light of observations made (supra), which is just

and appropriate course to be adopted by the Court. However, this Court realizes that writ petitioner joined service in 1967 and rendered almost 35 years' service till the infliction of penalty of dismissal from service upon him in the year 2002 and after having challenged the penalty impugned, he died pendente lis on 20.4.2008, the matter if now being remanded after such protracted litigation, is not going to serve useful purpose inasmuch as he & his family have suffered pangs of litigation and faced agony for sufficient long time.

31. Taking an over-all conspectus of the facts & circumstances (supra), this Court finds that even if one were to hold guilty of misconduct alleged against petitioner looking to nature of proved misconduct which certainly amounts to lapse on his part but penalty of dismissal from service in the opinion of this Court is shockingly disproportionate to the charge of absence from duty for 76 days proved against him merely on the basis of medical certificates being defective; but lesser punishment other than dismissal from service impugned would meet the ends of justice. Thus viewed, this Court considers it proper that in the facts of instant case, penalty of dismissal from service impugned deserves to be substituted with stoppage of four grade increments with cumulative effect and upon deemed reinstatement, writ petition would be entitled for continuity in service and notional fixation & other service benefits available under law but at the same time, no arrears of pay will be payable for intervening period till attaining age of superannuation/his death. Consequently, writ petition succeeds and is hereby allowed. The impugned orders dt. 25.5.2002 (Ann. 4) of disciplinary authority & dt. 28.12.2002 (Ann. 5) of appellate authority are partly modified to the extent that the penalty of dismissal from service stands substituted by stoppage of four annual grade increments with cumulative effect; and the writ petitioner be deemed to be reinstated with continuity of service along with consequential benefits including retiral benefits admissible to him & his family after his death with notional fixation of pay etc. but without arrears of salary for intervening period till attaining age of superannuation/death. Compliance be made within three months. No order as to costs.