

(2015) 02 AHC CK 0177

In the Allahabad High Court

Case No : Civil Misc. Writ Petition No. 60991 of 2010

Mustaq Ahmad

APPELLANT

Vs

State of Uttar Pradesh and Others

RESPONDENT

Date of Decision : 26-02-2015

Acts Referred:

Citation : (2015) 4 ADJ 397 : (2015) 5 ALJ 325 : (2015) 3 AWC 2991 : (2015) LabIC 3620

Hon'ble Judges : Suneet Kumar, J

Bench : Single Bench

Advocate : Mahendra Singh, Ajay Sengar, R.B. Maurya and Vikas Goswami, for the Appellant

Final Decision : Dismissed

Judgement

Suneet Kumar, J.—Heard Sri Mahendra Singh assisted by Sri Ajay Sengar learned counsel for the petitioner and learned Standing Counsel for the respondents. The petitioner was working as a Follower in the civil police, the petitioner was issued a charge-sheet under the provisions of Uttar Pradesh Government Servant (Discipline and Appeal) Rules 1999 (1999 Rules), alleging therein that the petitioner had absented without permission for period of 11 days between 12.3.2009 and 10.4.2009. The petitioner in reply to the charge-sheet submitted that the petitioner was not well, was taking treatment and on recovering from illness, the petitioner reported for duty. The Enquiry Officer in enquiry report dated 30.12.2009 proposed the penalty of dismissal for unauthorized absence and forfeiture of pay for the days absent from duty on the principle of no work no pay. The disciplinary authority issued a show-cause notice on 25.1.2010 alongwith copy of the enquiry report to which the petitioner replied on 9.2.2010. The disciplinary authority on considering the reply and other material available on record, did not accept the explanation, which was based on the medical certificate, submitted by the petitioner, consequently, accepted the proposal of the enquiry officer that the petitioner had absented without prior permission and

leave, did not submit any medical certificate and the details of the medical prescription of his treatment during his illness, the alleged medical certificates that were submitted, were not acceptable, further the petitioner being a habitual absentee, accordingly was awarded the punishment of dismissal from service vide order dated 25.2.2010.

2. Aggrieved by the order of the Superintendent of Police, Jalaun dated 26.2.2010, the petitioner preferred an appeal before the Deputy Inspector General of Police, Jhansi Division, Jhansi. The appellate authority confirmed the order of the disciplinary authority vide order dated 25.3.2010. Aggrieved by the order of the appellate authority the petitioner preferred a revision before the Additional Director General of Police, Lucknow who affirmed the orders passed by the disciplinary authority and the appellate authority vide order dated 31.7.2010.

3. The petitioner is assailing the orders passed by the disciplinary, appellate and revisional authority dismissing the petitioner from service.

4. The contention of learned counsel for the petitioner is that the petitioner had absented for only 11 days, for which the petitioner submitted a medical certificate, without disputing the contents of the medical certificate, it was not open for the authorities to have dismissed the petitioner. Further, it is submitted that the punishment is shocking, disproportionate and is not commensurate to the guilt. In support of his submission the learned counsel for the petitioner has relied upon a Division Bench judgment in *Virendra Kumar v. Union of India*, 2008 (10) ADJ 112 and *Rajesh Prasad Mishra Vs. The Commissioner Jhansi Division and Others*, (2011) 1 ADJ 135 : (2011) 1 UPLBEC 216 .

5. In rebuttal, it has been contended, by learned Standing Counsel that the petitioner is habitual of absenting without seeking prior permission, the petitioner was punished on 30 occasions in the past for unauthorized absence, therefore, the penalty of dismissal from service is appropriate.

6. Rival submissions fall for consideration.

7. The facts are not in dispute, it is also not being disputed by learned counsel for the petitioner that the procedure as prescribed under the 1999 Rules was not followed. The only submission pressed by learned counsel for the petitioner is that the petitioner could not have been dismissed from service for mere 11 days of absence, which being not deliberate but was for the reason of his illness.

8. The record reveals that the petitioner had absented without information and leave intermittently for 11 days, petitioner submitted medical fitness certificates for absence, which is on record. The fitness certificates was considered by the disciplinary authority but did not inspire confidence as it was not supported by the prescriptions for the medical treatment taken by the petitioner. The medical certificates dated 25.3.2009, 17.3.2009 and 4.4.2009 was stated to have been issued by a Gujjar Clinic which being a child specialist clinic, the doctor issuing the certificate was an Ayurvedacharya and a Homeopath. The certificate is

merely a fitness certificate stating that the petitioner was suffering from influenza fever, was under treatment of the concerned doctor, and that the petitioner being now fit to resume normal duties. The signature of the petitioner was attested by the doctor. This was the only material submitted by the petitioner during the enquiry proceedings, the authorities did not dispute that the fitness certificates were issued by the concerned doctor but have not accepted the authenticity regarding its contents, as it was not backed by the prescriptions indicating the nature of treatment taken by the petitioner, further, considering the past conduct and record of the petitioner that the petitioner had been absenting without prior information, for which salary was deducted for unauthorized absence on 30 occasions in the past, since his appointment i.e. between 1.11.1990 to 4.7.2008. The details of absence and the amount of pay deducted from the salary of the petitioner is detailed in the enquiry report. All the authorities were unanimous that the absence was willful and not for compelling reasons.

9. Learned counsel for the petitioner has not denied that the petitioner has been a habitual absentee from service, for which the authorities had on 30 occasions deducted pay for unauthorized absence. The petitioner not only being a public servant is also in service of the disciplined force, thus cannot claim leave as a matter of right. Petitioner has to apply for leave in accordance with the rules to the authority competent to grant the leave. The leave may be sanctioned subject to fulfillment of the requisite formalities. Every leave has a commencement date and a termination date unless it is extended. An employee, who remains absent after the end of the leave, exposes himself to penal consequence. If the leave is not allowed by the competent authority, it amounts to unauthorized absence and is a misconduct.

10. The ratio of the judgment of Vikram Singh (*supra*) is not applicable on the facts of the case, as the petitioner, therein, being a member of a disciplined force (CRPF) overstayed the sanctioned leave. The Court was of the opinion that unless the reasons for absence of the petitioner were examined and a finding recorded that the petitioner was not justified for overstay of leave, the overstay of his leave could not be treated as misconduct. In the facts and circumstances of that case the Court was of the opinion that the petitioner did not intend to disobey the orders and overstayed for justified reasons. The Court found the reason that the petitioners' wife was pregnant and that the child was born by a caesarian operation. The wife thereafter suffered from jaundice which relapsed and accordingly the petitioner overstayed the leave.

11. In *Krushnakant B. Parmar Vs. Union of India (UOI) and Another*, (2012) 132 FLR 1023 : (2012) 2 JT 352 : (2012) 2 SCALE 545 : (2012) 3 SCC 178 : (2012) 2 SLJ 19 : (2012) AIRSCW 1633 : (2012) 2 Supreme 254 , the Supreme Court held as follows:

"16. The question whether unauthorized absence from duty" amounts to failure of devotion to duty or behavior unbecoming of a Government servant cannot be

decided without deciding the question whether absence is willful or because of compelling circumstances.

18. Absence from duty without any application or prior permission may amount to unauthorized absence, but it does not always mean willful. There may be different eventualities due to which an employee may abstain from duty, including compelling circumstances beyond his control like illness, accident, hospitalization, etc., but in such case the employee cannot be held guilty of failure of devotion to duty or behavior unbecoming of a Government servant.

19. In a Departmental proceeding, if allegation of unauthorized absence from duty is made, the disciplinary authority is required to prove that the absence is willful, in absence of such finding, the absence will not amount to misconduct."

12. In *Shayama Charan Tripathi Vs. State of U.P. and Others*, (2014) 1 ADJ 280 : (2014) 2 ESC 656 , the Court held as follows :

"18. In a departmental proceeding, if allegation of unauthorized absence from duty is made, the disciplinary authority is required to prove that the absence is willful, in the absence of such finding, the absence will not amount to misconduct."

13. The facts of the present case are entirely on different footing. The petitioner is a habitual unauthorized absentee for which the petitioner was punished on 30 occasions. The petitioner without prior information and sanction of leave had absented, without there being any credit in his leave account. The medical certificates were merely fitness certificate issued by an Ayurvedacharya. The certificates were not supported by the prescription and treatment undertaken by the petitioner. The Court gave an opportunity to the petitioner to bring on record as to whether there was any medical prescriptions, the nature of treatment undertaken by the petitioner, however, no such prescriptions were placed on record.

14. The contention of learned counsel for the petitioner that no oral enquiry was held, the doctor was not examined, cannot be accepted as it was not the case of the petitioner before the authorities that the petitioner was prevented or prohibited from bringing any evidence or witness on his behalf. The petitioner relied only upon the alleged medical certificates in defence which were considered by the authorities but were not accepted as the certificates did not reflect that the petitioner had ever taken treatment as were not backed by relevant documents or prescriptions. The reasons for absence is not stated to be sudden, serious illness or unexpected bereavement in the family, thus, treating the absence as willful.

15. Recently, the Supreme Court in *Chennai Metropolitan Water Supply and Sewerage Board and Others Vs. T.T. Murali Babu*, AIR 2014 SC 1141 : (2014) AIRSCW 1142 : (2014) 2 JT 574 : (2014) 2 SCALE 163 : (2014) 4 SCC 108 , held that it is not an absolute proposition in law that whenever there is a long

unauthorized absence, it is obligatory on the part of disciplinary authority to record a finding of willful absence even if the employee fails to show the compelling circumstances to remain absent. It is also not necessary to plead "habitual absenteeism". Further, held, unauthorized absence by an employee, as a misconduct, cannot be put into a straitjacket formula for imposition of punishment. It will depend upon many a factor as laid down in *State of Punjab Vs. Dr. P.L. Singla*, AIR 2009 SC 1149 : (2009) 121 FLR 770 : (2008) 9 JT 157 : (2009) 1 LLJ 642 : (2008) 11 SCALE 227 : (2008) 8 SCC 469 : (2008) 2 SCC(L&S) 719 : (2009) 1 SLJ 65 : (2008) 2 UJ 1201 : (2009) AIRSCW 384 .

16. In *P.L. Singla* (supra) the Court ruled as follows:

"Where the employee who is unauthorized absent does not report back to duty and offer any satisfactory explanation, or where the explanation offered by the employee is not satisfactory, the employer will take recourse to disciplinary action in regard to the unauthorized absence. Such disciplinary proceedings may lead to imposition of punishment ranging from a major penalty like dismissal or removal from service to a minor penalty like withholding of increments without cumulative effect. The extent of penalty will depend upon the nature of service, the position held by the employee, the period of absence and the cause/ explanation for the absence."

17. The Supreme Court opined that *Krushanakant B. Parmar* case cannot be stated as an absolute proposition in law that whenever there is a long unauthorized absence, it is obligatory on the part of the disciplinary authority to record a finding that the said absence is willful even if the employee fails to show the compelling circumstances to remain absent. The Court referred to *Tushar D. Bhatt Vs. State of Gujarat and Another*, (2009) 123 FLR 431 : (2009) 2 JT 474 : (2009) 2 SCALE 501 : (2009) 11 SCC 678 : (2009) 2 SCC(L&S) 668 : (2009) 4 SCR 229 : (2009) 3 SLJ 88 , wherein, the Court upheld the order of dismissal for unauthorized absence.

18. This Court in judicial review would not substitute the findings recorded by the authorities, nor will the Court go into the sufficiency of the evidence.

19. In the cases of departmental enquiries and the findings recorded therein, the Court does not exercise the powers of appellate Court/authority. The jurisdiction of the High Court in such cases is very limited for instance where it is found that the domestic enquiry is vitiated because of non-observation of principles of natural justice, denial of reasonable opportunity; findings are based on no evidence, and/or the punishment is totally disproportionate to the proved misconduct of an employee.

(Refer- *Nirmala J. Jhala Vs. State of Gujarat and Another*, (2013) 4 AD 144 : AIR 2013 SC 1513 : (2013) 138 FLR 227 : (2013) 6 JT 407 : (2013) LabIC 2113 : (2013) 2 LLN 25 : (2013) 4 SCALE 579 : (2013) 4 SCC 301 : (2013) 2 SCC(L&S) 270 : (2013) 2 SCT 740 : (2013) AIRSCW 1800 and *S.R. Tewari Vs. Union of India (UOI) and Another*, (2013) 6 AD 444 : (2013) 138 FLR 375 : (2013) 9 JT

31 : (2013) LabIC 2810 : (2013) 2 LLN 563 : (2013) 7 SCALE 417 : (2013) 6
SCC 602 : (2013) 2 SCC(L&S) 893 : (2013) 3 SCT 461)

Regarding quantum of punishment, dismissal from service, appears to be justified considering the conduct of the petitioner, that the petitioner is a habitual absentee without taking leave or permission, had indulged in such misconduct on 30 occasions in the past, I am of the opinion that the quantum of the punishment, in the facts and circumstances of the present case, do not call for any interference.

The writ petition is devoid of merit. It is accordingly dismissed.

No order as to costs.