

(2009) 05 GUJ CK 0019

In the Gujarat High Court

Case No : Special Civil Application No. 2829 of 1988

Prabhatsinh Samatsinh

APPELLANT

Vs

D.S.P and Another

RESPONDENT

Date of Decision : 14-05-2009

Acts Referred:

Gujarat Civil Services (Conduct) Rules, 1971 — Rule 3, 3(1), 4(1)

Citation : (2009) 3 GLR 2499 : (2010) 1 SLR 194

Hon'ble Judges : K.S. Radhakrishnan, C.J; Akil Kureshi, J

Bench : Division Bench

Advocate : J.A. Adeshra, for the Appellant; Devang Vyas, AGP for Respondent 1, for the Respondent

Final Decision : Dismissed

Judgement

Akil Kureshi, J.—Petitioner has challenged an order of his removal dated 28.1.88 passed by the Disciplinary Authority and upheld by the Appellate Authority.

2. Briefly stated, facts of the case are:

The petitioner was employed as Armed Police Constable. A charge-sheet dated 31.12.84 came to be issued against the petitioner. In the chargesheet, it was alleged that the petitioner had married one Chandanben about 20 years back through which marriage he had five children. Despite this, about 10 years back, the petitioner had come in contact with one Savitaben and had developed illicit relations with her. They stayed together as husband and wife out of which cohabitation, they had two children. In the school records of the children also, the petitioner was shown as their father. Once again, thereafter, the petitioner developed illicit relation with one Dhuliben of village Rajpura, Taluka Padra and they are living together as husband and wife.

3. Since the petitioner did not accept the charges, departmental inquiry was conducted. Upon conclusion of the oral inquiry, the Inquiry Officer submitted his report dated 28.12.87. The Inquiry Officer relied on statements of various

witnesses to hold that the charges were proved. The Disciplinary Authority issued second show cause notice on 4.1.88 calling upon the petitioner to show cause why he should not be removed from service. After considering the representation of the petitioner, the Disciplinary Authority by the impugned order dated 28.1.88 awarded punishment of removal from service. The petitioner preferred appeal against the said order. The Appellate Authority, however, by an order dated 31.5.88 dismissed the appeal. Hence the petition.

4. Though initially the petition was heard by the learned single Judge of this Court, by order dated 29.6.88, learned single Judge noticed certain conflicting observations in various decisions of learned single Judges of this Court with respect to the question whether an act which has no relation to the discharge of duties of an employee can be treated as misconduct. The learned Judge, therefore, referred the issue to Larger Bench observing that "it is necessary to get the question conclusively decided by a Larger Bench under what circumstances a conduct of a Police personnel can be said to be unbecoming a Police personnel.

5. We have heard the learned advocates appearing for the parties at length. Learned advocate Shri J.A. Adeshra for the petitioner raised the following contentions:

That charges against the petitioner were not proved,

That the conduct of the petitioner was not covered under the misconducts defined under the Service Rules,

In any case, the acts of the petitioner were not connected with the discharge of his duties and therefore, the petitioner cannot be punished for misconduct,

That second show cause notice was pre-judged and the authority had already decided to impose punishment of removal.

6. That the punishment was grossly disproportionate to the proved charges.

7. On the other hand, learned AGP opposed the petition. He took us through the materials on record and submitted that no case for interference has been made out in exercise of powers under the writ jurisdiction.

8. We have considered the contentions raised on behalf of the petitioner in the following manner:

Re: Charges not proved:

On behalf of the petitioner, it was contended that there was no evidence on record to hold that the charges were proved. Counsel pointed out that father of the petitioner under whose purported complaint, the proceedings were initiated, did not support the case of the Department. He submitted that other important witnesses also did not support the charges.

Having perused the materials on record and in particular the report of the Inquiry

Officer as well as the punishment order, we find that there was sufficient evidence to hold that the charges were proved. It is true that the father of the petitioner, upon whose complaint the inquiry proceedings were initiated did not support the Department in the oral inquiry. However, there were other witnesses who had deposed before the Inquiry Officer. Fact that the petitioner is married to one Chandanben and that the marriage was never dissolved is not in dispute. Second "wife" of the petitioner Savitaben had stated that through the petitioner she had given birth to two children. One Dattubhai, brother of Savitaben had also stated that his sister Savitaben had stayed with the petitioner for about 15 years as husband and wife through which cohabitation, she had given birth to two children. Further, husband of Dhuliben, one Shri Ambalal Shivabhai had also stated that about 4 years back, his wife had quarrel with another lady, upon which a police complaint was filed. To investigate the same, two policemen had come, one of them was Prabhatsinh, i.e. the petitioner. Thereupon, Prabhatsinh had developed illicit relation with his wife and had taken her to Padra and thereafter to Vadodara. He stated that the petitioner had eloped with his wife and was keeping her as his wife. Significantly, this witness was not cross-examined by the petitioner. One Shri R.B. Patil, who had conducted the preliminary inquiry was also examined by the Department. He gave details of the steps taken by him as well as recording of evidence of various witnesses through which the incident had come to light.

To our mind, this cannot be stated to be a case of no evidence. It is by now well settled that in departmental inquiries, proof required is not one of beyond reasonable doubt but of preponderance of possibilities. In the case of Depot Manager, Andhra Pradesh State Road Transport Corporation Vs. Mohd. Yousuf Miya, etc., it was stated by the Hon"ble Supreme Court as under:

The standard of proof in the departmental proceedings is not the same as of the criminal trial. The evidence also is different from the standard point of Evidence Act. The evidence required in the departmental enquiry is not regulated by Evidence Act.

Re: Not a misconduct under the Rules:

It was contended that the Services Rules or Police Manual do not recognize such a conduct as misconduct and unless and until there is specific rule prescribing such a conduct of an employee as misconduct, no punishment can be imposed for such conduct. Reliance was placed on the decision of the Apex Court in the case of Glaxo Laboratories (I) Ltd. Vs. Presiding Officer, Labour Court, Meerut and Others, , wherein it was observed in para 23 that question of misconduct cannot be left to the vagaries of management to say ex post facto that some acts of omission or commission nowhere found to be enumerated in the relevant standing order is nonetheless a misconduct not strictly falling within the enumerated misconduct in the relevant standing order but yet a misconduct for the purpose of imposing a penalty. The decision in the case of Glaxo Laboratories (supra) was followed by the Apex Court in the case of A.L. Kalra Vs. Project and

Equipment Corporation of India Ltd.,

9. We, however, find that Rule 3 of the Gujarat Civil Services (Conduct) Rules, 1971 is very wide. Sub-rule (1) thereof reads as under:

3. General:

(1) Every Government servant shall at all times:

(i) maintain absolute integrity,

(ii) maintain devotion to duty, and

(iii) do nothing which is unbecoming of a Government servant.

Explanation: A Government servant, who habitually fails to perform a task assigned to him within the time set for the purpose and with the quality of performance expected of him, shall be deemed to be lacking in devotion to duty within the meaning of Clause (ii)

10. The expression, "do nothing which is unbecoming of a Government servant" has wide amplitude and large number of actions of the Government servant would be covered under the said expression. In the present case, it has been held against the petitioner that despite subsisting marriage, out of which wedlock, he had five children, he first had illicit relation with another lady with whom he cohabited for several years giving birth to two children. Thereafter, once again, while investigating into a complaint, he came in contact with one Dhuliben, a married woman. He developed illicit relations with Dhuliben and eloped with her and they started staying together as husband and wife. Such a conduct of a police official who has been employed in a disciplined force carrying out important functions of maintaining law and order and investigating crimes would certainly amount to acts unbecoming of a Government servant and therefore misconduct.

11. In the case of Chairman and M.D., Bharat Pet. Corpn. Ltd. and Others Vs. T.K. Raju, , the decisions of the Apex Court in the case of Kalra and Glaxo (Supra) came to be considered in following manner:

10. In Kalra the misconduct alleged against the delinquent was trivial. Report against him was found to be on ipse dixit. It was held that Rule 4(1)(i) did not specify that its violation will constitute misconduct. It was opined that the delinquent did not commit any misconduct by violating "Advance Rules". In that situation, it was observed that " how did the question of integrity arise passes (our) comprehension". It was held (SCC p.338 para 31)

31. To sum up the order of removal passed by Disciplinary Authority is illegal and invalid for the reasons: (i) that the action is thoroughly arbitrary and is violative of Article 14, (ii) that the alleged misconduct does not constitute misconduct within the 1975 Rules; (iii) that the inquiry officer himself found that punishment was already imposed for the alleged misconduct by withholding the salary and

the appellant could not be exposed to double jeopardy; and (iv) that the findings of the inquiry officer are unsupported by reasons and the order of the Disciplinary Authority as well as the Appellate Authority suffer from the same vice. Therefore, the order of removal from service as well as the appellate order are quashed and set aside.

11. In *State of Punjab v. Ram Singh Ex-Copnstable* it was stated : (SCC pp.57-58 para 5)

5. Misconduct has been defined in Black's Law Dictionary, 6th Edn. at p.999 thus:

A transgression of some established and definite rule of action, a forbidden act, a dereliction from duty, unlawful behaviour, wilful in character, improper or wrong behaviour, its synonyms are misdemeanour, misdeed, misbehaviour, delinquency, impropriety, mismanagement, offence, but not negligence or carelessness.

Misconduct in office has been defined as:

Any unlawful behavior by a public officer in relation to the duties of his office, wilful in character. Term embraces acts which the office-holder has no right to perform, acts performed improperly, and failure to act in the face of an affirmative duty to act.

12. In P. Ramanatha Aiyar's *Advanced Law Lexicon*, 3rd Edn. at p.3026, the term "misconduct" has been defined as under:

The term "misconduct" implies a wrongful intention, and not a mere error of judgment.... Misconduct is not necessarily the same thing as conduct involving moral turpitude. The word "misconduct" is a relative term, and has to be construed with reference to the subject matter and the context wherein the term occurs, having regard to the scope of the Act or statute which is being construed. "Misconduct" literally means wrong conduct or improper conduct.

13. On more than one occasion, different courts have taken pains to explain that *Kalra* does not lay down any inflexible rule. (See *Prabodh Kumar Bhowmick v. University of Calcutta*, *Tara Chand v. Union of India*, *Secy. to Govt. v. A.C.J. Britto and Norattanmal Chourasia v. M.R. Murli*.)

14. In the aforementioned situation, the High Court in our opinion committed a manifest error in relying upon *Kalra* and *Glaxo* as we have notice herein-above, that the respondent was not charged in terms of (Rule 4 of Part II of) the Rules alone. He was charged for violation of several other clauses of the Rules. The High Court, therefore, was not correct in coming to the conclusion that as some of the charges were vague and indefinite, thus, no punishment could have been imposed on the basis thereof.

12. In the result, we find that the conduct of the petitioner is sufficiently covered under Rule 3(1) of the Gujarat Civil Services (Conduct) Rules.

13. Re: Not connected with discharge of his duty:

Counsel for the petitioner submitted that the alleged acts attributed to the petitioner had no connection with the discharge of his official duties and therefore, even if the allegations are established, the petitioner cannot be punished for misconduct. It was contended that the acts committed by the petitioner in his personal life had no connection with his duties and no punishment therefore can be awarded for such actions.

14. We may at this stage notice the judicial trend on the issue:

Learned single Judge in the case of *Karsanbhai D. Parmar v. State of Gujarat and Ors.* 1986 (23) G.L.T. 87 set aside the punishment awarded to the petitioner observing that the Police Manual did not specify that to have a mistress is a misconduct.

15. Learned single Judge of this Court in the case of *Bodu Tarmamad Vs. Dt. Supdt. of Police, Jamnagar and Another*, examined the allegations against a Government employee that though he was a married man he allowed a Hindu girl to stay with him in police quarters without marriage ceremony. The learned Judge found that acts of the employee did not amount to misconduct. It was observed that there was no charge against the employee that he had allowed or had permitted a concubine to stay in the police quarter. The charge was simple enough that the petitioner though a married man had allowed a Hindu girl to stay with him without performing any marriage ceremony. It was on this background that the learned Judge found that the allegations did not amount to misconduct which can be visited with penalty under the Service Rules.

16. In the case of *Rabindra Nath Ghose In Re* 1985(1) SLR 598, learned single Judge of Calcutta High Court held that a Head Constable leading an immoral life with another woman would not amount to misconduct in performance of duties and his dismissal was therefore set aside.

17. On the other hand, learned single Judge of this Court in the case of *Thakore Chandrasingh Taktsingh Vs. State of Gujarat and Another*, was examining a case where a police constable was acquitted for criminal prosecution for kidnapping a minor girl. He was, however, proceeded departmentally on the said allegations and was eventually dismissed from service. The learned Judge found that the allegations against police constable who is a married man having eloped with a minor girl would amount to conduct "unbecoming of a Government servant" and therefore it was open for the Department to inquire into the charges.

18. In the case of *Bhikhudan A. Gadhavi v. District Panchayat* 2002(4) GCD 83 (Guj), learned single Judge of this Court upheld the order of dismissal of an employee of Panchayat on the charge of living with another lady though the first marriage was subsisting.

19. In the case of *K.V. Bhundias v. State* 2003(3) GCD 2118(Guj), learned single Judge upheld the order of removal of an employee on the charge of his having

illicit relation with another lady from whom a daughter was born to him though his lawfully wedded wife was still alive.

20. In the case of *State of Punjab and Others Vs. Ram Singh Ex. Constable*, , the Apex Court was considering a case where an employee working as Gunman in the office of the Deputy Commissioner of Police was found heavily drunk and roaming at a bus stand with his service revolver. In that context, it was observed that though taking drink by itself may not be a misconduct, and out of office hours one may take drink and remain in the house, but being on duty, disciplined service like police service personnel shall maintain discipline and shall not resort to drink or be in a drunken state while on duty. The Apex Court upheld the punishment making following observations:

5. Thus it could be seen that the word "misconduct" though not capable of precise definition, its reflection receive its connotation from the context, the delinquency in its performance and its effect on the discipline and the nature of the duty. It may involve moral turpitude, it must be improper or wrong behaviour; unlawful behaviour, wilful in character; forbidden act, a transgression of established and definite rule of action or code of conduct but not mere error of judgment, carelessness or negligence in performance of the duty; the act complained of bears forbidden quality or character. Its ambit has to be construed with reference to the subject-matter and the context wherein the term occurs, regard being had to the scope of the statute and the public purpose it seeks to serve. The police service is a disciplined service and it requires to maintain strict discipline. Laxity in this behalf erodes discipline in the service causing serious effect in the maintenance of law and order.

21. In the case of *Chairman and M.D., Bharat Pet. Corpn. Ltd. and Others Vs. T.K. Raju*, the Apex Court was considering a case where a Senior Sales Officer of Bharat Petroleum Corporation was proceeded departmentally on the ground that he had taken short term loans from various distributors, but not returned the same as per the promise. The Apex Court restored the punishment imposed by the employer and set aside the order passed by the High Court.

22. In the case of *M.M. Malhotra Vs. Union of India (UOI) and Others*, , the Apex Court was examining the legality of penal order of compulsory retirement passed by the Competent Authority on the petitioner. The petitioner was engaged as a Pilot in the Indian Air Force. He was married to one Roopa Malhotra as per Hindu rites. He, however, developed illicit relation with one Ms. Anna Suja John. He was charged with misconduct for having illicit relation with Ms. Anna Suja John and for having contracted plural marriage with her. The Apex Court though found that the second marriage was a nullity and therefore did not require formal declaration of decree of nullity by the Court and that therefore, charge of plural marriage would not stand, nevertheless, found the employee guilty under the Service Rules for misconduct for cohabiting with a married woman. The Court found that the conduct of the employee was unbecoming of an Officer and eventually order of punishment was upheld.

23. From the above decisions, it can be seen that the concept of "unbecoming of a Government servant" is sufficiently wide so as to cover variety of actions of an employee. It is not possible to lay down any rigid principles nor is it possible to enumerate exhaustively all such actions which would be covered under the said expression. It must depend on the facts and circumstances of each case particularly nature of allegations and duties being performed by the employee. However, no proposition of universal application can be laid down that every act of an employee in his private life must be excluded from the expression "misconduct". It must be judged on facts of each case.

24. Facts of the present case are very glaring. As already noted, the petitioner was engaged as an Armed Constable. He was married for a long time. Out of his first marriage, he had 5 children. Though the marriage was subsisting, he cohabited with another lady, namely, Savitaben out of which cohabitation, he had two children. Yet again, while investigating a criminal complaint, he came in contact with one Dhuliben who was a married women. He developed illicit relation with her and eloped with her. They started staying together as husband and wife. The conduct of the petitioner was thus clearly such that would bring disgrace to the Department. He was employed in a disciplined force discharging important and sensitive duties of maintenance of law and order and investigation of crimes. His conduct would certainly amount to grave misconduct which had to be appropriately dealt with.

25. Re: Second Show Cause Notice being prejudged.

26. It was contended that in the show cause notice issued by the Disciplinary Authority, it has been stated that the authorities have decided to impose punishment of removal and therefore the show cause notice was a mere formality and the entire issue was prejudged. There was, therefore, breach of principles of natural justice.

27. This contention also cannot be accepted. In the show cause notice itself, the Disciplinary Authority has stated that the decision is tentative and that the petitioner is permitted to make a representation against such a proposal. If such representation is made, the same will be considered before taking a final decision. The Disciplinary Authority thus made it sufficiently clear that the proposal for awarding punishment of removal is only tentative and final decision can be taken only after receiving representation from the petitioner. The petitioner thus had sufficient opportunity to make his representation with respect to all aspects of the matter including the quantum of punishment.

28. Re: Punishment grossly disproportionate:

It was contended that even if the charges are held to be proved, the punishment imposed was grossly disproportionate. The petitioner had put in 22 years of service without any previous adverse record.

29. We are afraid, the contention cannot be accepted. The Disciplinary Authority

as well as the Appellate Authority have taken into account all relevant aspects of the matter and awarded punishment provided under the Service Rules.

30. In the case of B.C. Chaturvedi Vs. Union of India and others, , the Apex Court observed as follows:

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 the disciplinary authority or the appellate authority shocks the conscience of the High Court/Tribunal, it would appropriately mould the relief, either directing the 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.

31. This principle of not interfering with the punishment awarded by the employer unless the same is found to be shockingly disproportionate to the proved charges has been consistently followed in series of decisions by the Apex Court such as, U.P. State Road Transport Corporation and Others Vs. Mahesh Kumar Mishra and Others, Regional Manager, Regional Manager, U.P.S.R.T.C., Etawah and Others Vs. Hoti Lal and Another, , Chairman and Managing Director, United Commercial Bank and Others Vs. P.C. Kakkar, , Union of India v. P. Chandra Mouli : (2003)10SCC196 , Govt. of India and Anr. v. George Philip AIR 2007 SCW 379.

32. Recently, however, there is a slight shift and theory of proportionality in appropriate cases is being applied. In the case of Chairman and MD V.S.P. and Others Vs. Goparaju Sri Prabhakara Hari Babu, , it was observed that Court ordinarily ought not to disturb the penalty where procedural requirements have been complied with by the departmental authority but the the principle of proportionality can be invoked in appropriate cases .

33. In the case of State of Gujarat v. Gajananad M. Dalwadi (2008) 1 SCC 716, the Apex Court observed that the Tribunal is not an appellate authority, its jurisdiction was also limited. It could not have ordinarily interfered with the quantum of punishment unless it was held to be wholly disproportionate to the imputation of charges.

34. In the case of State of M.P. and Others Vs. Hazarilal, the Apex Court, observing that the legal parameters of judicial review have undergone a change and that Wednesbury principle of unreasonableness has been replaced by doctrine of proportionality, interfered with the punishment by the Government of its employee upon finding that the same was disproportionate to the conduct which led to the conviction of the employee.

35. There is thus a subtle change from the requirement of shockingly disproportionate punishment stated in the case of B.C. Chaturvedi (supra) to permit interference in the quantum of punishment to that of wholly disproportionate punishment in appropriate cases as noticed in recent decisions of the Apex Court. However, virtue of judicial restraint in interference in the punishment awarded by the employer through a validly constituted departmental inquiry is not lost. In the case of Akhilesh Kumar Singh Vs. State of Jharkhand and Others, , the Apex Court observed that superior courts of India exercising power of judicial review would not ordinarily interfere with quantum of punishment.

36. Considering all these aspects of the matter, we do not find that even the punishment requires to be reduced.

37. In the result, we find no merit in the petition. The petition is hereby dismissed. Rule is discharged. Interim relief vacated.