

(2013) 12 JH CK 0008
In the Jharkhand High Court
Case No : W.P.S. No. 5040 of 2004

Shamsad Khan

APPELLANT

Vs

Union of India and Others

RESPONDENT

Date of Decision : 19-12-2013

Acts Referred:

Citation : (2014) 1 AJR 629 : (2014) 1 JLJR 362

Hon'ble Judges : S. Chandrashekhar, J

Bench : Single Bench

Final Decision : Disposed Off

Judgement

S. Chandrashekhar, J.—Challenging orders dated 02.09.2002, 15.03.2003 and 09.02.2004, the petitioner has approached this Court. Heard learned counsel for the parties and perused the documents on record.

2. The brief facts of the case are that, the petitioner was appointed as Constable on 25.03.1989 in Central Industrial Security Force. On 07.11.2001 he was admitted in H.E.C. Hospital Dhurba, Ranchi and he was discharged on 10.11.2001. In the mean-time he was suspended by order dated 09.11.2001. A Charge Memo dated 04/05.01.2002 was served upon the petitioner, to which he replied on 22.01.2002. In the departmental proceeding 6 witnesses including the In-charge Coy-Commander and one B.D. Ram were examined. An enquiry report was submitted on 25.06.2002 and a copy of the enquiry report was furnished to the petitioner by issuing a 2nd show-cause notice dated 23.07.2002. The petitioner submitted his reply on 06.08.2002 however, the penalty order of reduction of pay-scale from Rs. 3,425/- to Rs. 3,050/-, stoppage of annual increment for three years with further effect on future service was passed. By the same order it has also been ordered that during the period of suspension, the petitioner would not be entitled for salary, allowance etc. except the subsistence allowance and the said period would be treated as period not on duty. The petitioner preferred appeal which was disposed of by order dated 15.03.2003 and revision preferred by the petitioner has been dismissed by order dated

09.02.2004.

3. A counter-affidavit has been filed stating that during the departmental proceeding in spite of the notice issued to the petitioner on three occasions, the petitioner did not appear before the Enquiry Officer. During the departmental proceeding the petitioner was afforded sufficient opportunity to defend himself and on the basis of the materials produced by the department during the departmental enquiry, an enquiry report was submitted on 25.06.2002 finding the charge levelled against the petitioner proved. A second show cause notice was issued to the petitioner and after considering the reply of the petitioner, the penalty order dated 02.09.2002 was passed. It is further stated that the finding recorded in the departmental enquiry has been affirmed by the appellate authority as well as the revisional authority.

4. The learned counsel appearing for the petitioner has submitted that though a charge has been framed against the petitioner for intentionally avoiding the induction duty at Kolkata Airport, no evidence in support of charge has been brought on record by the department during the departmental enquiry and therefore, finding recorded by the enquiry officer holding the charge proved, is erroneous. The departmental authorities affirmed the finding recorded by the enquiry officer without applying their mind to the materials on record and without considering the defence of the petitioner and therefore, the penalty order passed against the petitioner is liable to be quashed. She has further submitted that one Bhagwat Singh, A.S.I. has not been examined during the departmental enquiry and therefore, the fact taken against the petitioner that the petitioner failed to inform the department about his illness, cannot be accepted.

5. As against the above, Mr. Prabhash Kumar, the learned counsel for the respondents has reiterated the stand taken in the counter-affidavit and further submitted that the plea taken by the petitioner is contradictory inasmuch as, in the letter written after his illness, the petitioner has not indicated that he had gone to the hospital to get his daughter treated and while returning from the hospital, he fell down and became unconscious and thereafter, he was taken to the hospital where he was admitted on 07.11.2001 itself.

6. On a perusal of Charge-Memo, I find that a charge of intentional absence without leave to avoid induction duty at Kolkata Airport, has been framed against the petitioner. It is alleged that he did not inform the competent authority about his illness nor did he take permission from the competent authority and he remained absent on the plea of medical rest on false pretext. During the departmental enquiry 6 witnesses were examined on behalf of the Department. One B.D. Ram has been examined as P.W. 4 and one M. Biruah who was Incharge Coy Commander at the relevant time, has been examined as P.W. 2. It would appear from the penalty order dated 02.09.2002 that the defence of the petitioner has been disbelieved on the ground that in his application the petitioner failed to indicate that he had gone to hospital to get his daughter treated and while returning he fell down and became unconscious. It is also

indicated in the final order dated 02.09.2002 that, since the petitioner failed to inform the Department about his sickness and take necessary permission from the competent authority, his plea has been disbelieved. I am of the opinion that the specific plea taken by the petitioner that on 07.11.2001 he was taken to hospital by his wife and one neighbour, has been disbelieved without verifying the said fact from the neighbour of the petitioner namely, Harendra and his wife. The petitioner took a defence that on 07.11.2001 itself he had telephonically informed one Bhagwat Singh who was deployed on duty in the 2nd shift and requested him to inform the competent authority about his illness however, this has been disbelieved without examining the said Bhagwat Singh. P.W. 2 and P.W. 4 both have admitted in their evidence that petitioner was not informed by them personally that he was deployed for induction duty on 07.11.2001 at Kolkata Airport. Both witnesses have admitted during the cross-examination that they knew about the admission of the petitioner in the hospital and the suspension order has been served upon the petitioner when he was admitted in the hospital.

7. In view of the above facts, I am of the opinion that only on suspicion, a charge has been framed and found proved against the petitioner that, only of avoiding induction duty at Kolkata Airport, the petitioner remained hospitalized on the ground of sickness. Suspicion howsoever strong, cannot take place of evidence and though, in the departmental proceeding the same standard of test as in the criminal case is not applicable however, there should be some evidence on record to connect the misconduct alleged with evidence produced during the enquiry.

8. The learned counsel for the petitioner has next contended that even if it is admitted that, the charge that the petitioner had knowledge about the induction duty on 07.11.2001 is proved, the penalty imposed upon the petitioner is excessive and disproportionate to the charge framed and found proved.

9. In *Ranjit Thakur Vs. Union of India (UOI) and Others*, the Hon"ble Supreme Court has held that even on proved charges of disobedience of order of superior officer to eat food, sentence of one year and thereafter, dismissal from service with added disqualification of being declared unfit for civil employment was disproportionately excessive. The Hon"ble Supreme Court has held as under,

25. Judicial review generally speaking, is not directed against a decision, but is directed against the "decision-making process". The question of the choice and quantum of punishment is within the jurisdiction and discretion of the court-martial. But the sentence has to suit the offence and the offender. It should not be vindictive or unduly harsh. It should not be so disproportionate to the offence as to shock the conscience and amount in itself to conclusive evidence of bias. The doctrine of proportionality, as part of the concept of judicial review, would ensure that even on an aspect which is, otherwise, within the exclusive province of the court-martial, if the decision of the court even as to sentence is an outrageous defiance of logic, then the sentence would not be immune from correction. Irrationality and perversity are recognised grounds of judicial review.....

10. In *Chairman cum Managing Director, Coal India Limited and Another Vs. Mukul Kumar Choudhuri and Others*, , the Hon''ble Supreme Court has held as under:

21. In a case like the present one where the misconduct of the delinquent was unauthorised absence from duty for six months but upon being charged of such misconduct, he fairly admitted his guilt and explained the reasons for his absence by stating that he did not have any intention nor desired to disobey the order of higher authority or violate any of the Company's rules and regulations but the reason was purely personal and beyond his control and, as a matter of fact, he sent his resignation which was not accepted, the order of removal cannot be held to be justified, since in our judgment, no reasonable employer would have imposed extreme punishment of removal in like circumstances. The punishment is not only unduly harsh but grossly in excess to the allegations.

11. In *Dev Singh Vs. Punjab Tourism Development Corporation Ltd. and Another*, , a case where an official file was misplaced and for that the employee was proceeded in departmental enquiry and he was dismissed from service for the said misconduct, the Hon''ble Supreme Court has held thus,

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 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. It is also clear from the above-noted judgments of this Court, if the punishment imposed by the disciplinary authority is totally disproportionate to the misconduct proved against the delinquent officer, then the court would interfere in such a case.

12. It is a settled proposition that different persons would react differently in similar set of circumstances and therefore, merely because the petitioner failed to indicate in the letter written to the Department that on 07.11.2001 he had gone to hospital to get his daughter treated, the defence taken by the petitioner cannot be disbelieved. The procedure adopted by the departmental authorities while holding the charge levelled against the petitioner stood proved, was erroneous and therefore, the impugned orders are liable to be interfered with and are hereby quashed.

13. The learned counsel for the respondents has submitted that insofar as, question of punishment is concerned, the departmental authority alone is the competent authority to impose the punishment on a delinquent employee. I find substance in the contention raised by the counsel for the respondents and therefore, the matter is remitted back to the disciplinary authority for imposing appropriate minor penalty. The writ petition is disposed of in aforesaid terms.