
(2012) 01 PAT CK 0098
In the Patna High Court
Case No : CWJC No. 393 of 1998

Shashi Prasad Yadav

APPELLANT

Vs

The State of Bihar and Others

RESPONDENT

Date of Decision : 10-01-2012

Acts Referred:

Citation : (2012) 4 PLJR 66

Hon'ble Judges : Shivaji Pandey, J

Bench : Single Bench

Advocate : Sushmita Mishra, for the Appellant; Sunil Kumar Ravi for the State, for the Respondent

Final Decision : Allowed

Judgement

Shivaji Pandey, J.—The petitioner is challenging the order contained in Memo No. 890 dated 14th April, 1994 (Annexure-1 to the writ petition) passed by the Superintendent of Police, Muzaffarpur whereby and whereunder the petitioner has been dismissed from service. On appeal, the order as aforesaid was affirmed vide Memo No. 1228 dated 12th July, 1996 passed by the D.I.G., Tirhut Range, Respondent No. 3 Ultimately the Memorial filed by the petitioner was rejected vide Memo No. 4779/P-2. The short facts of the case is that the petitioner was appointed as a constable on 1st October 1981. Petitioner was given duty of bodyguard of Sri Ganesh Prasad Yadav, MLA on 20th July, 1989, as has been alleged by the MLA, the petitioner left his duty on the pretext that he has to get his service revolver cleaned and oiled and he remained absent for a period between 20th July, 1989 to 15th August, 1989. For the aforesaid act of misconduct, petitioner was served with a charge-sheet dated 27th September, 1989 stating the charges, namely, that he remained absent for the period between 20th July, 1989 to 15th August, 1989 on giving a wrong fact that he was to get his revolver oiled as the revolver had damped due to rain water whereas the fact is that he had already got it cleaned and oiled on 6th July, 1989. Another part of the charge was that he was named accused in Sitamarhi

P.S. Case No. 95 of 1989 dated 24th July, 1989.

2. On receipt of the aforesaid charge, petitioner filed his reply dated 9th October, 1989 (Annexure-5 to the writ petition) giving explanation that the revolver which was given to him was not properly working as his service revolver damped. He has admitted that on 6th July, 1989 he got his revolver cleaned and oiled but he developed stomach pain and he was running under fever for that he had made a request for leave to the MLA, but for one reason or the other, he (MLA) turned his deaf ear to the request made by the petitioner. It was further stated that due to rain, his service revolver damped in rain water and for that he had gone for its cleaning and oiling on 20th July, 1989 where he had fallen ill. But he had gone to the Police Line and got the revolver oiled and fell seriously ill due to high fever. He was treated by the Doctor and for that he filed an application for leave and sent it through UPC. It is submitted that on recovery, petitioner joined on 20th March, 1989 and in support of his contention, he has annexed the copy of the application sent through UPC.

3. As claimed by the petitioner, departmental enquiry was conducted against the petitioner but the claim of the petitioner is that he was not given opportunity to defend his case, as no notice was served on him. After conclusion of the enquiry, enquiry report was submitted. It appears from the record that on receipt of the 2nd show cause, petitioner filed his reply vide explanation dated 4th August, 1993 in which petitioner could not deny the factual part that he was absent from duty for the period mentioned in the charge-sheet, but he has given his explanation about the reason for his absence. It was also stated that the period of absence can be adjusted against leave standing to his credit. So far being an accused in Sitamarhi P.S. Case No. 95 of 1989, he has stated that he had wrongly been named in that case as the Police after investigation found that he was wrongly named in that case and submitted a final form in his favour. The court vide order dated 13.12.1989 accepted the Final Form and in this way petitioner was let off from the criminal case. This fact is admitted that the petitioner was thereafter not sent up for trial.

4. In this view of the matter, the admitted position is that the petitioner could be proceeded departmentally confined to the allegation that the petitioner remained absent from duty for the period in question.

5. On consideration of his explanation and other evidences on record, the order of punishment vide Memo No. 890 dated 14th May, 1995 was passed by the Superintendent of Police, Muzaffarpur whereby the petitioner was dismissed from service and it was ordered that during the period of suspension he will be paid only the subsistence allowance. Petitioner filed appeal and the same was rejected and the order of punishment was affirmed. The petitioner thereafter filed a memorial and that, too, was rejected by the Director General-cum-Inspector General of Police, respondent no. 2.

6. Learned counsel for the petitioner submits that during the enquiry, petitioner

was not given the opportunity to defend his case, as no notice was ever served on him by the Enquiry Officer. So all the witnesses who were examined during the enquiry were ex parte. It has further been submitted that the enquiry report which was required to be served on the petitioner has not been served which is apparent from letter of Superintendent of Police, Muzaffarpur dated 22nd May, 1996 (Annexure-9 to the writ petition).

7. From the narration of facts mentioned in the said letter it is amply clear that the copy of the enquiry report was not served upon the petitioner which is in violation of natural justice. It has further been argued that the non-service of enquiry report to the petitioner is in complete violation of natural justice as the petitioner could not get a chance to give explanation on findings of the Enquiry Officer.

8. Learned counsel for the State has refuted the aforesaid submissions and submitted that the petitioner was given full opportunity and it is the petitioner who did not avail the opportunity and with regard to the service of enquiry report it has been submitted by the learned counsel for the State that the petitioner could not show any prejudice caused to him due to non-service of enquiry report. It has further been submitted that now service report will not make departmental enquiry illegal unless it shows that prejudice was caused to the petitioner due to non-service of enquiry report. It was further contended that petitioner cannot challenge the enquiry proceeding or report in view of the fact that the petitioner himself failed to participate in the enquiry.

9. Having considered the submissions of both the parties, it is clear that the enquiry was ex parte and this Court had directed the State Counsel to produce the original records of the case but unfortunately the records are not available and the same could not be produced.

10. In such circumstance, it is very difficult for this Court to find out whether notice was served upon the petitioner or not. The fact remains that it is an undisputed fact which cannot be denied by the petitioner that he remained absent for the period in question, save and except the explanation given for being absent due to illness. Learned counsel for the petitioner could not point out as to what prejudice has been caused to the petitioner in not serving the enquiry report. The matter could have been remanded back but the fact remains that it will be useless formality to remand the case afresh from the stage of service of enquiry report, the situation will not change with regard to absence of the petitioner for the period in question. But one fact and an issue is very relevant for consideration as to whether the punishment of dismissal is proportionate to the charges leveled. The charge is of absence for a period less than one month and for that petitioner has submitted his explanation and one fact is clear from the letter of Superintendent of Police, Muzaffarpur (Annexure-9) that he had approached the Police Line and his service revolver was oiled but thereafter he ought to have reported to his place of work, but he remained absent with an explanation that he was ailing during that period. In that view of the matter, this

Court is of the view that the order of punishment is not proportionate to the charges proved against the petitioner.

11. The Hon"ble Supreme Court like a case in hand has held that the authority which is conferred with discretionary power is bound to look into all attending facts and circumstances of the case and while imposing punishment the disciplinary authority ought to act reasonably and fairly. In the present case, petitioner was a constable and punishment of dismissal for being absent for less than one month will be very harsh and exercise of discretionary power by the Disciplinary Authority would be termed arbitrary and unreasonable. The order of punishment is unreasonable and completely disproportionate to the charges proved against the petitioner. The Hon"ble Supreme Court in the case of State of M.P. and Others Vs. Hazarilal, held as under:--

Para 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.

Para 11. Furthermore, the legal parameters of judicial review have undergone change. Wednesbury principle of unreasonableness has been replaced by the doctrine of proportionality.

Para 12. At this stage we may also notice the application of the doctrine by the United Kingdom House of Lords in Seal vs. Chief Constable of South Wales Police, Huang vs. Secy. of State for the Home Deptt., Tweed vs. Parades Commission for Northern Ireland.

12. Again in the case of Management of Coimbatore District Central Co-operative Bank Vs. Secretary, Coimbatore District Central Co-operative Bank Employees Association and Another, Hon"ble Supreme Court held as under:--

Para 19. de Smith States that "proportionately" involves "balancing test" and "necessity test" whereas the former (balancing test) permits scrutiny of excessive onerous penalties or infringement of rights or interests and a manifest imbalance of relevant considerations, the latter (necessity test) requires infringement of human rights to the least restrictive alternative.

Para 20. In Halsbury's Laws of England (4th Edn.), Re-issue, Vol. 1 (1), pp. 144-45, Para 78, it is stated:--

The court will quash exercise of discretionary power in which there is no reasonable relationships between the objective which is sought to be achieved and the means used to that end, or where punishments imposed by administrative bodies or inferior courts are wholly out of proportion to the

relevant misconduct. The principle of proportionality is well established in European Law and will be applied by English courts where European Law is enforceable in the domestic courts. The principle of proportionality is still at a stage of development in English Law; lack of proportionality is not usually treated as a separate ground for review in English Law, but is regarded as one indication or manifest unreasonableness.

Para 21. The doctrine has its genesis in the field of administrative law. The Government is its departments, in administering the affairs of the country are expected to honour their statements of policy or intention and treat the citizens with full personal consideration without abuse of discretion. There can be no "pick and choose", selective applicability of the Government norms or unfairness, arbitrariness or unreasonableness. It is not permissible to use a "sledgehammer to crack a nut". As has been said many a times; "where paring knife suffices, battle axe is precluded."

13. The same view has been reiterated by the Hon"ble Supreme Court in the case of State of U.P. Vs. Sheo Shanker Lal Srivastava and Others, as under:--

Para 22. It is now well settled that principles of law that the High Court or the Tribunal in exercise of its power of judicial review would not normally interfere with the quantum of punishment. Doctrine of proportionality can be invoked only under certain situations. It is now well settled that the High Court shall be very slow in interfering with the quantum of punishment, unless it is found to be shocking to one's conscience.

Para 23. In V. Ramana vs. A.P. SRTC this Court upon referring to a large number of decisions held: (SCC p. 348, para 11):--

11. The common thread running through in all these decisions is that the court should not interfere with the administrator's decision, unless it was illogical or suffers from procedural impropriety or was shocking to the conscience of the court, in the sense that it was in defiance of logic or moral standards. In view of what has been stated in Wednesbury case. The court would not go into the correctness of the choice made by the administrator open to him and the court should not substitute its decisions for that of the administrator. The scope of judicial review is limited to the deficiency in decision making process and not the decision.

Para 24. While saying so, we are not oblivious of the fact that the doctrine of unreasonableness is giving way to the doctrine of proportionality.

14. In view of the aforesaid fact and circumstances, this Court is of the view that disciplinary authority has not exercised his discretionary power fairly and properly and did not consider the attending facts and circumstances of the case and the order of punishment of dismissal is completely disproportionate shocking to the conscience of this Court. Hence, the order of dismissal is quashed and the matter is remanded back to the authority concerned to pass appropriate order in

accordance with law, considering the facts and circumstances of the case, including the letter of the Superintendent of Police, Muzaffarpur (Annexure-9 to the writ petition). The exercise of consideration should be completed within a period of three months from the date of receipt/production of copy of this order as the matter is very old. Accordingly, this petition is allowed to that extent.