

(2010) 07 DEL CK 0326

In the Delhi High Court

Case No : Writ Petition (C) No. 442 of 1995 and C.M. No. 773 of 1995

Shri Suresh Kumar

APPELLANT

Vs

Union of India (UOI) and Others

RESPONDENT

Date of Decision : 27-07-2010

Acts Referred:

Central Reserve Police Force Act, 1949 — Section 10, 12, 12(1), 16(2)
Central Reserve Police Force Rules, 1955 — Rule 27

Citation : (2010) 07 DEL CK 0326

Hon'ble Judges : J.R. Midha, J;Gita Mittal, J

Bench : Division Bench

Advocate : O.P. Saxena, for the Appellant; Ankur Chhiber, for the Respondent

Final Decision : Dismissed

Judgement

Gita Mittal, J.—The petitioner has filed the present writ petition assailing an order dated 30th May, 1994 passed by Shri D.C. Dey, Commandant, 42nd Battalion, Khonsa, Central Reserve Police Force (hereinafter referred to as "CRPF" for brevity) exercising powers of the Chief Judicial Magistrate u/s 16(2) of the Central Reserve Police Force Act, 1949 (hereinafter referred to as "CRPF Act, 1949" for brevity). By this judgment, the petitioner was found guilty of the offence of having overstayed leave without permission/sanction from the competent authority, without sufficient cause u/s 10(m) of the CRPF Act, 1949 and having failed to join the duty. The Commandant as Judicial Magistrate First Class had imposed the sentence of "simple punishment till the rising of the court".

2. As a result of the imposition of the sentence of imprisonment, the Commandant had exercised jurisdiction u/s 12(1) of the CRPF Act, 1949 read with Rule 27(a) of the CRPF Rules, 1955 directing that the petitioner be dismissed from service w.e.f. 30th May, 1994. The petitioner assailed this judgment by way of an appeal made to the Director General of Police (hereinafter referred to as "DIGP" for brevity) of the CRPF dated 24th June, 1994 which was rejected by an order dated 29th August, 1994. The petitioner has challenged this

order passed by the Director General of Police as well in the present petition.

3. The facts giving rise to the present petition to the extent necessary are briefly noticed hereafter. On 29th January, 1981, the petitioner was appointed as a Constable in the CRPF. The record discloses that the petitioner had sought leave on the ground that his wife was unwell and was granted earned leave of 33 days between the period 15th December, 1993 to 16th January, 1994. On 12th January, 1994, the petitioner telegraphically sought extension of the leave on the ground that his wife has failed to recover which was followed by a representation of the same date.

4. The respondents, however, did not consider the petitioner's request favourably and rejected the same on the ground of deficiency of personnel. This rejection of extension of leave was communicated to the petitioner by a communication dated 18th January, 1994. The petitioner was advised to return immediately. It is noteworthy that by a communication dated 19th January, 1994, the respondents additionally sought the complete record of the petitioner's wife duly certified by a doctor of the government hospital. The petitioner was reminded that he must report for duty failing which disciplinary action could be taken against him.

5. It is an admitted position before us that the petitioner did not resume duty and he also did not bother to respond to the communication of the respondents.

6. In these circumstances, a court of inquiry was conducted against him and by an order dated 14th May, 1994, he was declared as a deserter from service. On the basis of a complaint lodged by the Commandant of the 42nd Battalion, CRPF, a warrant of arrest was issued on 22nd March, 1994 to the Superintendent of Police, Sonapat, Haryana within whose jurisdiction the petitioner's home town fell.

7. Before the said warrant of arrest could be executed, the petitioner is stated to have reported on his own to the unit at Khonsa on 21st May, 1994. The petitioner had been unauthorisedly absent from duty for a period of 125 days by this time. The petitioner was taken into custody and was tried by the Commandant as afore-noticed in exercise of the powers of the Judicial Magistrate vested in him by virtue of Section 16(2) of the CRPF Act, 1949.

8. The respondents have produced the original record of the case before us. Perusal of the record shows that the petitioner was charged with an offence of overstaying leave by 125 days w.e.f. 17th January, 1994 to 21st May, 1994 without sanction from the competent authority which was an offence u/s 10(m) of the CRPF Act, 1949. It is noteworthy that the petitioner pleaded "guilty" to the charges in the court proceedings on the 26th May, 1994. He also stated that he had nothing to state in his defence but prayed to be excused for the reason that he had committed a mistake. The petitioner also refused to engage the services of a counsel/lawyer to defend him in the trial. The original record which has been produced before us, bears the signatures of the petitioner on all pages of the

statement which he had made on 26th May, 1994 as well as the signatures of the departmental complainant. In this background, the petitioner was found guilty of the offences with which he was charged. The Commandant-cum-Judicial Magistrate First Class had as a result passed an order dated 30th May, 1994 holding the petitioner guilty of the offence and sentenced him to imprisonment till the rising of the court. The petitioner is stated to have undergone the sentence.

9. Our attention has been drawn by Mr. Ankur Chhiber, learned Counsel for the respondents to the provisions of Section 12 of the Central Reserve Force Act, 1949 which reads as follows:

Place of imprisonment and liability to dismissal on imprisonment

12.(1) Every person sentenced under this Act to imprisonment may be dismissed from the force, and shall further be liable to forfeiture of pay, allowance and any other moneys due to him, as well as of any medals and decorations received by him.

(2) Every such person shall, if he is so dismissed, be imprisoned in the prescribed prison, but if he is not also dismissed from the force, he may, if the Court of the Commandant so directs, be confined in the quarterguard or such other place as the court or the Commandant may consider suitable.

10. We find that in the instant case, inasmuch as the petitioner had been sentenced to imprisonment, following the mandate of Section 12 of the CRPF Act, 1949, the Commandant also passed the order dated 30th May, 1994 ordering dismissal of the petitioner from service.

11. The petitioner's appeal was placed before the DIGP who dismissed the same by an order passed on 29th August, 1994 and upheld the sentence which was imposed on the petitioner.

12. Mr. O.P. Saxena, learned Counsel for the petitioner has contended that so far as the finding of guilt against the petitioner in respect of charges is concerned, the same is not assailed and that this writ petition is confined to a challenge to the sentence and the order of dismissal passed against the petitioner on the ground that the same is grossly disproportionate to the gravity of the allegations levelled against him. It is submitted that the petitioner was prevented by the serious sickness of his wife in joining duty on expiry of his leave and that he had duly communicated the same to the respondents. In this background, learned Counsel for the petitioner has prayed that a sympathetic view deserves to be taken of the petitioner's absence and that he ought not to have been removed from services.

13. Learned Counsel has urged that a discretion is cast u/s 12 of the statute upon the Commandant after a sentence of imprisonment being imposed upon CRPF personnel and that he had other options available to him under the statutory provision which could have been very well exercised.

14. The writ petition, however, is vehemently opposed by Mr. Ankur Chhiber, learned Counsel for the respondents inter alia on the ground that the petitioner has failed to invoke statutory remedy of appeal under the Code of Criminal Procedure and that the writ petition deserves to be rejected on this short ground alone. Learned Counsel for the respondents has further contended that the conduct of the petitioner reflects his indiscipline and lack of seriousness so far as his duties are concerned which left no option at all to the respondents but to proceed in the manner in which they did against the respondents.

15. We have given our considered thought to the rival contention. The petitioner had undoubtedly sought leave on the ground of sickness of his wife. The respondents considered the same compassionately and granted him earned leave for a period of 33 days between 15th December, 1993 to 16th January, 1994. On the eve of the expiry of the said leave, the petitioner sent a telegram and a representation dated 12th January, 1994 to the respondents seeking extension of leave. The respondents expressed inability to grant the extension on ground of deficiency in the available personnel. The petitioner has not assailed this position with regard to the personnel position with the respondents on any ground of arbitrariness, mala fide or illegality. In any case, faced with lack of adequate manpower, the respondents would have had no option but to reject the petitioner's request for extension of leave as was done.

16. We also find that in any case by the communication of 19th January, 1994, the respondents also asked the petitioner for proof of the wife's sickness including certification of the documentation by a doctor of a government hospital. The petitioner did not care to respond to these communications from the respondents and admittedly chose not to report for duty. He opted not to even acknowledge the respondents communications and sent no document let alone the required certification to support his stated ground for leave. Due service of the communications orders passed by the respondents is manifested from the fact that they have been annexed with the writ petition.

17. In this background, the respondents certainly had no option but to proceed in accordance with law. As noted hereinabove, warrants of arrest on 22nd March, 1994 issued to the petitioner were issued pursuant to the request made by the CRPF. It appears that it was only because of the issuance of these warrants that the petitioner was persuaded to report back to his unit. Interestingly, by this time, a period of almost 125 days since 17th January, 1994 when the petitioner's leave expired, have passed.

18. When the petitioner returned, he was taken into custody and tried for the offence of overstaying his leave without authority. The petitioner pleaded guilty and has not assailed the findings of guilt by the judicial magistrate before us. The only issue which has to be examined is as to whether the sentence of imprisonment till rising of the day by the order dated 30th May, 1994 and the consequent order of dismissal of the petitioner from service passed on the same day, is disproportionate to the seriousness of the allegations levelled against the

petitioner.

19. It is trite that a challenge to a sentence on grounds of proportionality can be successfully laid only if the sentence of punishment is so disproportionate to the gravity of the allegations that it shocks the conscience of the court.

20. So far as the scope and manner of judicial review of disciplinary action raising an issue of proportionality of a sentence imposed upon a person is concerned, the principles are well settled.

21. Placing reliance on the enunciation of the applicable principles in several judgments of the Supreme Court, a division bench of this Court of which one of us (Gita Mittal, J) was a member, had passed a judgment dated 27th January, 2010 in W.P. (C) No. 12952/2009 entitled Ram Gopal v. Union of India and Ors. and rejected a similar challenge as raised by the petitioner. The statement of law was noted as follows:

The judgment of the Supreme Court in B.C. Chaturvedi Vs. Union of India and others, is an authority with regard to the principles which apply. In para 18 of the judgment, the Supreme Court laid down the law as follows:

18. ...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.

19. In Union of India and another Vs. G. Ganayutham (Dead) by LRs., the court summed up the legal position in para 31 which reads as follows:

31. In such a situation, unless the Court/ Tribunal opines in its secondary role, that the administrator was, on the material before him, irrational according to Wednesbury or CCSU norms, the punishment cannot be quashed. Even then, the matter has to be remitted back to the appropriate authority for reconsideration. It is only in very rare cases as pointed out in B.C. Chaturvedi's case AIR 1995 SCW 4374 that the Court might, to shorten litigation - think of substituting its own view as to the quantum of punishment in the place of the punishment awarded by the competent authority. (In B.C. Chaturvedi and other cases referred to therein it has however been made clear that the power of this Court under Article 136 is different). For the reasons given above, the case cited for the respondent, namely. State of Maharashtra Vs. M.H. Mazumdar, cannot be of any help.

32. For the aforesaid reasons, we set aside the order of the Tribunal which has interfered with the quantum of punishment and which has also substituted its own view of the punishment. The punishment awarded by the departmental

authorities is restored. In the circumstances, there will be no order as to costs.

20. These decisions were examined and the principles reiterated by the court in the judgment reported at Union of India (UOI) and Another Vs. K.G. Soni, wherein the court stated as follows:

14. 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 the *Wednesbury's* case (*supra*) 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 decision to that of the administrator. The scope of judicial review is limited to the deficiency in decision-making process and not the decision.

15. To put differently, unless the punishment imposed by the Disciplinary Authority or the Appellate Authority shocks the conscience of the Court/Tribunal, there is no scope for interference. Further to shorten litigations it may, in exceptional and rare cases, impose appropriate punishment by recording cogent reasons in support thereof. In a normal course if the punishment imposed is shockingly disproportionate, it would be appropriate to direct the Disciplinary Authority or the Appellate Authority to reconsider the penalty imposed.

21. In *Ranjit Thakur Vs. Union of India (UOI) and Others*, the court was considering the legality of punishment which was imposed upon the petitioner upon trial by a court martial. The court held that judicial review was directed against the decision making process while the choice of quantum of punishment was within the jurisdiction and discretion of court martial. It was held that the sentence must suit the offence and the offender, and should not be so disproportionate to the offence so as to shock the conscience of the court and amount to conclusive evidence of bias. On application of the doctrine of proportionality which has derived its shades from the *Wednesbury* test, it was observed that if the decision of the court martial as to sentence is outrageous defiance of logic, the sentence would not be immune from correction. Para 25 of the judgment deserves to be considered in extenso which reads as follows:

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. In *Council Of Civil Service Unions v. Minister For The Civil Service* (1984) 3 WLR 1174 Lord Diplock said:

...Judicial Review has, I think, developed to a stage today when without re-iterating any analysis of the steps by which the development has come about, one can conveniently classify under three heads the grounds upon which administrative action is subject to control by judicial review. The first ground I would call "illegality", the second "irrationality" and the third "procedural impropriety". That is not to say that further development on a case by case basis may not in course of time add further grounds. I have in mind particularly the possible adoption in the future of the principle of "proportionality" which is recognised in the administrative law of several of our fellow members of the European Economic Community....

22. In the instant case, the petitioner has treated his service casually. He has shown dereliction and utmost contempt for the directions by the respondents to him to resume his duties. The petitioner has not even cared to support his request for extension of his leave on grounds of his wife's sickness with the medical record which has been sought from him.

23. Before this Court, the petitioner has placed reliance on a medical certificate dated 13th May, 1994 to support his plea of his wife's sickness. This certificate has been issued by a private hospital and polyclinic in district Gohana which merely states that Smt. Kamla Devi wife of Suresh Chand was suffering from PIVD Lumba Spine and was under the treatment at hospital from 2nd January, 1994 to 13th May, 1994 as an OPD case. The stamp of doctor on this certificate reflects that it had been issued by a general physician and not by any specialist. No treatment card or medical prescriptions or bills which would manifest the petitioner's contention that his wife was genuinely sick preventing him from resuming duties, has been placed before this Court. This certificate on the other hand manifests that even if the petitioner's wife was ill, her sickness was not so serious and she did not require any hospitalisation.

24. The above discussion would show that the petitioner who was a member of the disciplined para military force, has treated his service with utmost casualness which is completely intolerable. The petitioner was willfully absent from duty not for any short period but for a period of over four months. The excuse put forth by the petitioner as a reason for his absent is not supported by any credible documentation or medical record. The petitioner was aware of the fact that the respondents were having shortage of manpower and his services were urgently needed. Let alone resuming duties, the petitioner did not even care to respond to such requests from the respondents.

The para military and military forces certainly cannot brook indiscipline of this kind. Their personnel are expected to display discipline and sincerity in performance of duty of the highest order. The petitioner has displayed neither.

25. In support of his submission that the petitioner ought to have filed an appeal, reliance is placed on a decision dated 19th July, 2006 of the Gauhati High Court in Criminal Revision No. 386/2003 entitled Shri Srikand Prasad v. Union of India and Ors. connected cases, holding that in case of a conviction by the commandant in exercise of power u/s 12 of the CRPF Act, the same would be subject to the challenge which would lie by way of an appeal before the learned Sessions Judge in accordance with the provisions of the Code of Criminal Procedure. In view of our finding on the merits of the petitioner's challenge as well as the long pendency of the matter in this Court since 1995, we are not inclined to divert the petitioner to a remedy of an appeal at this stage. Rejection of a writ petition on the ground of availability of an alternate remedy is a rule of convenience and not an absolute bar. In any case, the remedy of appeal would be neither available nor be efficacious in view of the statutory limitation after passage of fifteen years of filing of this writ petition. Such objection as and when raised, should be brought to the notice of the court and adjudication thereon sought at the earliest. Even otherwise, there is no absolute bar to the maintainability of a writ petition against orders of a magistrate. The parameters of such challenge though narrow, are well settled. Maintainability of the challenge will depend on the facts and circumstances and grounds of challenge in the case. We are not opining on this issue in the present case for the aforementioned reasons.

26. In view of the above discussion, we are unable to hold that the punishment imposed upon the petitioner is disproportionate to the gravity of the charges of the allegations levelled against him.

We find no merit in this writ petition. The writ petition and application are accordingly hereby dismissed.

This order has been passed in the facts and circumstances of this case and shall not be treated as precedent.