

(2011) 02 GUJ CK 0176
In the Gujarat High Court
Case No : Second Appeal No. 22 of 2005

State of Gujarat and Another	Vs	APPELLANT
Jorubha Gumansinh Jadeja		RESPONDENT

Date of Decision : 07-02-2011

Acts Referred:

Civil Procedure Code, 1908 (CPC) — Section 80
Constitution of India, 1950 — Article 136, 14, 16, 19, 21
Penal Code, 1860 (IPC) — Section 114, 147, 148, 149, 323

Citation : (2011) 02 GUJ CK 0176

Hon'ble Judges : H.K. Rathod, J

Bench : Single Bench

Advocate : Shachi Mathur, Asstt. GP, for the Appellant; Umang Vyas, for Viral K. Shah, for the Respondent

Final Decision : Dismissed

Judgement

H.K. Rathod, J.—Heard learned Assistant Government Pleader Ms. Shachi Mathur for Appellants State of Gujarat and District Superintendent of Police, Jamnagar and learned Advocate Mr. Umang Vyas for learned Advocate Mr. Viral K. Shah for Respondent original Plaintiff Jorubha Gumansinh Jadeja.

2. This Second Appeal has been admitted by this Court (Coram: Hon'ble Mr. Justice AM Kapadia,J.) on 7th March, 2005 where following substantial questions of law have been raised for determination:

The following substantial questions arise:

(A) Whether in the facts and circumstances of the case and in view of the admitted position and in view of the temporary nature of appointment whether the orders, which are passed by the department, could have been passed without holding departmental inquiry ?

(B) Whether in the facts and circumstances of the case the action of the department was malafide?

(C) Whether in the facts and circumstances of the case and looking to the history of the original Plaintiff regarding unauthorised absence and his misbehaviour, order was sufficient enough to pass orders as is passed by the authority ?

Appeal ADMITTED.

3. This Court has also granted interim relief in terms of paragraph 5(A) in Civil Application No. 1632 of 2005 on 7th March, 2005 and subsequently, this has been confirmed by this Court during pendency of second appeal No. 22 of 2005 which order dated 9.3.2005 is quoted as under:

1. Having heard Ms. Hansa Punani, learned AGP appearing for the applicants and Mr. Hasit H Joshi, learned advocate appearing for the opponent and having considered the averments made in the application and in the affidavit in reply as well as in the facts and circumstances emerging from the record of the case, according to this Court, ad-interim relief in terms of para 5 (A) granted at the time of issuance of rule is required to be confirmed during the pendency of Second Appeal No. 22 of 2005.

2. The application succeeds and accordingly it is allowed with no order as to costs. Ad-interim relief in terms of para 5 (A) granted at the time of issuance of rule shall continue as interim relief during the pendency of Second Appeal No. 22 of 2005. Rule is made absolute.

4. By filing this second appeal, Appellants are challenging judgment and decree passed by learned 5th Jt. Civil Judge, (S.D.) Jamnagar in Regular Civil Suit No. 8 of 1994 dated 11.12.2001 wherein trial court has allowed suit partly and action of Defendants present Appellants in removing Plaintiff from service has been declared as excessive and directed original Defendants to reinstate Plaintiff in service with one half back wages from date of institution of suit. Service of Plaintiff has been ordered to be treated as continuous for the purpose of pension and leave. Decree was ordered to be drawn accordingly vide Exh. 41. Said judgment and decree passed by trial court vide Exh. 41 was challenged by Appellants before Joint District Judge, Jamnagar FTC No. 4 by filing Regular Civil Appeal No. 61 of 2002 wherein lower appellate court has dismissed said appeal while confirming judgment and decree passed by trial court vide judgment dated 24.9.2004. Therefore, Appellants challenged same before this Court by filing this second appeal.

5. Brief facts of suit filed by Plaintiff before trial court are to the effect that the Plaintiff was serving in police department as unarmed police constable who joined service on 13.2.1973. His total service and work was satisfactory and good. In 1985, he was on duty at Harshad Mata Temple situated within jurisdiction of Kalyanpur Police Station. On 14.4.85, one complaint was lodged against him and one Head Constable Mangalsinh in Kalyanpur Police Station for offence punishable u/s 323 read with Section 114 of IP Code stating that he and said Mangalsinh, have beaten Harijan Manu Deva and others and have voluntarily caused injuries which offence was registered as Crime No. 3 of 1985 in Kalyanpur

Police Station. In connection with said NC Complaint, DSP Jamnagar issued memorandum and charge-sheet to present Respondent original Plaintiff and Mangalsinh bearing No. SBDP-Jorubha 60/85 dated 10.6.1985. In connection with said charge-sheet and memorandum, departmental inquiry was held against Plaintiff and after issuing final notice, DSP Jamnagar dismissed Plaintiff by order dated 28.2.1989 bearing No. SB-DP-Jorubha 203-89. Against said order, Plaintiff preferred appeal before Deputy Inspector General of Police, Rajkot Range which appeal was dismissed by order dated 30.4.1990. Therefore, second appeal was preferred by Plaintiff before Director General of Police, Gujarat State, Ahmedabad which was also dismissed by order dated 25.11.1991. Thereafter, notice u/s 80 of CPC was issued by Plaintiff against original Defendants and after expiry of notice period, filed aforesaid suit inter alia pleading that in connection with complaint filed by complainant, no cognizance was taken by any court of law. It was also pleaded by Plaintiff before trial court that the DSP Jamnagar cannot play role of court. Such complaint cannot be subject matter for departmental inquiry. It is pleaded that against Plaintiff, except complaint lodged against him u/s 323 of IP Code, no allegations are there. It is also pleaded that even complainant has not supported the complaint, accordingly charge is not proved even then, Defendants have committed grave error in holding that charge is duly proved. It is also pleaded that no opportunity is given to the Plaintiff to be heard before passing final order. It is also pleaded that though equal charge was against Mangalsinh, even then, light punishment is imposed against Mangalsinh, accordingly, discriminatory order is passed which amounts to breach of Article 14 and 16 of Constitution of India. By filing said suit, it was prayed by Plaintiff before trial Court to declare that order passed by DSP Jamnagar dismissing him by order No. SBDP-Jorubha-203-89 dated 28.2.1989 and order passed in appeal No. C-214-A15-89-Jam-90-3884 dated 30.4.1990 as well as order passed in second appeal dated 25.11.1991 are illegal, unconstitutional, unlawful, discriminatory and against principles of natural justice. It is also prayed that Plaintiff be reinstated in service with past effect.

6. All Defendants were duly served and they appeared through Government Pleader before trial court but written statement was not filed by Defendant No. 2 and 3 and Defendants No. 1 and 4 filed written statement before trial court inter alia denying all averments made in plaint except those which were specifically admitted by them. It was contended by them in their reply that for want of statutory notice, suit deserves to be dismissed. Further, it was also contended that against Plaintiff, after he joined service, during period of four years, so many offences are registered. It was also contended that for offences committed by Plaintiff, departmental enquiry was held against him and after due process, he was ordered to be removed from service. It was also contended that all opportunity was given to Plaintiff before passing disputed order. It was also contended that against Plaintiff, in Jamnagar City Police Station, one offence is registered for Prohibition Act bearing Crime No. 147/77; (2) In Jamnagar City B Division Police Station Crime No. 96/77 for offence punishable u/s 365(3) In

Jamnagar City Crime No. 842/77 for offence punishable u/s 394; (4) In Jamnagar City Police Station Crime No. 751/78 for offence punishable u/s 323, 324, 506(2); (5) In Rajkot Railway Police Station Crime No. 24 of 1978 for offence punishable u/s 332, 504, 506, 114; (6) Jamnagar City Police Station Crime No. 233/82 for the offences punishable u/s 147, 148, 149, 458, 324, 323; (7) In Rajkot City B Division Police Station Crime No. 325/85 for offence punishable u/s 385, 447. It was contended that the punishment in departmental inquiry is imposed upon delinquent as per charge-sheet against him and on the basis of evidence on record against delinquent. It was also contended that against order passed by Director General of Police, revision was available to Plaintiff before State Government which was not preferred so suit filed by Plaintiff is premature. Ultimately, Defendants prayed before trial court to dismiss suit of Plaintiff.

7. On the basis of the pleadings of the parties, trial court framed issues at Exh. 8, which are quoted as under:

(1) Whether the Plaintiff proves that impugned order dated 28.2.89 to remove from police force and orders passed under appellate jurisdiction by Defendants dated 30.4.90 and 25.11.91 are illegal, without jurisdiction, ultraviolet, discriminatory, penal, against the principles of natural justice?

(2) Whether the Plaintiff proves that his service is satisfactory as averred in plaint?

(3) Whether the Defendant No. 4 proves that suit is premature?

(4) Whether the Defendant No. 4 proves that suit is barred for want to statutory notice u/s 80 of CP Code?

(5) Whether the Defendant No. 4 proves that four criminal offences were being registered as alleged in written statement?

(6) Whether the Defendant No. 4 proves that he is entitled for special cost?

(7) To what relief, if any, the Plaintiff is entitled for?

(8) What order and decree?

8. Before trial court, oral evidence was not adduced by any party but on consent given by each other party, documentary evidence was taken on record. After taking into consideration documentary evidence on record, trial court answered issue No. 1 and 7 partly in affirmative and issue No. 2 in affirmative while issue No. 3 to 5 in negative and accordingly partly allowed suit of Plaintiff for declaration and recovery of service benefits while declaring that the action of Defendants in removing Plaintiff from service is excessive and directing Defendants to reinstate Plaintiff in service with 50 % back wages from date of institution of suit. It was also ordered that the services of Plaintiff be treated as continuous for purpose of pension.

9. Against that, regular civil appeal was preferred by present Appellants before lower appellate court. Lower appellate Court framed following points for deciding appeal.

(1) Whether the Ld. Judge has erred in holding that the disputed order passed by the Defendant No. 4 dated 28.2.89 and thereafter orders passed by in appeal by Defendant No. 3 and 2 are illegal, without jurisdiction, ultraviolet, discriminatory, penal, void and against the principle of natural justice?

(2) Whether the Ld. Judge has committed mistake in holding that the dismissal order passed by the Defendants is excessive?

(3) Whether the Ld. Judge has committed mistake in partly allowing the suit filed by the Plaintiff for benefits of his service rendered to the police Department?

(4) What should be the final order?

10. By answering points No. 1 to 3 in negative, lower appellate court dismissed appeal filed by present Appellants and confirmed judgment and decree passed by trial court and, therefore, Appellants have filed this second appeal before this Court.

11. Learned AGP Ms. Shachi Mathur appearing for present Appellants raised contention before this Court that reasonable opportunity was given to Plaintiff and accordingly show cause notice for penalty was issued by department but he has not remained present and no reply was given by him and, therefore, ultimately punishment order was passed against Plaintiff by department. She also submitted that considering registration of one offence against present Respondent and after considering all factual aspects, DSP Jamnagar being competent authority has passed order of dismissal and, therefore, trial court should not have interfered with such punishment of dismissal imposed by DSP Jamnagar against Plaintiff. She also submitted that in all seven offences as referred to above were complaints lodged against present Respondent which being serious in nature, were taken into account by department while passing order of dismissal against present Respondent. She also emphasized that reasonable opportunity was given and principles of natural justice were not violated by department while passing order of punishment against Plaintiff and, therefore, trial court should not have interfered with order of punishment. She also submitted that lower appellate court has committed serious error in not appreciating these aspects and, therefore, interference of this Court is necessary. Except these submissions, no other submission has been made by learned AGP Ms. Mathur before this Court and no decision has been cited by learned AGP Ms. Mathur in support of her submissions as recorded by this Court.

12. Learned Advocate Mr. Umang Vyas appearing for present Respondent has submitted that no charge is proved against Plaintiff because during departmental inquiry, no witness has supported charge levelled against Plaintiff. He also submitted that the DSP Jamnagar has, while passing order of removal against

Plaintiff, much relied upon complaints lodged against Plaintiff in different police station but for that, no charge-sheet has been given to Plaintiff and no departmental inquiry was held against Plaintiff for the same. He submitted that if past incidents or pending criminal cases in all seven which are referred to above are to be relied upon by department, then, it ought to have been disclosed to Plaintiff by department while issuing show cause notice to that effect but in show cause notice issued to Plaintiff, that facts were not at all mentioned and that fact was not at all disclosed by department to Plaintiff. He also submitted that one Mangalsinh Head Constable was also charge-sheeted for the same misconduct but in case of said Head Constable Mangalsinh, two increments are stopped while considering reply filed by said Mangalsinh dated 11th August, 1986 but present Respondent original Plaintiff Jorubha Gumansinh, after receiving show cause notice, upto period of two months, not remained present before authority and, therefore, ultimately order of removal has been passed. Learned AGP Ms. Mathur appearing for present Appellants submitted that earlier, present Respondent Jorubha was dismissed from service by order dated 7th August, 1979 but after departmental inquiry, he was reinstated in service and, thereafter, another punishment of stoppage of one increment with cumulative effect was imposed and ultimately he was dismissed from service considering his past record by department. Mangalsinh, Head Constable who has now retired, received show cause notice for removal on 16th July, 1986 which was replied by him on 29th July, 1986 and thereafter, his two increments were stopped with permanent effect as stated above. It is necessary to note that earlier removal order of Plaintiff was not placed on record by Appellants either before trial court or before lower appellate court. Even no order of punishment which was imposed in past against Plaintiff was produced on record either before trial court or before lower appellate court, by present Appellants. In light of this back ground, it is necessary to note certain undisputed facts being admitted by both parties, which are quoted as under, as considered by lower appellate court:

Keeping in mind the settled principle of law first of all let us see admitted facts in this appeal which are as under:

- (1) It is not in dispute that the Plaintiff/Respondent is serving in police department as unarmed police constable in Jamnagar District.
- (2) It is also not in dispute that on the day incident took place on 14.4.85, on that day, Plaintiff was on duty at Harsidhdh Mata Temple.
- (3) It is also not in dispute that the Plaintiff was specifically posted there to maintain law and order.
- (4) It is also not in dispute that one complaint was lodged in Kalyanpur Police Station bearing No. crime No. 3/85 for the offences punishable u/s 323 read with 114 of IPC against present Plaintiff and one policeman Mangalsinh.
- (5) It is also not in dispute that in connection with the offence registered in Kalyanpur Police Station, no charge-sheet is filed in the court or no cognizance is

taken by any competent court of law.

(6) It is also not in dispute that departmental inquiry is held against both the police officers who are shown as accused in the complaint.

(7) It is also not in dispute that as reveals from the records of departmental inquiry papers none the witness has supported the charge.

(8) It is also not in dispute that same charge was against Mangalsinh even then light punishment is imposed and accordingly only two increments were permanently cut fro his pay.

(9) It is also not in dispute before filing of present suit Plaintiff has issued statutory notice as provision made in Sect. 80 of CP Code and which is duly served to all concerned parties.

Keeping in mind above undisputed factual aspects and the settled principles let us decide whether the Ld. Trial Judge has committed any error in appreciating evidence on record or has misinterpreted any provision of relevant law. I have perused the order passed by DSP Jamnagar and report submitted by departmental inquiry officer appointed to hold inquiry. On perusal of disputed order passed by DSP Jamnagar dated 28.3.89 it transpires that he has blindly relied on the report submitted by Department Inquiry Officer. Not only that over and above report of inquiry officer, he has also taken in consideration other offences registered in other police stations against the Plaintiff which are neither proved in any competent court or for that no departmental inquiry is held for the same.

13. Lower appellate court has considered facts of this case as well as one decision of this Court in case of Ravjibhai Ukabhai Patel v. Raj Gopalan and Anr. reported in 1990(2) GLH (UJ) 2 and observed as under at internal page 10 in judgment:

In one judgment reported in 1990(2) GLH UJ 2 it is held by the Hon''ble Guj. High Court that the order of dismissal based upon conviction by court and also upon subsequent involvement in alleged irregularities and no departmental inquiry is held in respect of alleged irregularities. Such order of dismissal deserves to be set aside. The ratio laid down in the above cited judgment is fully applicable to the facts of present case on hand. As per fact of cited judgment while passing the order of penalty, the competent authority had not only taken into consideration the conviction of the Petitioner in the criminal case but also his subsequent involvement in certain alleged irregularities. With respect to those alleged irregularities, no inquiry was held, nor was any opportunity given to the Petitioner to represent against the same. Same way here in case on hand on perusal of dismissal order it transpires that the Ld. DSP Jamnagar has blindly relied on the inquiry report but he has not taken pain to peruse the record and to determine whether charge is proved as per some applicable provisions of law. It looks that inquiry officer has observes in his report that no strict rules apply to

departmental inquiry accordingly provisions Indian Evidence Act does not apply strictly. On that basis, report is submitted which is blindly accepted by DSP Jamnagar No doubt as per settled law provisions of Evidence Act do not apply strictly to departmental inquiry, but that does not mean that without any supporting evidence charge can be said to be proved.

14. Lower appellate court has also observed further in page 12 while giving reasons as under:

Here, in case on hand, considering the allegation made against the Plaintiff and in support of allegation evidence produced by the prosecution, the Ld. Trial Judge has rightly set aside order of dismissal passed by the disciplinary authority and has passed order to pay 1/2 amount of his pay during suspension period.

Here in case on hand on perusal of order passed in appeal by Defendant No. 3 and 4 it transpires that none of the above officer has cared to see what is charge against the delinquent and what is evidence against the delinquent in the inquiry. Even for sake of argument it is accepted that on the basis of police statements charge is proved even then it is not in dispute that at the relevant time the delinquent was on official duty posted at Harsidhdh Mata Temple and while functioning his official duty, alleged offence is committed. Under such circumstances, it is also required to consider whether force used by the delinquent was improper or proper. But unfortunately neither DSP Jamnagar nor higher officers DIG Rajkot and DGP Gujarat State have taken in consideration any aspect while passing punishment order or confirming such order. As often held by Hon"ble Apex Court that the Appellate authority or Revisional Authority is supposed to reassess the entire evidence on record and has to decide independently whether order passed by the Trial Court or Competent Authority has properly taken in consideration all the factual aspects of the case and has properly appreciated evidence on record.

On perusal of judgment of trial court, it transpires that, the Ld. Judge has observed that no proper reasons were given by the dismissing authority and has not taken in consideration the other factual aspects of the case, hence, order passed dated 28.3.89 is illegal and against the principles of natural justice. It is admitted fact that both the parties have relied only on the documentary evidence produced by the respective parties. On perusal of records of inquiry held against the present Plaintiff, it looks that the Ld. Judge has rightly held that there was no reason for the Defendants to pass such harsh order. I have also perused inquiry record no witness has supported the charge. Not only that Defendants have not led any documentary evidence nor any officer from the any department of the State Government has stepped in the witness box to deny facts stated by Plaintiff before the Court which facts are supported by documentary evidence. On the other side Ld. Advocate for the appellate has relied on other offences registered against the Plaintiff in other police stations but as often principle laid down by Hon"ble Apex Court of India and other Hon"ble High Courts, such complaints cannot be taken consideration without giving charge-sheet for the same and

after holding that departmental enquiry for the same. From the above discussion it becomes crystal clear that disputed order passed by the Defendants dated 17.11.76 is against the principles of natural justice which can be said arbitrary and which required to be declared illegal. Hence, I have no hesitation to hold that the Ld. Judge has rightly held that disputed order passed by the Defendants dated 17.11.76 is illegal, arbitrary and against the natural justice, accordingly, I reply point No. 1 in the negative.

As discussed in my fore-going discussion that the Plaintiff has successfully succeeded to prove before the trial court that while he was on duty at Harsidhdh Mata Temple to maintain law and order at that time while functioning his duty one complaint was lodged against him in Kalyanpur Police Station, for that, no charge sheet was filed in any competent court and accordingly for that offence he is not convicted by any court of law. He also succeeded to prove that the departmental inquiry was held against him, for that, charge-sheet was issued to him there after evidence of prosecution was recorded. Though none the witness has supported the prosecution even then it was held that charge is proved. He also succeeded to prove that as charge-sheet issued to co accused Mangalsinh, same charge was there, however, minor punishment order was passed against him and accordingly order of withdrawing increments with future effect was passed. Accordingly it can be said that discriminatory order is passed by the disciplinary authority, which is unconstitutional.

15. I have also perused judgment and decree passed by trial court as well as judgment and order passed by lower appellate court. I have also perused record and proceedings which have been received by this Court from subordinate court.

16. As regards contention raised by learned AGP Ms. Mathur before this Court that in past, this Respondent was dismissed from service and various punishments were imposed and various criminal offences have been registered, in all, seven, as referred to above and, therefore, punishment of removal has been rightly imposed against present Respondent which should not have been interfered by trial court, according to my opinion, this contention cannot be accepted by this Court simply on the ground that the past record which has been referred to above and relied upon by learned AGP Ms. Mathur has not been disclosed to Plaintiff while issuing show cause notice and before passing punishment of removal. Not only that but that past record which has been relied upon by learned AGP Ms. Mathur is also not disclosed by Department to Plaintiff before passing punishment order of removal. If it was the intention of the department to rely upon past record, then, department must have to give reasonable opportunity of hearing to Plaintiff against such past record which has been considered against Plaintiff but in this case, no such opportunity was given to present Respondent original Plaintiff and no adverse material has been disclosed or supplied by Appellants to Respondent though it has been made the sole basis for imposing punishment of removal against Respondent. It is necessary to note that said past record not produced on record before trial court

and lower appellate court and not proved said contentions by leading proper evidence. This aspect has been considered by apex court in case of *Indu Bhushan Dwivedi v. State of Jharkhand and Anr.* reported in 2010 (6) SCALE 212. Relevant observations made by apex court in para 13, 17, 18 and 19 are quoted as under:

13. The Division Bench of the High Court first considered the question whether the past adverse record could be considered for imposing the punishment of dismissal, referred to the judgment of the Constitution Bench in *State of Mysore Vs. K. Manche Gowda*, as also the judgment in *The State of Uttar Pradesh and Others Vs. Harish Chandra Singh*, and held that when the High Court proposed the punishment of dismissal from service and the Appellant himself made a request in paragraph 17 of his reply that his past record may be considered, no prejudice can be said to have been caused to him on account of consideration of the adverse reports. Paragraphs 21 and 22 of the impugned order which contain the reasoning of the High Court on this issue are extracted below:

21. Thus, the ratio decided in the above case is where the past records is considered for awarding lesser punishment, no notice about the proposal that the past records will be considered is necessary. In this case, the stand taken by the 2nd Respondent, namely, the High Court, the past records were taken into consideration in addition to the charges proved only to consider if any lesser punishment than the dismissal could be inflicted, as desired by the Petitioner. In case, the past records were not considered by the disciplinary authority, then the then the Petitioner may raise a grievance non-consideration of his past records while awarding punishment in spite of his request. Under those circumstances, the past records as admitted in the counter affidavit filed by the Respondent No. 2 have been considered.

22. As indicated above, when specially the Petitioner has made a request in his reply to consider his past records, while awarding punishment as his past records are good, the disciplinary authority was constrained to go into the past record. But, according to the counter by the Respondent No. 2, the past records did not support the claim of the Petitioner that his past records were good. On the contrary, his past records contained various details about his bad records in so many words as mentioned in the counter. There is no question of consideration of past records for giving higher punishment than the disciplinary authority felt while issuing 2nd show cause notice that the maximum punishment alone, would commensurate the proved charges. In the aforesaid circumstance, there is no requirement to mention in the show cause notice regarding to mention in the show cause notice regarding his past records. As stated by the counsel for the Respondent No. 2, the past records were considered at the instance of the Petitioner and also with a view to consider if any lesser punishment than the dismissal could be inflicted upon the Petitioner. As such the first contention would fail.

17. We shall first deal with the question whether consideration of the past

adverse record of the Appellant by the High Court had the effect of vitiating the ultimate order passed by the State Government. An exactly similar question was considered and answered in affirmative by the Constitution Bench in *State of Mysore v. K. Manche Gowda* (supra). The facts of that case were that while the Respondent was holding the post of an Assistant to the Additional Development Commissioner, Planning, Bangalore, the Government of Mysore appointed Shri G.V.K. Rao (Additional Development Commissioner) to conduct a departmental enquiry against him in respect of the false claims for allowances and fabrication of vouchers. The Enquiry Officer framed four charges against the Respondent. After holding an enquiry in accordance with relevant rules, the Enquiry Officer submitted report with the recommendation that the Respondent might be reduced in rank. However, the government issued a notice to the Respondent requiring him to show cause as to why he may not be dismissed from service. After considering his reply, the Government dismissed the Respondent from service. The Respondent challenged his dismissal by filing writ petition under Article 226 of the Constitution of India. The High Court quashed the order of dismissal on several grounds including the one that the Respondent had not been foretold about the proposed consideration of his past adverse record. This Court approved the view taken by the High Court and observed:

Under Article 311(2) of the Constitution, as interpreted by this Court, a Government servant must have a reasonable opportunity not only to prove that he is not guilty of the charges leveled against him, but also to establish that the punishment proposed to be imposed is either not called for or excessive. The said opportunity is to be a reasonable opportunity and, therefore, it is necessary that the Government servant must be told of the grounds on which it is proposed to take such action: see the decision of this Court in *State of Assam and Another Vs. Bimal Kumar Pandit*, If the grounds are not given in the notice, it would be well nigh impossible for him to predicate what is operating on the mind of the authority concerned in proposing a particular punishment: he would not be in a position to explain why he does not deserve any punishment at all or that the punishment proposed is excessive. If the proposed punishment was mainly based upon the previous record of a government servant and that was not disclosed in the notice, it would mean that the main reason for the proposed punishment was withheld from the knowledge of the government servant. It would be no answer to suggest that every government servant must have had knowledge of the fact that his past record would necessarily be taken into consideration by the Government in inflicting punishment on him; nor would it be an adequate answer to say that he knew as a matter of fact that the earlier punishments were imposed on him or that he knew of his past record. This contention misses the real point, namely, that what the government servant is entitled to is not the knowledge of certain facts but the fact that those facts will be taken into consideration by the Government in inflicting punishment on him. It is not possible for him to know what period of his past record or what acts or omissions of his in a particular period would be considered. If that fact was brought to his

notice, he might explain that he had no knowledge of the remarks of his superior officers, that he had adequate explanation to offer for the alleged remarks or that his conduct subsequent to the remarks had been exemplary or at any rate approved by the superior officers. Even if the authority concerned took into consideration only the facts for which he was punished, it would be open to him to put forward before the said authority many mitigating circumstances or some other explanation why those punishments were given to him or that subsequent to the punishments he had served to the satisfaction of the authorities concerned till the time of the present enquiry. He may have many other explanations. The point is not whether his explanation would be acceptable, but whether he has been given an opportunity to give his explanation. We cannot accept the doctrine of "presumptive knowledge" or that of "purposeless enquiry", as their acceptance will be subversive of the principle of "reasonable opportunity". We, therefore, hold that it is incumbent upon the authority to give the government servant at the second stage reasonable opportunity to show-cause against the proposed punishment and if the proposed punishment is also based on his previous punishments or his previous bad record, this should be included in the second notice so that he may be able to give an explanation.

(Emphasis supplied)

18. The proposition laid down in the above noted judgment represents one of the basic canons of justice that no one can be condemned unheard and no order prejudicially affecting any person can be passed by a public authority without affording him reasonable opportunity to defend himself or represent his cause. As a general rule, an authority entrusted with the task of deciding between the parties or empowered to make an order which prejudicially affects the rights of any individual or visits him with civil consequences is duty bound to act in consonance with the basic rules of natural justice including the one that material sought to be used against the concerned person must be disclosed to him and he should be given an opportunity to explain his position. This unwritten right of hearing is fundamental to a just decision, which forms an integral part of the concept of rule of law. This right has its roots in the notion of fair procedure. It draws the attention of the authority concerned to the imperative necessity of not overlooking the cause which may be shown by the other side before coming to its decision. When it comes to taking of disciplinary action against a delinquent employee, the employer is not only required to make the employee aware of the specific imputations of misconduct but also disclose the material sought to be used against him and give him a reasonable opportunity of explaining his position or defending himself. If the employer uses some material adverse to the employee about which the latter is not given notice, the final decision gets vitiated on the ground of the violation of the rule of *audi alteram partem*. Even if there are no statutory rules which regulate holding of disciplinary enquiry against a delinquent employee, the employer is duty bound to act in consonance with the rules of natural justice # *Managing Director, Uttar Pradesh Warehousing Corporation and Another Vs. Vijay Narayan Vajpayee*, However, every violation of

the rules of natural justice may not be sufficient for invalidating the action taken by the competent authority/employer and the Court may refuse to interfere if it is convinced that such violation has not caused prejudice to the affected person/employee.

19. In Harish Chandra Singh's case (supra), a three-Judge Bench of this Court considered a somewhat similar question in the backdrop of the fact that even though in the show cause notice, the competent authority had proposed dismissal of the Respondent, after considering his reply, a lesser punishment i.e. removal from service was imposed upon him. The Respondent in that case had joined Police Department in 1947. He was dismissed from service on 21.6.1951 but was reinstated in January, 1952. He was finally removed from service in 1956. In the year 1951 itself, punishment of reduction to the lowest scale of the post for a period of three years was imposed on the Respondent. In 1955, his pay was reduced for a period of two years. In the course of service, the Respondent had earned fifteen rewards and commendations. In the departmental inquiry which led to his removal from service in 1956, the Respondent was found guilty of three charges of gross negligence in the performance of his duty of investigating the cases registered under various sections of the Indian Penal Code. The trial Court dismissed the suit filed by the Respondent. On appeal, Additional District Judge, Varanasi decreed the same. The High Court confirmed the appellate judgment and dismissed the second appeal preferred by the State by observing that the Respondent had not been given opportunity to explain the past punishments which were considered by the Deputy Inspector General of Police in arriving at his decision to remove the Respondent from service. While considering the question whether it was necessary for the concerned authority to give notice to the Respondent as a condition precedent for consideration of his past punishments, this Court referred to the factual matrix of the case and held that when the final punishment was lesser than the proposed punishment, consideration of the past adverse record was inconsequential. The Court referred to the arguments urged on behalf of the State and observed:

The learned Counsel for the State contends that on the facts of this case it is clear that the Plaintiff had notice that his record would be taken into consideration because the Superintendent of Police had mentioned it towards the end of his order, a copy of which was supplied to the Plaintiff. In the alternative he contends that if the record is taken into consideration for the purpose of imposing a lesser punishment and not for the purpose of increasing the quantum or nature of punishment, then it is not necessary that it should be stated in the show-cause notice that his past record would be taken into consideration.

It seems to us that the learned Counsel is right on both the points. The concluding para of the report of the Superintendent of Police, which we have set out above, clearly gave an indication to the Plaintiff that his record would be considered by the Deputy Inspector General of Police and we are unable to appreciate what more notice was required. There is also force in the second point

urged by the learned Counsel. In *State of Mysore v. K. Manche Gowda* (1964) 4 SCR 540 the facts were that the Government servant was misled by the show-cause notice issued by the Government, and but for the previous record of the Government servant the Government might not have imposed the penalty of dismissal on him. This is borne out by the following observations of Subba Rao, J., as he then was:

In the present case the second show cause notice does not mention that the Government intended to take his previous punishments into consideration in proposing to dismiss him from service. On the contrary, the said notice put him on the wrong scent, for it told him that it was proposed to dismiss him from service as the charges proved against him were grave. But, a comparison of paragraphs 3 and 4 of the order of dismissal shows that but for the previous record of the Government servant, the Government might not have imposed the penalty of dismissal on him and might have accepted the recommendations of the Enquiry Officer and the Public Service Commission. This order, therefore, indicates that the show cause notice did not give the only reason which influenced the Government to dismiss the Respondent from service.

It is necessary to note that against unarmed Head Constable Mangalsinh, same charge was levelled as per same incident and charge-sheet which has been levelled against present Respondent means original Plaintiff and there is no difference in respect to charge-sheet which has been served to Plaintiff as well as said Unarmed Head Constable Mangalsinh, means both have committed same and similar misconduct and both were charge-sheeted for same misconduct and yet same department has imposed punishment of stoppage of two increments with future effect in case of Mangalsinh, Unarmed Head Constable and in case of present Respondent, for the same misconduct, same department imposed extremely harsh punishment of dismissal from service for the same charge. In such circumstances, when charges and delinquency being same and identical, it was necessary for department to justify the action of harsh punishment. No material was produced for justifying such action. There was, thus, no justifiable reason to pass different order of punishment. This aspect has been recently considered by apex court in case of *Tata Engineering and Locomotive Co. Ltd. Vs. Jitendra Pd. Singh and Another*, There, Hon"ble apex court was considering a case of dismissal and discrimination in imposing punishment. Relevant observations made by Hon"ble apex court in para 2 are quoted as under:

2. On an enquiry being held, the enquiry authority found that the allegation of misconduct is proved and the disciplinary authority on consideration of the report of the enquiry authority and the other relevant material dismissed the first Respondent from service. Thereafter, a reference to the Labour Court at the instance of the first Respondent was made. The Labour Court though held on a preliminary question that the disciplinary enquiry conducted against the first Respondent is valid came to the conclusion after perusing the documentary and oral evidence on record that the dismissal was not justified and held that he was

entitled to reinstatement with full back wages with continuity in service and other consequential benefits. A writ petition was filed in the High Court which was allowed but on the basis of certain offer made, the learned Single Judge also directed that the Appellant shall pay to the first Respondent salary from the date of discharge till the date of the order in a lump sum of Rs. 50,000.00. Thereupon both the management and the workman filed two appeals. In the appeals, several questions were raised as to whether the act attributed to the first Respondent would amount to misconduct at all which will entail a disciplinary enquiry at the instance of the management to end up with his dismissal; strong reliance was placed on *Glaxo Laboratories (I) Ltd. Vs. Presiding Officer, Labour Court, Meerut and Others*, Ultimately however the two learned Judges were agreed on one aspect of the matter that the question, whether on misconduct attributed to the workman there should have been casual connection between misconduct and employment of the workman may not be of much significance when such acts have taken place within the premises of the factory, should be decided in an appropriate case. What influenced the Court in deciding the matter is that;

Since as many as three workmen on almost identical charges were found guilty of misconduct in connection with the same incident, though in separate proceedings, and one was punished with only one month's suspension, and the other was ultimately reinstated in view of the findings recorded by the Labour Court and affirmed by the High Court and the Supreme Court, it would be denial of justice to the Appellant if he alone is singled out for punishment by way of dismissal from service.

20. Similar view is also taken by apex court in case of *State of UP and Ors. v. Raj Pal Singh* 2010(4) SCALE 485. Relevant observations made by apex court in para 1 and 2 are quoted as under:

1. This appeal is directed against the judgment of the High Court of Allahabad interfering with an order of punishment inflicted upon the Respondent in a disciplinary proceedings. Admittedly, the Respondent was an Assistant Warder and the allegation against him was that he along with 4 other Assistant Warder beaten one Shivdan Singh, and even though the senior officers dissuaded them, they never listened to that. These allegations were proved in a departmental proceedings and the disciplinary authority passed the order of dismissal so far as the present Respondent is concerned, though in respect of some others, he passed the order of stoppage of 5 increments. The Respondent assailed the legality of the order by approaching the Public Service Tribunal. The Tribunal having refused to interfere, he approached the High Court. The High Court came to the conclusion that the charges and the delinquency being same and identical, and all the employees having been served with a set of charges out of the same incident, there was no justifiable reason to pass different orders of punishment, and therefore, the order of dismissal cannot be sustained. The High Court consequently set aside the order of dismissal and directed stoppage of 5

increments in case of the Respondents as was the order in case of some other Assistant Warder. The High Court further directed that the delinquent Respondent would be paid only 50 % of back wages. It is this order of the High Court which is the subject matter of challenge in this appeal. It is contended on behalf of the Appellants that once the charges have been held to be established, it was not appropriate for the High Court to interfere with the quantum of punishment and judged from this stand point, the order of the High Court cannot be sustained. In support of the said contention, reliance is placed on the decision of this Court in *B.C. Chaturvedi Vs. Union of India and others*, and *Secretary to Government, Home Deptt. and Others Vs. Srivaikundathan*,

2. Though, on principle the ratio in aforesaid cases would ordinarily apply, but in the case in hand, the High Court appears to have considered the nature of charges levelled against the 5 employees who stood charged on account of the incident that happened on the same day and then the High Court came to the conclusion that since the gravity of charges was the same, it was not open for the disciplinary authority to impose different punishments for different delinquents. The reasonings given by the High Court cannot be faulted with since the State is not able to indicate as to any difference in the delinquency of these employees. It is undoubtedly open for the disciplinary authority to deal with the delinquency and once charges are established to award appropriate punishment. But when the charges are same and identical in relation to one and the same incident, then, to deal with the delinquents differently in the award punishment, would be discriminatory. In this view of the matter, we see no infirmity with the impugned order requiring our interference under Article 136 of the Constitution. Though the High Court by the impugned judgment has directed that the delinquent would be paid 50 % of the back wages but having regard to the nature of charges against the Respondent, we are not inclined to allow any back wages from the period of dismissal till the date of reinstatement. We are told that he has been reinstated on 5.11.1997. We would make it clear that the Respondent would not be entitled to any back wages from the date of dismissal till 5.11.1997.

21. Learned AGP Ms. Shachi Mathur submitted that while deciding issue No. 3 to 7, trial court has observed that the present Respondent original Plaintiff has claimed reinstatement in service and back wages from date 28.2.1989 and on the facts of present case, it cannot be said that the Plaintiff was wholly blameless. She further submitted that considering settled proposition of law that no work, no pay, trial court has granted one half back wages. Relying upon aforesaid observations made by trial court while considering case of Respondent for back wages for interim period, she submitted that once when trial court was of the opinion that the Plaintiff cannot be said to be wholly blameless, then, some punishment ought to have been imposed by trial court but that care has not been taken by trial court while partly allowing suit in favour of Plaintiff.

22. As against that, learned Advocate Mr. Umang Vyas for Respondent original

Plaintiff has submitted that denial of 50 per cent back wages itself would amount to imposition of punishment and for that, for whatever charge was found to be proved as per trial court against Plaintiff, denial of 50% back wages for interim period can be considered to be proper punishment. In support of such submission, he placed reliance upon decision of apex Court in case of Jitendra Singh Rathor Vs. Shri Baidyanath Ayurved Bhawan Ltd. and Another,

23. For appreciating these submissions made by both learned Advocates, it is necessary to consider the observations made by trial court while examine issue No. 3 to 7. Therefore, relevant observations made at internal page 13 of judgment by trial court are reproduced as under:

The Plaintiff has claimed to reinstate in the service and for the back wages from the date of 28.2.89. On the facts of the present case, it cannot be said that the Plaintiff was wholly blameless. That it is settled proposition of law that "No works, no pay". It is also to be noted that from the date of the removal till today the Plaintiff should have earned something. That the adjustment of this earnings is not possible to be calculated. In the circumstances of 1/2 i.e. 50% back wages is allowed, from the date of the suit it will meets ends of justice.

24. Thus, considering aforesaid observations, it is clear that the trial court has denied 50% back wages to Respondent original Plaintiff while considering that the Respondent original Plaintiff cannot be considered to be wholly blameless. In light of this, relevant observations made by apex court in para 3 and 4 in Jitendra Singh Rathor Vs. Shri Baidyanath Ayurved Bhawan Ltd. and Another, are quoted as under:

3. Wide discretion is vested in the Tribunal under this provision and in a given case on the facts established the Tribunal can vacate the order of dismissal or discharge and give suitable directions. It is a well-settled principle of law that when an order of termination of service is found to be bad and reinstatement is directed, the wronged workman is ordinarily entitled to full back wages unless for any particular reason the whole or a part of it is asked to be withheld. The Tribunal while directing reinstatement and keeping A the delinquency in view could withhold payment of a part or the whole of the back wages. In our opinion, the High Court was right in taking the view that when payment of back wages either in full or part is withheld it amounts to a penalty. Withholding of back wages to the extent of half in the facts of the case was, therefore, by way of penalty referable to proved misconduct and that situation could not have been answered by the High Court by saying that the relief of reinstatement was being granted on terms of withholding of half of the back wages and, therefore, did not constitute penalty.

4. u/s 11A of the Act, advisedly wide discretion has been vested in the Tribunal in the matter of awarding relief according to the circumstances of the case. The High Court under Article 227 of the Constitution does not enjoy such power though as a superior court, it is vested with the right of superintendence. The

High Court is indisputably entitled to scrutinise the orders of the subordinate tribunals within the well accepted imitations and, therefore, it could in an appropriate case quash the award of the Tribunal and thereupon remit the matter to it for fresh disposal in accordance with law and directions, if any. The High Court is not entitled to exercise the powers of the Tribunal and substitute an award in place of the one made by the Tribunal as in the case of an appeal where it lies to it. In this case, the Tribunal had directed reinstatement, the High Court vacated the direction of reinstatement and computed compensation of Rs. 15,000 in lieu of restoration of service. We are not impressed by the reasoning of the High Court that reinstatement was not justified when the tribunal in exercise of its wide discretion given under the law found that such relief would meet the ends of justice. The Tribunal had not recorded a finding that there was loss of confidence of the employer. The job of a librarian does not involve the necessity of enjoyment of any special confidence of the employer. At any rate, the High Court too did not record a finding to that effect. Again, there is no indication in the judgment of the High Court as to how many years of service the Appellant had put in and how many years of service were still left under the Standing orders. The salary and other service benefits which the Appellant was receiving also did not enter into the consideration of the High Court while computing the compensation. We are, therefore, of the view that the High Court had no justification to interfere with the direction regarding reinstatement to service and in proceeding to substitute the direction by quantifying compensation of Rs. 15,000 it acted without any legitimate basis.

25. In view of above observations made by this Court while considering contention raised by both learned advocates and considering substantial question of law which has been framed by this Court at the time of admitting this appeal, according to my opinion, punishment of removal imposed by department against Plaintiff itself was discriminatory and violative of Article 14 and 16 of Constitution of India because similar charge was faced by another Head Constable Mangalsinh who was punished by stoppage of two increments with future effect and for the same misconduct based on the same charge-sheet, Appellants imposed punishment of dismissal against present Respondent and, therefore, first substantial question of law is not relevant because Plaintiff was not working as temporary employee but he was a permanent employee of Appellants. Decision to remove Respondent from service itself was arbitrary, discriminatory and it may be considered to be malafide on the part of Appellants. The substantial questions of law as framed by this Court, past history/past record of present Respondent/ original Plaintiff, if it was considered, then, without disclosing such material to Plaintiff and without supplying such adverse material to Plaintiff and without giving reasonable opportunity of hearing to Plaintiff against past misconduct or default, punishment of removal if it is based, then, it is against principles of natural justice as held by apex court in above referred cases. charge-sheet was issued to Plaintiff only for one misconduct and even in show cause notice which was served to Plaintiff for removal, only one misconduct as mentioned in charge-

sheet was disclosed and except that, nothing was mentioned about past record/past misconduct. It was not mentioned that why such punishment should not be imposed on the basis of past record/past history of Plaintiff and, therefore, if contention of department is to be considered, then also, without disclosing such past record to Plaintiff, it cannot be considered against Plaintiff for justifying dismissal/removal against the Plaintiff. Therefore, substantial questions of law have been answered accordingly by this Court. Therefore, contentions raised by learned AGP Ms. Mathur cannot be accepted. It is also not case of Appellants that past misconduct/past record or adverse material has been disclosed by them in charge-sheet or in show cause notice issued to Plaintiff. This aspect has been recently considered by apex court in case of Mohd. Yunus Khan Vs. State of U.P. and Others, Relevant observations made by apex court in para 33 and 34 are reproduced as under:

33. The courts below and the statutory authorities failed to appreciate that if the disciplinary authority wants to consider the past conduct of the employee in imposing a punishment, the delinquent is entitled to notice thereof and generally the charge-sheet should contain such an article or at least he should be informed of the same at the stage of the show cause notice, before imposing the punishment.

34. This Court in Union of India (UOI) and Others Vs. Bishamber Das Dogra, considered the earlier judgments of this Court in State of Assam and Another Vs. Bimal Kumar Pandit, ; India Marine Service Private Ltd. Vs. Their Workmen, ; State of Mysore Vs. K. Manche Gowda, ; Colour-Chem Limited Vs. A.L. Alaspurkar and Others, ; Director General R.P.F. and Others Vs. Ch. Sai Babu, , Bharat Forge Co. Ltd. Vs. Uttam Manohar Nakate, ; and The Govt. of A.P. and Others Vs. Mohd. Taher Ali, and came to the conclusion that it is desirable that the delinquent employee be informed by the disciplinary authority that his past conduct could be taken into consideration while imposing the punishment. However, in case of misconduct of a grave nature, even in the absence of statutory rules, the Authority may take into consideration the indisputable past conduct/service record of the delinquent for "adding the weight to the decision of imposing the punishment if the fact of the case so required.

26. It is also required to be considered that if adverse material/past record is to be considered against delinquent by department, then, it is necessary for department to supply all such material to the delinquent and non supply of copies of such material to delinquent amounts to violation of basic principles of natural justice which also vitiates inquiry proceedings as decided by apex court in case of State of U.P. and Others Vs. Saroj Kumar Sinha, Relevant Head Note (C) at page 3131 are quoted as under:

Departmental enquiry conducted against the Government servant cannot be treated as a casual exercise. The enquiry proceedings also cannot be conducted with a closed mind. The enquiry officer has to be wholly unbiased. The rules of natural justice are require to be observed to ensure not only that justice is done

but is manifestly seen to be done. The object of rules of natural justice is to ensure that a government servant is treated fairly in proceedings which may culminate in imposition of punishment including dismissal/removal from service. In the instant case not only the delinquent has been denied access to documents sought to be relied upon against him, but he has been condemned unheard as the enquiry officer failed to fix any date for conduct of the enquiry. In other words, not a single witness has been examined in support of the charges levelled against the Respondent. The entire proceedings are vitiated having been conducted in complete violation of principles of natural justice and total disregard of fair play. The Respondent never had any opportunity at any stage of the proceedings to offer an explanation against the allegations made in the charge-sheet.

Non-Disclosure of documents having a potential to cause prejudice to a Government servant in the enquiry proceedings would clearly be denial of a reasonable opportunity to submit a plausible and effective rebuttal to the charges being enquired into against the government servant.

27. Looking to gravity of misconduct as found to be proved against present Respondent on the basis of complaint filed against Respondent u/s 323 and 114 of IP Code, for that, no criminal prosecution was lodged against present Respondent. Head Constable Mangalsinh was also facing same charge but different and light punishment of stoppage of two increments with future effect has been imposed against said Head Constable Mangalsinh and extremely harsh punishment of dismissal/removal has been imposed by Appellants against present Respondent without any justification for the same. Past record/misconduct shown to Court for first time by department but it was not made part of charge-sheet or show cause notice which was served by department to present Respondent before of passing of removal order and, therefore, looking to gravity of misconduct, question of proportionality of punishment is also required to be considered by this Court and denial of 50 per cent back wages for interim period can be considered to be proper punishment for proved misconduct as discussed by trial court. This aspect has been examined by apex court in case of Chairman cum Managing Director, Coal India Limited and Another Vs. Mukul Kumar Choudhuri and Others, Relevant observations made by apex court in para 22,23,24,25 and 26 are quoted as under:

22. The question, however, remains: is the punishment of removal grossly disproportionate to the proved charge of unauthorized absence for more than six months ?

23. In order to answer the aforesaid question, it would be appropriate to refer to a few of decisions of this Court wherein doctrine of proportionality has been considered. In Union of India and Anr. v. G. Ganayutham, this Court elaborately considered the proportionality in the administrative law in England as well as in our own country. The court considered some important English decisions, viz., Associated Provincial Picture Houses Ltd. v. Wednesbury Corporation, Council of

Civil Service Unions v. Minister for Civil Service, R. v. Goldstein and R. v. Secretary for Home Dept. ex. p. Brind and few decisions of this Court, viz., Ranjit Thakur v. Union of India, State of Maharashtra v. M.H. Mazumdar, Ex-Naik Sardar Singh v. Union of India, Tata Cellular v. Union of India, State of A.P. v. McDowell & Co. and summed up position of proportionality in administrative law in England and India thus:

(1) To judge the validity of any administrative order or statutory discretion, normally the Wednesbury test is to be applied to find out if the decision was illegal or suffered from procedural improprieties or was one which no sensible decision-maker could, on the material before him and within the framework of the law, have arrived at. The court would consider whether relevant matters had not been taken into account or whether irrelevant matters had been taken into account or whether the action was not bona fide. The court would also consider whether the decision was absurd or perverse. The court would not however go into the correctness of the choice made by the administrator amongst the various alternatives open to him. Nor could the court substitute its decision to that of the administrator. This is the Wednesbury test.

(2) The court would not interfere with the administrator's decision unless it was illegal or suffered from procedural impropriety or was irrational -- in the sense that it was in outrageous defiance of logic or moral standards. The possibility of other tests, including proportionality being brought into English administrative law in future is not ruled out. These are the CCSU principles.

(3)(a) As per Bugdaycay (1987 ACC 514), Brind and Smith as long as the Convention is not incorporated into English law, the English courts merely exercise a secondary judgment to find out if the decision-maker could have, on the material before him, arrived at the primary judgment in the manner he has done.

(3)(b) If the Convention is incorporated in England making available the principle of proportionality, then the English courts will render primary judgment on the validity of the administrative action and find out if the restriction is disproportionate or excessive or is not based upon a fair balancing of the fundamental freedom and the need for the restriction thereupon.

(4)(a) The position in our country, in administrative law, where no fundamental freedoms as aforesaid are involved, is that the courts/tribunals will only play a secondary role while the primary judgment as to reasonableness will remain with the executive or administrative authority. The secondary judgment of the court is to be based on Wednesbury and CCSU principles as stated by Lord Greene and Lord Diplock respectively to find if the executive or administrative authority has reasonably arrived at his decision as the primary authority.

(4)(b) Whether in the case of administrative or executive action affecting fundamental freedoms, the courts in our country will apply the principle of "proportionality" and assume a primary role, is left open, to be decided in an

appropriate case where such action is alleged to offend fundamental freedoms. It will be then necessary to decide whether the courts will have a primary role only if the freedoms under Articles 19, 21 etc. are involved and not for Article 14.

24. Dealing with the question of proportionality with regard to punishment in disciplinary matters, the court said:

32. Finally, we come to the present case. It is not contended before us that any fundamental freedom is affected. We need not therefore go into the question of "proportionality". There is no contention that the punishment imposed is illegal or vitiated by procedural impropriety. As to "irrationality", there is no finding by the Tribunal that the decision is one which no sensible person who weighed the pros and cons could have arrived at nor is there a finding, based on material, that the punishment is in "outrageous" defiance of logic. Neither *Wednesbury* nor *CCSU* tests are satisfied. We have still to explain "*Ranjit Thakur*".

33. In *Ranjit Thakur* this Court interfered with the punishment only after coming to the conclusion that the punishment was in outrageous defiance of logic and was shocking. It was also described as perverse and irrational. In other words, this Court felt that, on facts, *Wednesbury* and *CCSU* tests were satisfied. In another case, in *B.C. Chaturvedi Vs. Union of India and others*, a three-Judge Bench said the same thing as follows: (SCC p. 762, para 18)

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 authority/ 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.

Similar view was taken in *Indian Oil Corporation Ltd. and another Vs. Ashok Kumar Arora*, that the Court will not intervene unless the punishment is wholly disproportionate.

34. 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* case 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 v. M.H. Mazumdar* cannot be of any help.

25. Again, in the case of Coimbatore District Central Cooperative Bank v. Coimbatore District Central Cooperative Bank Employees Assn. and Anr. this Court considered the doctrine of proportionality and it was held:

17. So far as the doctrine of proportionality is concerned, there is no gainsaying that the said doctrine has not only arrived in our legal system but has come to stay. With the rapid growth of administrative law and the need and necessity to control possible abuse of discretionary powers by various administrative authorities, certain principles have been evolved by courts. If an action taken by any authority is contrary to law, improper, irrational or otherwise unreasonable, a court of law can interfere with such action by exercising power of judicial review. One of such modes of exercising power, known to law is the "doctrine of proportionality".

18. "Proportionality" is a principle where the court is concerned with the process, method or manner in which the decision-maker has ordered his priorities, reached a conclusion or arrived at a decision. The very essence of decision-making consists in the attribution of relative importance to the factors and considerations in the case. The doctrine of proportionality thus steps in focus true nature of exercise-the elaboration of a rule of permissible priorities.

19. de Smith states that "proportionality" 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. [Judicial Review of Administrative Action (1995), pp. 601-05, para 13.085; see also Wade & Forsyth: Administrative Law (2005), p. 366.]

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

The court will quash exercise of discretionary powers in which there is no reasonable relationship 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 Management of Coimbatore District Central Co-operative Bank Vs. Secretary, Coimbatore District Central Co-operative Bank Employees Association and Another, 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 of manifest unreasonableness.

21. The doctrine has its genesis in the field of administrative law. The Government and 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 time; "where paring knife suffices, battle axe is precluded".

22. In the celebrated decision of Council of Civil Service Union v. Minister for Civil Service 1985 ACC 374 : (1984) 3 WLR 1174 : (1984) 3 All ER 935 (HL Lord Diplock proclaimed: (All ER p. 950h-j)

Judicial review has I think developed to a stage today when, without reiterating any analysis of the steps by which the development has come about, one can conveniently classify under three heads the grounds on 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'

23. CCSU has been reiterated by English courts in several subsequent cases. We do not think it necessary to refer to all those cases.

24. So far as our legal system is concerned, the doctrine is well settled. Even prior to CCSU, this Court has held that if punishment imposed on an employee by an employer is grossly excessive, disproportionately high or unduly harsh, it cannot claim immunity from judicial scrutiny, and it is always open to a court to interfere with such penalty in appropriate cases.

25. In Hind Construction and Engineering Co. Ltd. Vs. Their Workmen, some workers remained absent from duty treating a particular day as holiday. They were dismissed from service. The Industrial Tribunal set aside the action. This Court held that the absence could have been treated as leave without pay. The workmen might have been warned and fined. (But)

It is impossible to think that any other reasonable employer would have imposed the extreme punishment of dismissal on its entire permanent staff in this manner. (AIR p. 919, para 7)

(Emphasis supplied)

The Court concluded that the punishment imposed on the workmen was

not only severe and out of proportion to the fault, but one which, in our judgment, no reasonable employer would have imposed". (AIR pp. 919-20, para 7)

(Emphasis supplied)

26. In Management of The Federation of Indian Chambers of Commerce and Industry Vs. Their Workman, Shri R. K. Mittal, the allegation against the

employee of the Federation was that he issued legal notices to the Federation and to the International Chamber of Commerce which brought discredit to the Federation--the employer. Domestic inquiry was held against the employee and his services were terminated. The punishment was held to be disproportionate to the misconduct alleged and established. This Court observed that: (SCC p. 62, para 34)

The Federation had made a mountain out of a mole hill and made a trivial matter into one involving loss of its prestige and reputation.

27. In *Ranjit Thakur* referred to earlier, an army officer did not obey the lawful command of his superior officer by not eating food offered to him. Court-martial proceedings were initiated and a sentence of rigorous imprisonment of one year was imposed. He was also dismissed from service, with added disqualification that he would be unfit for future employment.

28. Applying the doctrine of proportionality and following *CCSU, Venkatachaliah, J.* (as His Lordship then was) observed: (SCC p. 620, para 25)

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.

(Emphasis supplied)

28. The doctrine of proportionality is, thus, well recognized concept of judicial review in our jurisprudence. What is otherwise within the discretionary domain and sole power of the decision maker to quantify punishment once the charge of misconduct stands proved, such discretionary power is exposed to judicial intervention if exercised in a manner which is out of proportion to the fault. Award of punishment which is grossly in excess to the allegations cannot claim immunity and remains open for interference under limited scope of judicial review. One of the tests to be applied while dealing with the question of quantum of punishment would be: would any reasonable employer have imposed such punishment in like circumstances? Obviously, a reasonable employer is expected to take into consideration measure, magnitude and degree of misconduct and all other relevant circumstances and exclude irrelevant matters before imposing punishment. In a case like the present one where the misconduct of the delinquent was unauthorized 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. Ordinarily, we would have sent the matter back to the appropriate authority for reconsideration on the question of punishment but in the facts and circumstances of the present case, this exercise may not be proper. In our view, the demand of justice would be met if the Respondent No. 1 is denied back wages for the entire period by way of punishment for the proved misconduct of unauthorized absence for six months.

29. According to my opinion, trial court as well as lower appellate court both have rightly examined matter and rightly decided it and rightly framed issues and also rightly gave detailed reasons in support of conclusions and it cannot be considered that findings given by courts below are baseless and perverse and, therefore, no error is committed either by trial court or by lower appellate court while deciding suit as well as regular civil appeal filed by present Appellants and, therefore, there is no substance in this appeal filed by Appellants. Accordingly, second appeal is dismissed with no order as to costs. Interim relief which has been granted by this Court in Civil Application No. 1632 of 2005 is ordered to be vacated forthwith with a direction to present Appellants to comply with or implement judgment and decree passed by trial court with all consequential benefits in favour of present Respondent Jorubha Gumansinh Jadeja as early as possible, within three months from date of receipt of copy of this order.