
(2001) 04 RAJ CK 0088

In the Rajasthan High Court

Case No : Civil Writ Petition No. 7714 of 1992

Sujata Malhotra

APPELLANT

Vs

State of Rajasthan and Others

RESPONDENT

Date of Decision : 09-04-2001

Acts Referred:

Constitution of India, 1950 — Article 14, 16, 226, 32

Citation : (2001) 2 WLC 604 : (2003) 1 WLN 216

Hon'ble Judges : K.S. Rathore, J;Arun Madan, J

Bench : Division Bench

Final Decision : Allowed

Judgement

Arun Madan, J.—The petitioner has assailed penalty of removal from service imposed by the Disciplinary Authority State Government (respondent No. 10) by its order dated 28.8.1992 (Ann. 35) in disciplinary proceedings initiated against her under charge sheet dated 17.11.1987 (Ann. 5).

2. Two charges were framed against the petitioner:(1) that she is guilty of having remained wilfully absent from government service while working as Dietician, SMS Hospital, Jaipur for a period from 11.10.1982 to 11.1.1987; and (2) that she is guilty of having gone abroad (Nigeria) without prior intimation and permission by obtaining No Objection Certificate from the State Government and the Head of Department. To the aforesaid charges, a statement of allegations was also served upon the petitioner.

3. For charge No. 1 it has been alleged in the statement of allegations, the petitioner had submitted an application for grant of extra ordinary leave from 11.10.1982 for three months on the ground of her newly born child being sick, whereafter she extended leave for six months from 10.1.1983 by sending letter of application to the Superintendent SMS Hospital, Jaipur, who by his letter dated 28.1.1983 refused to grant the leave applied for and extended by her, rather she was directed to resume her duty since otherwise proceedings under Rule 86(1),

RSR were to be initiated but she did not report for duty and rather remained absent without application and thus has been absent from 11.10.1982.

4. For charge No. 2 in the statement of allegations it has been alleged that the petitioner had gone to meet her husband abroad (Nigeria) without prior intimation and permission or obtaining No Objection from the State Government, as has been admitted in her letter dated 15.1.1987 and thus by wilful absence from 1.10.1982 she remained abroad in defiance of the orders of the State Government and returned back on duty by attending on 12.1.1987, for which she is responsible.

5. Undisputed facts are that after due selection by Rajasthan Public Service Commission (for short "RPSC") the petitioner was appointed as Dietician by an order dated 12.1.1977 of the State Government. In the year 1981 while she was posted in SMS Hospital, Jaipur as Dietician upon her application she was issued no objection certificate (Ann. 1 dt. 6.5.1981) to go abroad for a period of two months to USA to meet her relatives on following conditions:

1. Smt. Sujata Malhotra will proceed abroad after getting her leave duly sanctioned from the competent authority.

2. She will not extend the period of stay abroad without approval of the State Government.

3. She will not accept any foreign assignment during her stay abroad.

4. She will not undertake any study while abroad.

5. Her resignation from abroad will not be accepted.

6. It is confirmed that no foreign exchange will be made available through any Government channel.

7. In case of violation of any of the conditions or undertaking given by Smt. Sujata Malhotra her service shall stand terminated.

6. Further it is an admitted fact that the petitioner was granted maternity leave for three months from July 1982 and after availing of this leave she worked upto 10.10.1982 and on 11.10.1982 she applied for leave for three months as her newly born child was not keeping well. As per reply to the writ petition the respondents have admitted to receive her application for grant of extra ordinary leave of three months from 11.10.1982 and further extension of that leave for six months. The respondents have submitted xerox copy of application dated 11.10.1982 (Ann.R-1) and extension of leave application dated 10.1.1983 (Ann. R-2) for six months. The respondents have further admitted in the reply to have received petitioner's application from Nigeria which was produced as Annexure R. 6.

7. Admittedly, after having remained absent from duty from 11.10.1982 to 11.1.1987 the petitioner resumed and joined her duty by attending the office on

12.1.1987 in SMS Hospital, Jaipur and thereafter upon her posting by an order dated 2.7.1987 (Ann. 3) she continued to work as Dietician in SMS Hospital, Jaipur.

8. The petitioner submitted her written statement (Ann. 6) to the charge sheet (Ann. 5) denying the charges and allegations. On 14.9.1988 Additional Commissioner (DE-2) was appointed as Inquiry Officer by order (Ann. 7). It is her case that she submitted on 11.4.1989 a list of documents (Ann. 8) alongwith original documents (Ann. 9 to 20) in defence before the Inquiry Officer in departmental enquiry against her. She further stated that documents mentioned at S.No. 1 & 2 in the list of documents (Ann. 8) were returned to her by the inquiry officer. She also submitted supplementary list of documents (Ann. 21) alongwith original documents (Ann. 22 to 25) and written arguments before the inquiry officer on 13.7.1989 (Ann. 26). In the inquiry, only G.C. Chaturvedi was examined as PW-1. The department had also presented its written arguments (Ann. 27).

9. After conclusion of departmental enquiry, the petitioner was served with an order dated 26.5.1990 imposing punishment of removal from service.

10. This order dated 26.5.1990 was challenged by the petitioner in her petition (SB Civil Writ No. 2616/1990) which was allowed by this Court by its order dated 11.7.1991 which resulted in quashing of the impugned order in the following terms:

The writ petition is allowed. The order dated 26.5.1990 is declared illegal and is hereby quashed. However, since the petitioner has subsequently been supplied a copy of the enquiry report on her demand, the respondent Government will be free to give a notice to the petitioner calling upon her to submit her representation against the findings recorded by the Enquiry Officer. After considering such representation, the respondent Govt. will be free to pass appropriate order in accordance with law. Parties are left to bear their own costs.

11. The entire order of this Court dated 11.7.1991 has been reproduced in the writ petition itself. A perusal thereof shows that several grounds were raised in her earlier writ petition assailing order of punishment dated 26.5.1990 but this Court disposed off it only on the ground that copy of the inquiry report was not made available to her before passing order of punishment of removal from service. Under its order this Court held that it was obligatory on the part of the disciplinary authority to furnish a copy of the enquiry report to the delinquent so as to afford him/her an opportunity to make representation against the findings or conclusions of the enquiry officer, before imposition of any of major panalties against the delinquent.

12. In deference to the order of this Court revoking punishment of removal from service, the respondent State Government under its order dated 14.10.1991 reinstated the petitioner in service but asked her to submit explanation to the enquiry report, which she submitted on 12.11.1991 (Ann. 34) against the report

(Ex. 31).

13. It was also the case of the petitioner that despite her persistent representations for making payments of arrears of salary for the period from 26.5.1990 to 2.11.1991 (from the date of earlier punishment which was revoked by this Court, till she was reinstated and joined), she was not made such payments in accordance with law as ordered by this Court to pass appropriate orders. To utter dismay, after about one year of earlier order of this Court, on 28.8.1992 another order (Ann. 35) was passed imposing punishment of removal from service against the petitioner. Hence this writ petition.

14. This writ petition came up for admission on 19.5.1993. On 22.6.1993 the learned Single Judge (per V.K. Singhal, J.) though after hearing only the learned Counsel for the petitioner at admission stage without issuing notice to the opposite side, had recorded his satisfaction that so far as finding of the disciplinary authority to the extent that the petitioner was guilty for misconduct, is correct and is not vitiated by any error apparent from law, but he was of the view that if any misconduct is proved in the disciplinary proceedings then the quantum of punishment cannot be reviewed in the proceedings under Article 226, and since different view had been taken in *Dr. Mal Chand Poonia v. State of Rajasthan* (SB Civil Writ Petition No. 1829/1989) decided on 31.10.1990. the learned Single Judge referred to the Division Bench for adjudicating the following points:

(1) Where the misconduct of Government servant in the disciplinary proceedings is proved, whether any interference Under Article 226 could be made on the quantum of punishment?

(2) Whether in the facts and circumstances of the case the punishment of removal of the petitioner from service was justified?

15. Thereupon on 20.7.1993 the then Chief Justice ordered to list this petition before the Division Bench. On 17.1.1996 the Division Bench of this Court issued notices. After service, this writ petition was admitted and notices were ordered to be issued. The reply has been filed by the respondents on 28.1.1997 by parawise answering to the averments of the writ petition.

16. During the course of arguments Shri Virendra Dangi learned Counsel for the petitioner has not only challenged the order of the learned Single Judge who has while referring aforesaid two of questions to the Division Bench held the finding of the disciplinary authority (to the extent that the petitioner was guilty for misconduct) as correct and that such finding was not vitiated by any error apparent from law, but also challenged the impugned order of punishment in its entirety assigning it *per se* illegal, arbitrary and bad in law because the disciplinary authority ignored all the facts documents and legal position stated in her representation (Ann. 34).

17. Shri Virendra Dangi has referred to some of findings arrived at by the

disciplinary authority during the course of imposing impugned punishment against the petitioner, which we will state at appropriate stage a little latter, and on the basis of which Shri Dangi contended that the disciplinary authority has failed to appreciate material on record and further failed to apply judicial mind rather has simply revived earlier order of removal (dt. 26.5.1990) in a mechanical manner.

18. Shri Virendra Dangi also contended that in view of the facts that even after an absence of four years and three months (from 11.10.1982 to 11.1.1987) the petitioner was not only allowed to resume her duty on 11.1.1987 but was also allowed to work uninterruptedly initially for (a) 11 months (11.1.1987 to 18.11.1987) i.e. date of joining back after alleged absence till impugned charge sheet was issued on 18.11.1987 and (b) thereafter during pendency of inquiry i.e. up to 26.5.1990 for more than three years, the respondents had actually condoned her aforesaid absence for all practical purposes and therefore, after that for the same period of absence there was no occasion for issuing any charge sheet or conducting inquiry and awarding punishment. He cited decision in State of Madhya Pradesh and others Vs. R.N. Mishra and others,

19. Shri Virendra Dangi then contended that the impugned charge sheet does not state that the alleged wilful absence on the part of the petitioner is a misconduct, rather it merely mentioned that the petitioner has violated the orders of State Government by remaining absent from 11.10.1982 and by remaining abroad without prior intimation to the Department but curiously enough there has been no mention of any such Government Orders which stipulate and envisage for prior intimation or permission before proceeding abroad even once the passport was admittedly allowed to be issued in favour of the petitioner by issuing No Objection Certificate thereto. That apart, once the respondents Department in its reply has admitted to have received an application for grant and extension of leave (Ann. R.6) being sent by the petitioner from Nigeria on or about 15.9.1983 in response to Department's letter dated 14.7.1983, then the circumstances stated in her extension leave application sent from Nigeria so also for grant of permission to leave country, ought to have been stated in the statement of allegations thereby it has caused prejudice to her and in this view of the matter, according to Shri Dangi the inquiry itself is vitiated besides G.C. Chaturvedi appearing on behalf of the department had failed to controvert the defence set up by the petitioner by way of any document, in rebuttal, inasmuch as the Presenting Officer during inquiry proceedings had never doubted the veracity and genuineness of defence documents nor denied the existence of documents of defence nor denied their contents either by controverting in departmental evidence or putting questions during cross-examination of the petitioner's evidence so as to show their veracity in suspicion. In these circumstances, the disciplinary authority ought to have considered defence documents as true being admissible in evidence with a view to accept the defence in favour of the petitioner.

20. Lastly Shri Virendra Dangi contended on the aspect of interference under Article 226 of the Constitution not only in the matter of challenge to the findings of disciplinary authority but also to the quantum of punishment. He has cited a catena of decisions which would be mentioned and dealt with in later part of this judgment at appropriate stage.

21. As per decision in Union of India (UOI) and Others Vs. J. Ahmed, disciplinary proceeding can be held against a member of the All India Service for any act or omission which renders him liable to a penalty can be imposed for good and sufficient reasons. Code of Conduct is set out in the Conduct Rules which indicates the conduct expected of a member of the relevant service, meaning thereby the conduct which is blameworthy for the Government servant in the context of Conduct Rules would be misconduct. If a servant conducts himself in a way inconsistent with due and faithful discharge of his duty in service, it is misconduct. Stroud's Judicial Dictionary defines "misconduct" which means, misconduct arising from ill motive and acts or negligence, errors of judgment, or innocent mistake, do not constitute such misconduct.

22. The Apex Court in P.H. Kalyani Vs. Air France Calcutta, held that a single act of omission or error of judgment would ordinarily not constitute misconduct though if such error or omission results in serious or atrocious consequences, the same may amount to misconduct. The Apex Court so held that it is difficult to believe that lack of efficiency or attainment of highest standards in discharge of duty attached to public office would ipso facto constitute misconduct. To prove negligence in performance of duty or error of judgment in evaluating the developing situation, as misconduct, there must be the consequences directly attributable to negligence such as to be irreparable or the resultant damages. Therefore, the Apex Court held as under:

There may be negligence in performance of duty and a lapse in performance of duty or error of judgment in evaluating the developing situation may be negligence in discharge of duty but would not constitute misconduct unless the consequences directly attributable to negligence would be such as to be irreparable or the resultant damage would be so heavy that the degree of culpability would be very high. An error can be indicating of negligence and the degree of culpability may indicate the grossness of the negligence. Careless can often be productive of more harm than deliberate wickedness or malevolence..."

...But in any case, failure to attain the highest standard of efficiency in performance of duty permitting an inference of negligence would not constitute misconduct nor for the purpose of Rule 3 of the Conduct Rules as would indicate lack of devotion to duty.

...But when the respondent is sought to be removed as a disciplinary measure and by way of penalty, there should have been clear case of misconduct, viz. such acts and omissions which would render him liable for any of the punishments set out in Rule 3 of the Discipline and Appeal Rules, 1955. No such

case has been made out.

23. As regards condonation of misconduct, Shri Dangi cited a decision in *State of M.P. v. R.N. Mishra* JT 1997 (8) SC 162, wherein following the dictum of law on the principle of condonation of misconduct laid down in *B.C. Chaturvedi Vs. Union of India and others*, to the effect that promotion given to an employee, who is required by Government Rules to be considered for promotion, despite the pendency of preliminary enquiry does not amount to condonation of misconduct which is subject matter of enquiry, the Apex Court held that an employee/officer who is required to be considered for promotion, despite the pendency of preliminary inquiry or contemplated inquiry against him is promoted, having found fit for the promotion so made would not amount to condonation of misconduct which is subject matter of the inquiry. We are surprised as to how aforesaid decision cited by Shri Dangi would help him in advancing any case for condonation of misconduct in favour of the petitioner, because it was a case where the Apex Court held that the doctrine of condonation of misconduct under ordinary law of master and servant cannot be pressed into service where as employee is governed by statutory rules because under the law the employer under the statutory rules is required to consider the case of an employee for promotion against whom a preliminary enquiry is pending. The Apex Court had also held that under law the Government is not justified in excluding an employee from the field of consideration for promotion merely on the ground that certain disciplinary proceedings are contemplated or some preliminary inquiry to inquire into the misconduct attributed to that employee are pending. In the instant case no promotion was ever granted during the pendency of inquiry or prior to contemplation of such inquiry.

24. In *Ashok Kumar v. Union of India* 1988 (2) SLR 209 punishment of termination of service was substituted by punishment of censure to be entered in the service record holding termination in grossly disproportionate to the charge that the appellant had absented from duty for three days without leave. In *B.R. Singh and others Vs. Union of India and others*, , punishment of dismissal from service for the charge of signing attendance register during a few days of absence (i.e. seven days) was held excessive and therefore was substituted by reinstatement without back wages. In *Union of India and others Vs. Giriraj Sharma*, for the charge of overstaying leave period for further 12 days by employee subsequent to order of rejection of application for extension of leave, the dismissal was held disproportionate one and thereby relief of reinstatement with all monetary and service benefits was granted with liberty to visit minor punishment, inasmuch as it was held that circumstances which remained uncontroverted in the counter show that it was not his intention to wilfully flout the order but the circumstances forced him to do so. It was a case where the learned Counsel for the employee had fairly conceded that it may be open to the authorities to visit him with a minor penalty. These decisions (*supra*) do not render any help to the present petitioner against whom charge is of wilful absence for more than four years.

24. Next case cited by Shri Dangi is of the Single Bench of this Court in Babulal Tatiwal v. State 1992 (3) WLC (Raj) 76 wherein removal on the ground of wilful absence from duty from 4.10.1980 to 31.12.1980 exceeding one month (for which leave was not applied for nor sanctioned) was held proper but keeping in consideration the factum of employee being class IV employee who had also prepared to forego claim for arrears of pay and other allowances, penalty of removal was altered into that of withholding six grade increments. Another case cited of this Court is of Division Bench in Babulal v. State of Rajasthan 1996 (2) RLR 350. In that case the Division Bench of this Court held that the period of one month of absence should be continuous and not different break ups constituting a total period of one month, inasmuch as punishment of removal is shocking to conscience and thus it was set aside and the disciplinary authority was directed to consider question of imposition of some other sentence. The Division Bench also held that the learned Single Judge misinterpreted provisions of R. 86 of RSR that for remaining absent from duty exceeding one month the only punishment is removal from service and there was gross misappreciation of facts by concerned authorities so also by the Single Judge. In other words, this Court held that the words. "may be removed from service" in R. 86 RSR do not always mean which would imply that he must have to be removed from service but that is only the maximum sentence as provided by law.

26. In Chitarmal v. State of Rajasthan 1997 (1) WLR (Raj) 734, the delinquent had applied for leave but not sanctioned inasmuch as his absence was held due to illness which was fully established by medical certificates and that apart copy of inquiry report was supplied only after passing of order of dismissal, hence this Court held the alleged absence not wilful, and that requirement of statute and principles of natural justice was held to be flagrantly violated, and therefore, the petitioner was reinstated with all consequential benefits for the charge of wilful absence for 57 days. The facts of this case being distinguished to the present case are not attracted and do not help in any manner.

27. In Suresh Kumar Chug v. State 1997 (1) RLR 315 the learned Single Judge of this Court after having followed the doctrine of law for interference in the quantum of punishment observed that directing reinquiry in the circumstances of the present case would be disproportionately harmful to the petitioner and this Court under Article 226 of the Constitution can shorten the duration of litigation by moulding the punishment in such a manner to meet the ends of justice because there has been infraction of several procedures established for protecting the interest of the petitioner which may entail re-enquiry. In that case termination was set aside directing reinstatement of the petitioner but with no back wages for the period during which he remained out of service holding it to be his only punishment for misconduct committed and further that the period so excluded was also held not countable for his pensionary benefits but his pay on reinstatement was directed to be fixed after taking into consideration that period.

28. As regards interference by the High Court by invoking Article 226 of the

Constitution for issuance of writ of certiorari, Shri Dangi though cited numerous decisions but we will like to have brief resume of some of decisions as in each of those decisions they have been referred to or followed in subsequent matters. In T.C. Basappa Vs. T. Nagappa and Another, the Apex Court held as under:

The language used in Articles 32 and 226 of the Constitution is very wide and the powers of the Supreme Court as well as of all the High Courts in India extend to issuing of orders, writs or directions including writs in the nature of habeas corpus, mandamus, quo warranto, prohibition and certiorari as may be considered necessary for enforcement of the fundamental rights and in the case of High Courts, for other purposes as well.

One of the fundamental principles in regard to the issuing of a writ or certiorari, is, that the writ can be availed of only to remove or adjudicate on the validity of judicial acts. The expression, "judicial acts" includes the exercise of quasi judicial functions by administrative bodies or other authorities or persons obliged to exercise such functions and is used in contrast with what are purely ministerial acts. The second essential feature of a writ of certiorari is that the control which is exercised through it over judicial or quasi judicial Tribunals or bodies is not in an appellate but supervisory capacity.

An error in the decision or determination, itself may also be amenable to a writ of certiorari but it must be a manifest error apparent on the face of the proceedings, e.g. when it is based on clear ignorance or disregard of the provisions of law. In other words, it is a patent error which can be corrected by certiorari but not a mere wrong decision.

29. In Dwarka Nath Vs. Income Tax Officer, Special Circle D-ward, Kanpur and Another, the Apex Court held as under:

Article 226 is couched in comprehensive phraseology and it ex facie confers a wide power on the High Court to reach injustice wherever it is found. A wide language in describing the nature of the power, the purposes for which and the person or authority against whom it can be exercised was designedly used by the Constitution.

...That apart, High Courts can also issue directions, orders or writs other than the prerogative writs. The High Courts are enabled to mould the reliefs to meet the peculiar and complicated requirements of this country.

30. The Apex Court further held that before the writ can be issued, the following conditions to be complied with:

(1) The body of persons must have legal authority; (2) there must be authority to determine questions affecting the rights of subjects and (3) the body of persons should have a duty to act judicially. A writ of certiorari can be issued to quash a quasi judicial act of an administrative Tribunal or authority. The question whether an act is a judicial or an administrative one arises ordinarily in the context of the proceedings of an administrative Tribunal or authority. An act

emanating from an administrative Tribunal would not be anytheless a quasi judicial act if the aforesaid tests were satisfied.

...A statute may enjoin on an administrative authority to act administratively or judicially. If it expressly imposes a duty on the administrative body to act judicially it is clearly a case of a judicial act. But the Act may not expressly confer a duty to act judicially but this duty may be inferred from the provisions of the statute. It may be gathered from the cumulative effect of the nature of the rights affected, the manner of the disposal provided, the objective ceriterion to be adopted, the phraseology used, the nature of the power conferred of the duty imposed by the statute. A duty to act judicially may arise in widely different circumstances and a hard and fast rule or any inflexible rule of guidance is neither possible nor advisable to be laid down.

31. In P.J. Irani Vs. The State of Madras, the Apex Court held that in an event of power being vested in Government to exempt particular building from operation of Rent Control Act, by individual orders of Government, Article 226 would be available to set aside such an order. The Apex Court then held as under:

....Even if the order did not violate Article 14, the High Court does not lack power under Article 226 to set aside an ultra vires order vitally affecting a person's right to statutory protection against eviction. Immunity from interference by the Courts could not be sought for orders which are plainly ultra vires, merely because they were passed bonafide in the sense of being without indirect motive. Particularly so when the power of the High Court under Article 226 of the Constitution is not limited to the issue of writs falling under particular groupings, such as the certiorari, mandamus, etc., as these writs have been undnerstood in England but the power is general to issue any direction to the authorities, viz. for enforcement of fundamental rights as well as for other purposes.

32. In Union of India and Another Vs. Tulsiram Patel and Others, the Apex Court took note of the passage from E.P. Royappa Vs. State of Tamil Nadu and Another,

Article 14 is the genus while Article 16 is a species. Article 16 gives effect to the doctrine of equality in all matters relating to public employment. The basic principle which, therefore, informs both Articles 14 & 16 is equality and inhibition against discrimination. Now, what is the content and reach of this great equalising principle? It is a founding faith, to use the words of Bose, J. "a way of life", and it must not be subjected to a narrow pedantic or lexicographic approach. We cannot countenance any attempt to truncate its all embracing scope and meaning, for to do so would be to violate its activist magnitude.

...In fact equality and arbitrariness are sworn enemies; one belongs to the rule of law in a republic while the other, to the whim and caprice of an absolute monarch. Where an act is arbitrary it is implicit in it that it is unequal both according to political logic and constitutional law and is therefore violative of Article 14, and if it affects any matter relating to public employment, it is also violative of Article 16.

Articles 14 & 16 strike at arbitrariness in State action and ensure fairness and equality of treatment. They require that State action must be based on relevant principles applicable alike to all similarly situated and it must not be guided by any extraneous or irrelevant considerations because that would be denial of equality. Where the operative reason for State action, as distinguished from motive inducing from the antechamber of the mind, is not legitimate and relevant but it is extraneous and outside the area of permissible considerations, it would amount to mala fide exercise of power and that is hit by Articles 14 and 16. Mala fide exercise of power and arbitrariness are different lethal radiations emanating from the same vice: in fact the latter comprehends the former. Both are inhibited by Articles 14 & 16.

33. In *Mrs. Maneka Gandhi Vs. Union of India (UOI)* and *Another*, the Apex Court reaffirmed what had been laid down in earlier decision in *Royappa's case (supra)* in these words:

Article 14 strikes at arbitrariness in State action and ensures fairness and equality of treatment. The principle of reasonableness, which legally as well as philosophically, is an essential element of equality or non-arbitrariness pervades Article 14 like a brooding omnipresence...

34. In *Kumari Shrilekha Vidyarthi and Others Vs. State of U.P. and Others*, the Apex Court held, "Constitution did not envisage or permit unfairness or unreasonableness in State actions in any sphere of its activity contrary to the professed ideals in the Preamble, and exclusion of Article 14 in contractual matters is not permissible in constitutional scheme". The Apex Court then held, "even assuming that it is necessary to import the concept of presence of some public element in a State action to attract Article 14 and permit judicial review, it can be said that the ultimate impact of all actions of the State or a public body being undoubtedly on public interest, the requisite public element for this purpose is present also in contractual matters." The Apex Court then took notice of earlier decision in *Liberty Oil Mills and Others Vs. Union of India (UOI) and Others*, wherein it has been observed, "the non assigning of reasons or the noncommunication thereof may be based on public policy, but termination of an appointment without the existence of any cogent reason in furtherance of the object for which the power is given would be arbitrary and therefore, against public policy."

35. Thus according to the decision (*supra*) it stands settled law that the Constitution does not envisage or permit unfairness or unreasonableness in State actions in any sphere of its activity contrary to the professed ideals in the Preamble. The scope and permissible grounds of judicial review in any of matters either contractual or employment under statutory rules, and the relief available, are different matters but that does not justify the view of total exclusion of Article 14 when the modern trend is also to examine the unreasonableness. Even if it is shown that the State action under challenge is arbitrary and thereby violative of Article 14 of the Constitution, there can be no impediment in striking

down the impugned act irrespective of the question an additional right, contractual or statutory, if any, is also available to the aggrieved persons. In our considered opinion the wide sweep of Article 14 and the requirement of every State action qualifying for its validity on this touchstone, irrespective of the field of activity of the State, has long been settled. Where there is arbitrariness in State action, Article 14 springs in and judicial review strikes such an action down because every action of the executive authority must be subject to rule of law and must be informed by reason and, therefore, whatever be the activity of the public authority it should meet the test of Article 14.

36. Here we must not forget that it is for the person alleging arbitrariness who has to prove it. It can be done by showing in the first instance that the impugned State action is uninformed by reason inasmuch as there is no discernible principle on which it is based or it is contrary to the prescribed mode of exercise of the power or is unreasonable. If this is shown, then the burden is shifted to the State to repeal the attack by disclosing the material and reasons which led to the action being taken in order to show that it was an informed decision which was reasonable. If after a prima facie case of arbitrariness is made out, the State is unable to show that the decision is an informed action which is reasonable, the State action must perish as arbitrary. That apart as expounded in *Shrilekha v. State of U.P.* (supra) conferment of the power together with the discretion which goes with it to enable proper exercise of the power is coupled with the duty to shun arbitrariness in its exercise and to promote the object for which the power is conferred, which undoubtedly is public interest and not individual or private gain, whim or caprice of any individual. And, therefore, all persons entrusted with any such power have to bear in mind its necessary concomitant which alone justifies conferment of power under the rule of law. Similarly the Government cannot act arbitrarily at its sweet will and, like a private individual, deal with any person it pleases, but its action must not be arbitrary or capricious, but must be based on some standard or norm which is not arbitrary, irrational or irrelevant. The governmental action must not be arbitrary or capricious, but must be based on some principle which meets the test of reason and relevance. Such a rule of administrative law was validated by the Courts as an emanation flowing directly from the doctrine of equality. Any departure from standard or principle meeting the test of reasonableness and non-discrimination would certainly be invalid unless it can be supported or justified on some rational and non-discriminatory ground. (See *Kasturi Lal Lakshmi Reddy, Represented by its Partner Shri Kasturi Lal, Jammu and Others Vs. State of Jammu and Kashmir and Another*, The dictum of law laid down in the decisions (supra) was reaffirmed by the Apex Court in *Unni Krishnan, J.P. and others Vs. State of Andhra Pradesh and others* etc. etc.,

37. Last decision relied upon by Shri Dangi is of this Court in *Babulal v. State of Rajasthan* 2000 (3) RLR 529 wherein this Court observed as under:

Article 14 which ensures for a fair and just treatment at the hands of State or

any instrumentality of State to all citizens, and is a guarantee against arbitrariness, unreasonableness and irrational discrimination, provides the bedrock for equality before law. It forbids any invidious discrimination between similarly situated person. Two persons facing the same charge or charges of similar nature and found guilty of the same are persons similarly situated. In such cases it can be stated with conviction when two or more employees is visited with more serious punishment and the other employee is given lesser punishment, and the discriminatory treatment cannot be explained on any rational ground then it must be held that employer is guilty of invidious discrimination. The fact that one is on workcharge establishment and another on regular does not entitle the disciplinary authority to impose a higher punishment on employee on workcharge establishment as compared to other employee on regular establishment. Classification of two delinquent officers on such basis in the matter of choosing punishment to be imposed cannot be justified. Hence, contention of learned Counsel for the respondents, justifying the different punishments on the basis of nature of establishment on which the petitioner was employed, cannot be accepted.

38. In that case, though this Court would have quashed the proceedings and remanded the case back for continuance of the disciplinary proceedings afresh against the petitioner Babulal, but since the learned Counsel on behalf of the petitioner stated that in totality of the circumstances when he had been found guilty of supervisory negligence he shall be satisfied if relief to him is confined to the second contention and a lesser punishment is imposed for supervisory negligence than termination of service and if reinstated in service, he would also be prepared to forego 50% of his back wages to which he would be otherwise entitled to on quashing of entire proceedings, in these circumstances this Court setting aside punishment of dismissal of the petitioner, imposed punishment of three grade increments without cumulative effect besides directing the reinstatement of the petitioner with continuity of service and consequential benefits but with only 50% of back wages.

39. In *Dr. Malchand Poonia v. State of Rajasthan* (S.B. Civil Writ Petition No. 1829/1989 decided on 31.10.1990) (to which the learned Single Judge (Per V.K. Singhal, J.,) taking different view has referred the matter to this Division Bench for adjudicating the aforesaid two points), another Single Bench (Per M.R. Calla, J., (as her then was) of this Court had followed the decisions of the Apex Court in *State of Orissa v. N.N. Swamy* 1997 (2) SCC 508 and *Rameshwar Dayal v. State of U.P.*, 1971 (3) SCC 924 and held as under:

Prima facie had the reasoning adopted in the case of *Dr. Syed Ajmal Hussain* been applied to the case of the petitioner even the finding with reference to the charge as given by the Enquiry Officer could be sustained, but in any case, I find that the petitioner's case is atleast identical if not better than that of *Dr. K.C. Somani*, *Dr. Syed Ajmal Hussain*, *Dr. J.P. Gupta* and *Dr. Shyamlal Khunteta* and hence there was no reason to impose extreme penalty of removal from service

against the petitioner. The equality of opportunity in the matter relating to employment extends over the whole period of employment i.e. the point of time of entry into the service to that when the stage of cessation of employment is reached.

Here is a case in which I find that there is a great disparity inasmuch as the petitioner has been subjected to extreme punishment of removal from service whereas in other identical cases, the doctors have been punished with penalty of stoppage of 2-3 increments with cumulative effect. Some of the cases of doctors referred above going abroad is admitted but the petitioner has categorically stated that he never went abroad and no material has come on record to disbelieve the same.

40. In *Rameshwar Dayal v. State of U.P. (Supra)*, the Apex Court held that although the offences were the same, the defences were also the same and the facts were absolutely the same, the sentences passed on their conviction were widely different and this shows how the question of sentences to be awarded in a crime may be viewed differently by different Judges, a problem which has never been solved satisfactorily so far, and in these circumstances, the Apex Court observed that the two cases being identical, it looks somewhat odd that one of the accused should be sentenced to 4 year's imprisonment while another who committed the identical offence and in the like circumstances should be sentenced to three months' imprisonment and something must be done to make the punishment even in these two cases.

41. As expounded in *State of Orissa v. N.N. Swamy (supra)* in para 16, under Article 16(1) of the Constitution the matters relating to employment not only mean the initial appointment but subsequent to the employment whether prior or subsequent to the employment (See also *The General Manager, Southern Railway Vs. Rangachari*,

42. After having comprehensive analysis of a catena of decisions (supra), irretrievable conclusion is that Article 226 confers power on the High Courts to issue writs for enforcement of the fundamental rights as also non-fundamental rights. High Courts can issue appropriate directions, orders or writs other than the prerogative writs. Thus it enables the High Court can mould the reliefs to meet the peculiar and complexed requisites of this country. Writs under Article 226 can be issued to any person or authority for the enforcement of any of the fundamental rights and for any other purpose. A writ of certiorari is available in cases where Tribunal or authority under a statute in making the enquiry acted in flagrant disregard of the rules of procedure and where no particular procedure is prescribed, it violated the principle of natural justice.

43. However, an error in the decision or determination itself is also amenable to a writ of certiorari but it must be a manifest error apparent on the face of the proceedings, e.g. when it is based on clear ignorance or disregard of the provisions of law. We are conscious of the law that the exercise of power under

Article 226 is not so wide or large as to enable the High Court to convert into a court of appeal and examine the correctness of the impugned decision and decide as to what is the proper view to be taken or the order to be made.

44. Having benefitted by the enlightenments derived from dictum of law laid down in series of decisions cited at the bar, in our considered view, the High Court can invoke Article 226 of the Constitution in case of the State action being not based on relevant principles applicable alike to similarly situate, and being guided by extraneous or irrelevant considerations or unreasonableness or being based on clear ignorance or disregard of the provisions of law. In other words, in a nutshell, in case the State action is violative of Articles 14 & 16 of the Constitution and offended to doctrine of equality, fairness and reasonableness besides smacked of discrimination, then judicial review under Article 226 strikes such an action down. That being so, as analysed supra, even in cases of proved misconduct of the charge of wilful absence, the punishment of termination or removal from service has been interfered with by this Court by invoking Article 226 of the Constitution, holding the punishment of removal from service as disproportionate and the relief of reinstatement with all monetary and service benefits has been granted with liberty to visit minor punishment even to the extent of lowest punishment of censure but only upon keeping in view nature of gravity of charge. In this view of the matter, first question referred to by the learned Single Judge is answered that the interference under Article 226 could be made on the quantum of punishment where the misconduct of Government servant in the disciplinary proceedings is proved. That apart, this Court under Article 226 can shorten duration of litigation instead of directing reinquiry either on the merit or on the quantum of punishment in the circumstances of the case, by moulding the punishment in order to meet the ends of justice obviously for the reasons that reinquiry would be disproportionately harmful to the petitioner and because of infraction of several procedures established for protecting the interest of the delinquent.

45. As regards second question referred to by the learned Single Judge though relating to justifiability of the impugned punishment of removal of the present petitioner from service, but since the learned Counsel for the petitioner has also challenged the referral order of the learned Single Judge concomitantly holding the impugned charge of wilful absence as proved, therefore, to meet the ends of justice and shorten the duration of litigation which in the instant case the petitioner has been fighting since 26.5.1990 date of first order of punishment which was set aside by this Court in her earlier writ petition (supra) and the present writ petition having been filed in the year 1992 is second inning of her legal gimmick, we deem it proper to also consider and decide merits of the case assailing the conclusions of the disciplinary authority for imposing punishment of removal of the petitioner from service.

46. On a bare reading of the impugned charge sheet, it stands explicit established that the charge sheet itself shows that the disciplinary authority had

prejudged the delinquent (petitioner) guilty, because under both of the charges, the disciplinary authority has mentioned that the petitioner has been guilty of wilful absence and having gone abroad (Nigeria) without prior intimation and without obtaining No Objection Certificate from the State Government. The disciplinary authority has not at all mentioned in the charge sheet that the act of allegedly wilful absent and having gone abroad without prior intimation and no objection certificate is misconduct. The words used by the disciplinary authority are "guilty" and "responsible" but failed to state as to whether it is her misconduct under the Conduct Rules. Though the disciplinary authority while imposing punishment of removal from service has specifically mentioned the order dt. 11.1.1956 by which it was stated to have been contemplated that the Government servant was required to take prior permission to leave head quarter, but curiously enough there has been no mention of such order dt. 11.1.1956 in the statement of allegations to the memo of charges. Similarly once the department in its reply to the writ petition is admitted to have received letter (Ann. R.6) of the petitioner sent from Nigeria on or about 15.9.1983 in response to its letter dt. 14.7.1983 seeking grant and extension of leave, and it has appended that letter (Ann. R.6) to the reply, but the disciplinary authority failed to mention any of facts as stated by the petitioner in his letter dt. 15.9.1983 (Ann. R.6) in the statement of allegations as well as memo of the charges in the impugned charge sheet. Thus, it is a case where the inquiry has been held against the delinquent (petitioner) without disclosing the material which has been sought to be utilised against her, and hence the proceeding is totally vitiated inasmuch as the conclusion arrived at in such inquiry stand vitiated on the principles of natural justice.

47. Let us advert to examine the question of justifiability of absence of the petitioner whether wilful or not. It is an admitted position that the word "wilful" has not been defined under the CCA Rules or the Rajasthan Civil Service (Conduct) Rules, 1971. However, Rule 86 of Rajasthan Service Rules, 1951 (for short, "RSR") deals with absence after expiry of leave. It Sub-rule (1) provides that a government servant who is absent from duty without leave or before leave applied for has been sanctioned by the competent authority shall be treated to have remained wilfully absent from duty unless on satisfactory reasons being furnished, the absence is regularised by grant of leave due or is commuted into extra ordinary leave by the authority competent to sanction leave. Similarly Clause (a) to Sub-rule(2) of Rule 86 contemplates that a government servant who remains absent from duty after the expiry of the sanctioned leave or after communication of refusal of extension of leave is not entitled to any pay and allowances for the period of such absence and the period of such absence shall be commuted into extra ordinary leave unless on satisfactory reasons being furnished the period of absence is regularised by grant of leave due by the authority to grant leave and Clause (b) to Sub-rule (2) of Rule 86 then envisages that wilful absence from duty after the expiry of leave renders a government servant liable to disciplinary action. Sub-rule (3) to Rule 86 stipulates penalty of

removal from service if the charge of wilful absence from duty for a period exceeding one month is proved, inasmuch as notwithstanding the provisions of Sub-rules (1) & (2) to Rule 86, departmental proceedings under CCA Rules can be initiated by the disciplinary authority.

48. As per provisions contained in Rule 86 of the RSR, an absentee servant can be treated wilfully absent either in case of his being absent without leave, or in case of his being absent before leave applied for has been sanctioned. Under the Rules word, "or" has been used betwixt "without leave" and "before leave applied for has been sanctioned". These two expressions are independent. First expression "without leave" is an act to be performed by the absentee servant, whereas second expression relates to the act for being performed by the employer i.e. Government's competent authority to sanction leave. If the absentee servant remains "without leave" then it may be his fault but as soon as the absentee servant sends his application and applies for leave then it is the duty and obligatory for the authority to either sanction or reject leave and inform the absentee about the decision taken on his leave applied for, either sanctioned or rejected. However, if the sanctioning authority fails to communicate either the rejection or sanction of the leave applied for to the Government servant within reasonable time in accordance with relevant rules then the absentee servant cannot be blamed and saddled for making him liable to any disciplinary action. Even as per legislative intent and object to frame Rule 86, provisions have also been contemplated that if the absentee servant continue to be absent even after expiry of the sanctioned leave or after communication of refusal of extension of leave, then on his failure to furnish satisfactory reasons at the worst he is not entitled to any pay and allowances for the absence period and if satisfactory reasons are furnished and the sanctioning authority is satisfied, in that eventuality his absence can be regularised by grant of leave due by the sanctioning authority as stipulated under Rule 86(2)(a). Similarly, even in cases of the absentee servant having remained absent without leave or before applied leave is sanctioned, such absence can be regularised by grant of leave due or can be commuted into extra ordinary leave provided the sanctioning authority is satisfied to the reasons furnished by such absentee. In other words there should be satisfactory reasons being furnished for his such absence under Rule 86(1) of the RSR, otherwise it will amount to interruption in service involving forfeiture of past service besides such absentee under Rule 86(1) can be treated to have remained wilfully absent. There is also non obstante clause in Sub-rule (3) to Rule 86, i.e. "notwithstanding the provisions contained in Sub-rules (1) & (2)". But as per specific provision contained in Clause (b) to Sub-rule (2) of Rule 86, disciplinary action can be rendered against the absentee servant only upon his wilful absence from duty after the expiry of leave.

49. Be that as it may, the decks are clear that before imposing the penalty on the delinquent, a legal duty is cast upon the disciplinary authority to record good and sufficient reasons and to record satisfaction upon considering circumstances or reasons furnished by the absentee servant for his alleged absence, as is

provided in Rule 14 of the CCA Rules which begins with the words, "MAY FOR GOOD AND SUFFICIENT REASONS, WHICH SHALL BE RECORDED, AND.....". Thus while affirming the view taken by this Court in *Prabhu Dayal v. State of Rajasthan* 1993 (3) RLR 592. We are of the firm view that undisputably the action of the disciplinary authority under the CCA Rules is quasi judicial and the order passed by it is also quasi judicial and therefore, even in the absence of a requirement by the statute, it is always imperative for disciplinary authority to record reasons because fulfilment of such requisite of recording of reasons is a part and parcel of the requirement of complying with principles of natural justice. Further the scheme of CCA Rules not only reinforces essentiality of giving of good and sufficient reasons but also the rule making authority has designedly thought it proper to incorporate the requirement of recording good and sufficient reasons, inasmuch as such requisite carries with it another requirement of communicating those reasons to the affected person. Once the rule requires that reasons to be recorded in support of punishment order must be good and sufficient, it is open to the Court to examine those reasons and consider for itself whether the reasons are good and sufficient because even sufficiency of reasons is open to scrutiny not only by the appellate and reviewing authority but also by the Courts of law. Thus we disapprove the view taken by the learned Single Judge (Per V.K. Singhal, J.,) in his referral order in the instant case on all aspects of disciplinary action as well as the quantum of punishment.

50. We may hasten to reiterate that the principle of proportionality stands well recognised in disciplinary actions and that being so in *Bhagat Ram Vs. State of Himachal Pradesh and Others*, the Apex Court observed that the penalty imposed must be commensurate with the gravity of the misconduct and that any penalty disproportionate to the gravity of the misconduct would be violative of Article 14, and similarly in a Constitution Bench decision (*Union of India and Another Vs. Tulsiram Patel and Others*, the Apex Court also held that in an order of punishment, the Court can interfere with the quantum of punishment on various grounds and one of those grounds is where the penalty is arbitrary. It then held as under:

....Where the court finds that the penalty imposed by the impugned order is arbitrary or grossly excessive or out of all proportion to the offence committed or not warranted by the facts and circumstances of the case or the requirements of that particular government service the Court will also strike down the impugned order...

51. Thus it is settled law that the punishment should not be vindictive or unduly harsh and it should not be so disproportionate to the offence as to shock the conscience and amount in itself to conclusive evidence of bias and that being so, irrationality and perversity are recognised grounds of judicial review.

52. In the instant case the period of absence alleged to be wilful is 11.10.1982 to 11.1.1987, out of which, as is stated in the statement of allegations to charge No. 1, itself, from 11.10.1982 admittedly the petitioner had applied for grant of

extra ordinary leave for three months on the ground of her newly born child being sick, and whereafter she extended leave for six months from 10.1.1983 by sending letter of her application to the Superintendent SMS Hospital Jaipur. But as against which, it is the case of the department respondent that upon having received her application for extension of leave from 10.1.1983 for six months, the Superintendent SMS Hospital, Jaipur had by his letter dated 28.1.1983 refused to grant the leave applied for and extended by her. This letter dated 28.1.1983 has been produced by the respondent Department alongwith its reply to the writ petition, as Annexure- R.3 which reads as under:

With reference to your letter application dated 19.1.1983 it is to inform you that due to an acute shortage of trained staff the work is suffering badly. Hence the leave applied for further period of six months w.e.f. 10.1.1983 cannot be sanctioned.

You are, therefore, hereby asked to join your duty immediately, failing which action as per Rule No. 86(1) of R.S.R. will be taken against you, which please note.

53. Here we reproduce the contents of application of the petitioner dated 10.1.1983 as under:

In continuation to my previous application, it is stated that my daughter still needs my personal attention and look after her. Under the circumstances it is requested that my leave may kindly be extended for a period of six months more i.e. upto 10.8.1983 treating it as extra ordinary leave and obliged.

54. Undisputably, the maternity leave was granted to the petitioner from July 1982 and she gave birth to female child during maternity period on 11.8.1982 as has been stated by her in application dated 11.10.1982, according to which since birth newly born baby was not keeping well her constant presence near the child was must necessary as there was no one else in the house to look after such a tender kid and for these reasons, by her aforesaid application dated 11.10.1982 she prayed for grant of three months extra ordinary leave from 11.8.1982 onwards. If the petitioner has applied for extra ordinary leave from 11.10.1982 on the ground of sickness of her newly born daughter and she extended that leave for further six months upto 10.8.1983, refusal to that leave by the sanctioning authority by alleged letter dated 28.1.1983 assigning the reason, "due to an acute shortage of trained staff the work is suffering badly" cannot but shock the conscience of any man of reasonable prudence. A lady servant having given birth to a baby, if she has sought extension of leave on the ground of her newly born baby being sick requiring her constant presence to look after a tender kid in a house having there been none, was expected to remain with her tender kid in compelling circumstances which were beyond her control for the welfare of her newly born daughter.

55. It was also the case of the petitioner not only before the Inquiry Officer and disciplinary authority but also before this Court, as is appearing from

representation dated 12.11.1991 (Ann. 34) that after having submitted second extension application dated 10.1.1983 she had to go to Nigeria where her husband had been working in Nigeria in the Ministry of Housing and Transport, because her husband had met with an accident and so she had applied for permission to leave India along with original telegram relating to intimation about accident of her husband, which had also been reiterated by her in subsequent letter received by the Superintendent SMS Hospital on 15.9.1983 (Ann. R.6) wherein she had also stated that while being at Nigeria she having fallen ill, was admitted and had undergone major operation of ectopic pregnancy in March, 1983. To prove these facts she had produced before the Inquiry Officer, (1) Certificate from Town Memorial Hospital, Ibadan, Nigeria for the period (10.1.1983 to 26.3.1983), (2) Certificate from Oyo State Health Council, Ibadan, Nigeria dated 29.5.1984, (3) Treatment Card from General Hospital in Nigeria dated 9.10.1983, (4) Certificate from Town Memorial Hospital, Ibadan, Nigeria from July, 1983 to October, 1983, (5) Letter from Chief, TA Oni Memorial Children Hospital, Ibadan, Nigeria dated 19.1.1984.

56. According to the petitioner she returned back to India in June, 1984 but since she was not fit to join the duties, she had to undergo medical treatment from Dr. Lucky, Dr. P.K. Sethi, & Dr. M.L. Dewangan and in support of her such a case she had also produced before the Inquiry Officer Ex. D.1 to Ex. D.10 viz. (1) Card from Rehabilitation Research Centre, Jaipur No. 79802, (2) examination report from Dr. Lucky dated 8.6.1984, (3) examination report from Dr. P.K. Sethi dated 3.7.1984, (4) examination report from Rehabilitation Research Centre, Jaipur, (5) examination report from Dr. P.K. Sethi dated 15.3.1985, (6) letter from Dr. Lucky with certificate from Dr. M.L. Dewangan dated 1.1.1987. Besides abovesaid documents, the petitioner had also produced before the inquiry officer along with supplementary list viz. (1) Medical examination report dated 14.9.1984 from Dr. Shashi Vaid, (2) Medical Report dated 17.8.1984 from Dr. Shashi Vaid, (Ex. D.9) & (3) X-Ray report dated 5.11.1984 from Sharma Clinic & Nursing Home, Jaipur (Ex. D.10).

57. Upon a careful reading of inquiry report (Ann. 31) it is clear that affidavit of the petitioner dated 22.1.1987 has been exhibited as Ex. P.1 whereas documents produced by her (except those of medical examination report & certificates issued by the doctors of Nigeria) have been exhibited as Ex. D.1 to Ex. D.10 which had been admitted by the prosecuting agency (department representing before the inquiry authority) as has been categorically stated by the inquiry officer in his report at page 4. Once the affidavit of the petitioner (Ex. P.1) and documents produced by the delinquent have been admitted by the department (Ex. D.1 to D.10) then surprisingly enough, the inquiry authority as well as the disciplinary authority had no option but to believe the contents of those contents unless and until they were either denied or controverted in rebuttal by adducing admissible cogent and reliable evidence to disprove the defence of the delinquent as to the facts of her having undergone treatment either at Nigeria or in India not only in respect of her own ailment but also her tender kid, for which she had

to keep away from duty which was beyond her control on account of compelling reasons as explained by her through production of numerous medical examination report/prescription or certificates from the respective doctors, so also in her affidavit (Ex. P.1) and letter of her leave extension applications, so also in her application dated 15.1.1987 (Ex. P.7) & 22.1.1987 (Ex. P.5). But having discarded them, not only the inquiry officer but also disciplinary authority, both have committed an error apparent on the face of record warranting interference by this Court under Article 226 of the Constitution by judicial review inasmuch as they have failed to assign good and sufficient reasons for discarding her evidence in the nature of documents so also for holding her guilty of wilful absence for the period in question.

58. That apart, the inquiry is also vitiated obviously because of the reasons that the charges were not framed with closed mind, and that disciplinary authority failed to apply mind to admitted facts amongst others (supra), e.g. her admission made in letter dated 15.1.1987 as to her having gone abroad (Nigeria) without prior intimation and obtaining No Objection Certificate of the State Government. Despite such admission on the part of the petitioner she had also categorically stated that she had gone to meet her husband who had met with an accident in Nigeria. But this part of letter dated 15.1.1987 has not been taken into consideration by the disciplinary authority by applying mind either during framing of the charges or during imposition of the punishment or during submission of inquiry report by the inquiry authority.

59. Further more, the inquiry is vitiated because of the reasons that no reason, what to talk of good or sufficient reason, has been assigned either by the inquiry authority or by the disciplinary authority for not applying mind to and not considering the documents relating to the medical examination and treatment report besides certificates of the doctors of Nigeria under whose medical advise the petitioner and her tender kid remained for treatment as indoor and outdoor patient--in respect of which the petitioner has categorically stated in her affidavit (Ex. P.1) and application dated 15.1.1987 (Ex. P.7) so also her own letter sent from Nigeria (Ex. P.6) which have been relied upon by the disciplinary authority while punishing the petitioner merely on the admission on her part. These admissions were already within the knowledge of the disciplinary authority before framing the charge, to which it could have applied mind but failed to do so, rather without assigning good and sufficient reasons to discard the ground urged by the petitioner for her having gone abroad without prior intimation or no objection certificate, the disciplinary authority adhered to admission on the part of the petitioner under charge No. 2, so as to hold her guilty and this has resulted in having committed an error of law apparent on the face of record warranting interference by way of judicial review.

60. Above all once petitioner's affidavit, application and letter (Ex. P.1, Ex. P.6 & Ex. P.7) amongst others have been produced by the department during inquiry in support of the charges against the delinquent (petitioner), it is surprised enough

without denying and controverting its contents in rebuttal to the delinquent's defence, how could they be discarded from accepting the defence of delinquent which stood proved from such documents produced and relied by the department itself, which self-same has been believed against the delinquent by the inquiry authority or the disciplinary authority and while doing so, both of these authorities committed an error of law warranting judicial review by this Court in exercise of powers and we hold that inquiry itself stands vitiated for the reasons assigned herein before.

61. In other words, once the delinquent (petitioner) accepted the allegations made under charge No. 2 of having gone abroad (Nigeria) without prior intimation and No Objection Certificate of the competent authority, by categorically alleging that this had happened due to certain circumstances beyond her control; but this part of her defence was not considered by the inquiry officer, either by examining any witness to contradict the facts stated by her for compelling circumstances or by giving any opportunity to prove the circumstances set out by her in defence by producing documents, despite the fact that the petitioner herself in representation dated 20.6.1989 before the inquiry officer specifically stated that the liability to call for the witnesses in defence is of the government to prove documents relating to medical treatment having undergone by her in Nigeria, therefore, we hold that the inquiry officer failed to apply his mind and to carry out his quasi-judicial duty in finding the petitioner guilty of charge No. 2 without evidence but merely on her own admission used against her, while charges cannot be held to have been established merely on the admission of the servant-delinquent, inasmuch as it was incumbent upon the inquiry officer to carry out his quasi-judicial duty to call and summon the witness irrespective either of the department or the defence before finding the delinquent guilty of the charges or while discarding the defence. In the instant case, despite the prayer having been made by the delinquent (petitioner) in her application dated 20.6.1989, the inquiry officer failed to carry out his quasi-judicial duty to summon relevant witness to prove documents produced in defence which were neither admitted nor controverted in rebuttal during the course of recording of the evidence in disciplinary proceedings against her. That being so it is also a case of a flagrant contravention of the rules and principle of natural justice resulting in vitiating the inquiry proceeding, itself, and therefore, the findings suffered from grave incongruities besides infirmities and could not be sustained.

62. Though as per charge No. 1 the petitioner is blamed for wilful absence for the period (11.10.1982 to 11.1.1987) but under the statement of allegation to charge No. 1, it is not the case of the department that the petitioner was absent without leave, rather as is evident from the allegation under charge No. 1, she has been absent from 11.10.1982, but concomitantly the department, itself, has admitted under the statement of allegation to charge No. 1 that she applied for leave from 11.10.1982 for three months on the ground of sickness of her newly born baby and this extra ordinary leave was also extended for the period from

10.1.1983 to another six months through her application received by the Superintendent SMS Hospital, Jaipur. But surprisingly enough the charge is that she proceeded on extra ordinary leave though applied for but "before leave has been sanctioned".

63. It is shocking, if the servant applies for leave in compelling circumstances such as sudden sickness either of himself or family members or for the cause having arisen beyond his/her control and thereby he has to proceed on, may be from the date of application of leave applied for or from future date, then certainly next step and obligation shifts on the competent authority to sanction leave, and in that event how could the servant be expected to await for sanction which is the act beyond the control of servant, because if the sanctioning authority despite having received application for grant of leave, did not care to take decision on leave application immediately atleast keeping in view the emergent exigency of circumstances or the reasons assigned for applying the leave, then the very purpose of applying for leave will be frustrated inasmuch as if the sanctioning authority communicates or takes decision on the leave applied for after the same having been availed of, then in our judicial conscience and considered opinion, the servant applying for leave cannot be blamed for having remained absent "before leave applied for has been sanctioned", for treating him/her to have remained wilfully absent from duty.

64. In the instant case, admittedly once the petitioner applied for grant of extra ordinary leave from 11.10.1982 for three months which she extended by her subsequent application dated 10.1.1983 for further six months, but upon her subsequent extension application dated 10.1.1983, the respondent department kept reticence without any decision till first term of applied leave had lapsed and availed of by the petitioner, and on 28.1.1983 it communicated directing the petitioner to resume her duty merely assigning untenable and insufficient reason qua the compelling reasons of the petitioner for remaining absent.

65. Moreover as against communications of the department the petitioner reiterated her compelling reasons to resume her duty (as detailed above) and further extended her extra ordinary leave even by sending application (Ann. R.6) sent from Nigeria which was admittedly received on or about 15.9.1983 in response to department's letter dated 14.7.1983, again indicating her compelling reasons assigned therein for continuity in proceeding on leave. But surprisingly enough the department respondent again kept reticence without having resorted to take decision either on her extension application for grant of extra ordinary leave or for proceeding in exercise of powers under Rule 86 of the RSR. Rather it kept on awaiting for her return to duty whereas it could have initiated proceedings for treating her absence as wilful under Rule 86(1). And it failed to carry out statutory duty under Rule 86.

66. A lapse of about three years and six months after having received last extension application of the petitioner dated 15.9.1983 till she resumed her duty on 12.1.1987 clearly shows that the sanctioning authority had failed to exercise

its statutory duty contemplated under Rule 86 as well as other rule relevant for grant or sanction of leave under the R.S.R. If the authority fails to exercise its statutory duty then for its own fault it cannot blame others.

67. We would not have entered into such controversy but we have seen callousness on the part of the statutory authority, itself in cases of disciplinary action for the charge of wilful absence against the government servant. In the instant case, despite the petitioner having applied for extra ordinary leave, which was extended from time to time, the sanctioning authority failed to exercise its powers fairly under the R.S.R. It is a case where sanctioning authority did not care to exercise powers either to sanction or reject extra ordinary leave applied for not only till the petitioner resumed duty but also till date, rather it has blamed the petitioner by issuing the impugned charge sheet.

68. Once the government servant applies for grant of any kind of leave admissible under the R.S.R., then the competent authority must carry out its statutory duty to either sanction or reject the leave applied for so as to resort to distinct statutory duty enshrined under other rules subsequently either to treat the absence wilful under Sub-rule (1) of Rule 86, or to regularise his case on satisfactory reasons being furnished by grant of leave due or commutation into extra ordinary leave as provided under Rule 86(1). Even in case of government servant having remained absent after expiry of sanctioned leave or communication of refusal of extension of leave, he has got right of consideration for regularisation of leave period by furnishing satisfactory reasons to the satisfaction of the sanctioning authority, for grant of leave due or commutation of leave into extra ordinary leave, otherwise he could not be entitled to any pay and allowances for such leave period, as provided under Rule 86(2)(a) of the R.S.R.

69. In case of the present petitioner, neither she had been communicated refusal to her application (Ann. R.6) for extension or grant of extra ordinary leave having been sent from Nigeria which was admittedly received by the respondent department on or about 15.9.1983, nor any explanation on her said application was asked for, rather non-exercise of statutory powers under Rule 86, R.S.R. by the sanctioning authority or disciplinary authority by keeping silence for about three and half years shows that it has forgiven and condoned the absence of the petitioner till she resumed her duty. Moreover delay of three & half years in initiating disciplinary action and issuing the impugned charge sheet despite the authority having knowledge of whereabouts of the petitioner during the alleged absence (for one reason or the other, either without leave or before leave applied for has been sanctioned, or after expiry or sanctioned leave or communication of refusal of extension of leave or after expiry of leave applied for or extended by her, whichever the case may be) not only shows failure to exercise its statutory power under the R.S.R. but also raises an inference of implied consent of sanction and forgiveness on the part of the competent authority for the impugned period of absence of the present petitioner. Rather such a delay is held to be fatal to the department which has failed to explain on record with good and

sufficient grounds as it has resulted in denial of reasonable opportunity.

70. Even under the impugned punishment order. itself, (Ann. 35), in last para, the period of absence (from 11.10.1982 to 11.1.1987) has been ordered to be treated as extra ordinary leave (without pay), which the petitioner has been praying for grant of extra ordinary leave, right from the day she applied for and extended from time to time.

71. As a legal and logical corrolary to the conclusions drawn above, we answer the questions framed by the learned Single Judge in referral order in the following manner:

(1) that the interference under Article 226 of the Constitution of India could be made on the quantum of punishment where the misconduct of Government servant in the disciplinary proceedings is proved.

(2) that in the facts and circumstances of the case the punsihment of removal of the petitioner from service was not at all justified.

72. The disciplinary proceedings are totally vitiated and the disciplinary authority has failed to record good and sufficient reasons for passing the impugned order imposing punishment of removal from service against the petitioner. Consequently, the impugned order of punishment (Ann. 35) is liable to be set aside.

73. This leads us to determine as to what relief should be granted to the petitioner consequent upon quashing of the punishment order holding the inquiry proceedings as vitiated. By virtue of holding the punishment order illegal and inquiry proceedings vitiated, the petitioner is entitled to reinstatement in service. We would have remanded the case back for exercise of powers of the competent authority under Rule 86, R.S.R. but keeping in view peculiar facts and circumstances of the case: (1) that the present petitioner has been fighting this legal battle second time; (2) that in earlier writ petition first order of punishment dated 26.5.1990 (Ann. 30) was set aside and the matter was remanded back but again the petitioner was visited with punishment of removal from service by reiterating selfsame reasons stated in earlier punishment with no change, resulting in present petition pending since 1992; and further (3) looking to the nature of absence relating back to the years 1982-1987 and ultimate nature of the conclusions recorded against the petitioner, which we have found to be not good and sufficient reasons to impose punishment of removal from service, we find that directing fresh enquiry would itself be disproportionately harmful to the petitioner as has been observed by the Supreme Court reported in B.C. Chaturvedi Vs. Union of India and others, followed by the Court in Suresh Kuamr Chugh v. State (supra) and therefore shortening the duration of litigation, we have on over all view of the matter decided not to remand the matter to the Disciplinary Authority as that would entail multiplicity of litigation besides infraction of several procedures on account of earlier lapses on the part of the Authority which is neither desirable nor warranted in the interest of justice.

74. The petitioner while admitting the fact that she had overstayed the period of leave applied for and extended on the circumstances explained by her in which it was inevitable for her to continue on leave as she was forced to do so on account of unexpected circumstances, referred to above. However, since the disciplinary authority who is also competent authority to sanction leave, itself, had ordered by impugned order (Ann. 35) to treat the period of her absence in question as extra ordinary leave (without pay), therefore, in our considered opinion, treating the period of absence as extra ordinary leave without pay, is itself a punishment for overstaying leave period applied for and extended.

75. Therefore, on an overall conspectus of the matter in the totality of the circumstances and in the interest of justice, we deem it proper that ends of justice would be met if the petitioner is reinstated with continuity of service and other consequential benefits subject to that on reinstatement she shall be entitled to only 50% of the consequential financial benefits flowing to her as arrears of back wages including pay fixation by virtue of revised pay scales which came into force during the period from 11.10.1982 to 11.1.1987 and during the course of pendency of inquiry and her two writ petitions till date.

76. As a result of the above discussion, this writ petition is allowed. The impugned order of punishment dated 28.8.1992 (Ann. 35) is quashed and set aside, and however, the period of absence of the petitioner from 11.10.1982 to 11.1.1987 shall be treated as extra ordinary leave without pay in accordance with R.S.R. and accordingly the petitioner is directed to be reinstated with continuity of service from 12.1.1987 and with all consequential benefits (to which she would be otherwise entitled to on quashing of penalty in disciplinary proceedings) including promotion and salary except that she shall be entitled to only 50% of back wages including pay fixation on revision of pay scales admissible. The writ petition will stand disposed of accordingly with no order as to costs. The respondents are directed to reinstate the petitioner in service within fifteen days and to implement the aforesaid directions of this Court for consequential benefits within eight weeks from the date of submission of the certified copy of this order.