

* **IN THE HIGH COURT OF DELHI AT NEW DELHI**
 + **W.P.(C) No.988 of 2011**
 % Decision Delivered On: 11th November, 2011

KAMAL K. SHARMA

. . . PETITIONER

Through: Ms. Meenakshi Arora with
 Mr. Vasanth Anantharaman,
 Advocates.

VERSUS

UOI AND ANR.

. . . RESPONDENTS

Through: Mr. Gaurang Kanth with Mr.
 Arnav Patnaik and Ms. Eshita
 Baruah, Advocates.

CORAM :-

HON'BLE THE ACTING CHIEF JUSTICE
HON'BLE MR. JUSTICE RAJIV SAHAI ENDLAW

A.K. SIKRI, Acting Chief Justice (ORAL)

1. The petitioner herein joined as a member of Indian Audit & Accounts Service under the Union of India on 26.12.1980. On 01.9.1997, he was selected by the Government of Botswana as the Assistant Accountant General of Botswana for a period of five years, which period came to an end on 30.8.2002. This assignment of the petitioner was approved by the Government of India.
2. One year before the aforesaid term was to expire, the petitioner enrolled himself for a part-time weekend MBA

programme from De Montfort University, South Africa in July, 2001. When the petitioner's assignment of Government of Botswana came to an end on 31.8.2002, he was still pursuing his MBA programme. The petitioner sent his application for leave on 12.8.2001 and 24.2.2003 via email requesting for grant of leave from 02.9.2002 to 29.2.2004, which was sanctioned. By this time, the petitioner has completed his class-room studies. However, he had yet to submit his dissertation to obtain MBA degree. In the meantime, wife of the petitioner, a trained teacher, was offered teaching assignment in the Burlington, North Carolina, U.S.A., which she has since joined. As per the petitioner, since he could not complete his dissertation for MBA programme while in U.S.A. and wanted to join his family there, he requested for extension of leave beyond 28.2.2003, which was granted upto 29.2.2004. Even after the expiry of this leave, he sought further extension for a period of six months from 01.3.2004 to 31.8.2004. This time, his request was turned down and the petitioner was asked to report back to the Department immediately vide letter dated 19.5.2004. He failed to join the Department. Two further reminders dated 09.9.2004 and 19.1.2005 were

issued to him, but with no results. It would also be relevant to point out that the petitioner has exhausted all his leave and thereafter was given half pay leave upto 29.2.2004. As the petitioner did not join back the duties, period after 01.3.2004 was treated as unauthorized absence. He was issued show cause notice dated 25.2.2005 and thereafter disciplinary proceedings were initiated under Rule 14 of CCS (CCA) Rules, 1965 vide orders dated 31.5.2005. In the said Chargesheet, two Articles of charges were framed, which are as under:

"Article – I

Shri K.K. Sharma, IA&AS, was on foreign assignment to Government of Botswana from 1.9.1997. On completion of his assignment on 31.8.2002, Shri Sharma was sanctioned different kinds of leave from 2.9.2000 to 29.2.2004, on his request made vide his applications dated 12.08.2002 and 24.2.2003. On expiry of his above leave, Shri Sharma had applied for sanction of further leave for six months from 1.3.2004 to 31.8.2004, vide his application dated 9.3.2004, which was not sanctioned to him. On refusal of leave, Shri Sharma was requested to report back in the department immediately, vide this office letter No.2500/GE.I/S-201/PF dated 19.5.2004. Two reminders had also been issued to him to report back to the department immediately, vide letters dated 9.9.2004 and 19.1.2005. Shri Sharma had not reported back to the department and continued to remain absent from 1.3.2004 unauthorisedly.

A show cause notice was issued to him vide No.1010/GE.I/S-201/PLAINTIFF dated 25.2.2005, calling for his explanation as to why disciplinary action for major penalty should not be initiated against him for his unauthorized absence with effect from 1.3.2004 and will disobedience of orders of the Comptroller & Auditor General of India, directing him to report back to the department.

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However, no response from Shri Sharma had been received in this regard.

By his above act, Shri K.K. Sharma exhibited lack of absolute devotion to duty, lack of absolute integrity and acted in a manner unbecoming of a Government servant and thereby contravened Rule 3(1) (i), (ii) and (iii) of CCS (Conduct) Rules, 1964.

Article – II

Shri K.K. Sharma had been pursuing higher studies of MBA from De Monfort University, South Africa, vide student No.00014009, as confirmed by the University vide their communication dated 6th May, 2003 and also mentioned by Shri Sharma in his letter dated 18.6.2003, without seeking prior permission of the competent authority, as required under Ministry of Home Affairs OM No.130/54-Ests. (A) dated 26.2.1955 (Govt. of India decision No.(4) below Rule 3 of the CCS (Conduct) Rules, 1964.

By his above misconduct, Shri Sharma has violated the instructions contained in the above OM and thus acted in a manner unbecoming of a Government servant and thereby contravened Rule 3(1)(iii) of CCS (Conduct) Rules, 1964."

3. The inquiry was held. As per the report submitted by the Inquiry Officer, the petitioner was exonerated from the charge under Article-II and held guilty of Article-I of the charge. As per the inquiry record, which is not disputed by the petitioner, the petitioner has attended two hearings which were held on 06.2.2006 and 10.2.2006. It is also recorded by the Inquiry Officer that during the hearing, the applicant did not contest the fact that he was absent from the duties. He had only submitted his explanation for remaining absent from duties, viz., purportedly serious problem faced by him, which according to the petitioner was

of the competent authority. This explanation was found unsatisfactory. The Disciplinary Authority, on the basis of aforesaid charges proved against the petitioner, imposed the punishment of dismissal from service vide presidential order dated 22.2.2007.

4. The petitioner preferred appeal against the said order. According to him, he waited for six months, but did not receive any reply and therefore, he approached the Central Administrative Tribunal (hereinafter referred to as 'the Tribunal') and filed OA No.176/2008. There it transpired that the appeal of the petitioner was not competent as the order was passed by the President of India and in such circumstances, he could file revision petition. This OA was, thus, disposed of on 03.12.2008 accepting the request of the petitioner to file a revision petition on direction issued by the Tribunal. Revision petition preferred thereafter by the petitioner was dismissed vide orders dated 28.6.2010. The petitioner approached the Tribunal again for setting aside the presidential order dated 22.2.2007 and revisional order dated 28.6.2010. This OA had been dismissed by the learned Tribunal *in limine* vide orders dated 08.9.2010.

5. The Tribunal noted that the petitioner had not disputed that he remained absent from duties and therefore, only the explanation furnished by him had to be considered. The Tribunal found that the wife of the petitioner was not suffering from such a serious illness because of which presence of the petitioner was needed in U.S.A. along with the wife or which could prevent the petitioner from coming to India and join his duties. In this behalf, the Tribunal noted that the petitioner had himself placed on records literature with regard to the disease 'Vitiligo', but nothing therefrom has been pointed out to show that the disease of the wife of the applicant was such that it was impossible for her to travel to India and/or the treatment for vitiligo was not available in India. Vitiligo, as per the literature placed on record by the applicant himself, is an autoimmune disease in which a person's immune system reacts against the body's own organs or tissues, and as such, people's bodies produce proteins called cytokines that alter their pigment-producing cells and cause these cells to die. It is a skin disease and may have some physical and emotional stress.

6. The Tribunal further noted that in his email dated 07.8.2005 sent to CAG's office, the petitioner had not mentioned that the problem of his wife was so acute that she could not travel to India or that there is no treatment of the disease available in India. Other medical records sought to be relied upon by the petitioner have similarly been rejected on the same grounds. The Tribunal, thus, concluded as under:

"5..... In order to show the medical problem of his wife, the applicant has placed on record an e-mail dated 7.8.2005 sent by him to CAG's office, wherein it is mentioned that his wife was undergoing biopsy etc. to determine the skin complications she had developed. There is nothing mentioned in the said e-mail that the problem of his wife was so acute that she could not travel to India, or that there is no treatment of the disease available in India. The applicant has also relied upon a certificate dated 23.6.2005 issued by one Ritu Khanna Shetty, M.D., M.P.H., wherein it is mentioned that the wife of the applicant had been a patient under her treatment for number of years, and she had been recently diagnosed with vitiligo, which necessitated the applicant to be very involved in her medical care and medical follow ups. It is also mentioned that due to the progressive nature of the disease along with its emotional burden, the wife of the applicant needed a lot of support during this difficult period. It is further mentioned that both her teenage sons were away at college, and it was very essential, therefore, that the applicant stayed physically by her side to help her along both physically and emotionally, which would enable her to be complaint with her medical follow ups and treatment plus get the necessary moral support of her husband. There is nothing in the said certificate which may even remotely suggest the diseases to be of a serious nature. The applicant has brought nothing whatsoever on records to suggest that vitiligo is such a disease that a person cannot travel, or that the treatment of vitiligo is not available in India, and is available only in USA. Once, the applicant had not himself brought on record any

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evidence to show how serious was the disease of occasion had arisen for the concerned authorities to comment upon the nature of ailment of the wife of the applicant. In fact, it is rather observed that as per showing of the applicant himself, the disease of his wife had become serious only towards the end of 2004. What has been held against the applicant is that he had not brought on record any evidence to show that the disease of his wife was so serious that she could not travel to India, or could not be treated in India. The learned counsel also urged, though not with full conviction, that the punishment inflicted upon the applicant is not commensurate to his misconduct. We do not find any merit in this contention as well. At no stage, the applicant desired his willingness to join his duties. Even after he was proceeded departmentally, he would not show his willingness to join. He would rather with to quit by taking voluntary retirement. We are told during the course of arguments that the applicant is still in USA. We find nothing wrong in the observations made by the authorities that the misconduct of the applicant would warrant his dismissal from service. Even otherwise, the courts and tribunals would not interfere with the quantum of punishment unless the punishment is shockingly disproportionate to the delinquency indulged in the employee concerned."

7. Assailing the aforesaid order of the Tribunal, the present writ petition is filed. Learned counsel for the petitioner has made twofold submission of the following nature:

- (i) Rule 11 of CCS (CCA) Rules provides imposition of major penalty which includes penalty of dismissal from service. However, as per Chapter – X of the Vigilance Manual issued by the Central Vigilance Commission stipulates that unauthorized leave does not fall into the category

of misconduct meriting imposition of major penalty of "dismissal from service". Therefore, the petitioner should not have been imposed the punishment of dismissal from service for his misconduct. In the same vein, it was also submitted that the petitioner in his long service has unblemished record and the orders of dismissal was shockingly disproportionate to the charge.

- (ii) Another submission of the learned counsel for the petitioner was that the Tribunal went into the nature of the disease of the petitioner's wife and communicated that it was not so serious which prevented the petitioner's wife or petitioner to come back to India and which according to the learned counsel, it was not permissible for the Tribunal to go into this aspect. According to him, once the disease was established on the basis of medical certificate and as per the Doctor, it was not proper to undertake the journey, no further inquiry in this behalf was necessary.

7. We are not convinced with either of the aforesaid arguments. Insofar as the first argument is concerned, it is to be borne in mind that it was not a case of "unauthorized leave" but "unauthorized absence" from duties, that too for a long period. Moreover, reading of Para 11.4 of Chapter – X of the Vigilance Manual would reveal that the Central Vigilance Commissioner has enumerated the guidelines for imposing a major penalty which are "illustrative" in nature as stated in the said Para itself. Para 11.4 of the said Manual reads as under:

"11. Institution of formal proceedings

11.4. Certain types of vigilance cases in which it may be desirable to start proceedings for imposing a major penalty are given below as illustrative guidelines:-

- (i) Cases in which there is a reasonable ground to believe that a penal offence has been committed by a Government servant but the evidence forthcoming is not sufficient for prosecution in a court of law, e.g.:
 - a) Possession of disproportionate assets;
 - b) Obtaining or attempting to obtain illegal gratification;
 - c) Misappropriation of Government property, money or stores;
 - d) Obtaining or attempting to obtain any valuable thing or pecuniary advantage without consideration or for a consideration which is not adequate.
- (ii) Falsification of Government records;
- (iii) Gross irregularity or negligence in the discharge of official duties with a dishonest motive;
- (iv) Misuse of official position or power for personal gain;

- (v) Disclosure of secret or confidential information even though it does not fall strictly within the scope of the official Secrets Act;
- (vi) False claims on the Government like T.A. claims reimbursement claims, etc."

8. Thus, not only the instances given where major penalty can be imposed are illustrative and not exhaustive, these are mere guidelines. Therefore, simply because "unauthorized absence" is not specifically mentioned in the above-mentioned Vigilance Manual would not mean that the employee would be precluded from provisions under Rule 14 of CCS(CCA) Rule in case of misconduct of "unauthorized absence". We would like to observe that if "unauthorized absence" is for long period, it would become serious misconduct and the Government would be within its power to initiate major penalty proceedings.
9. Insofar as second argument is concerned, on the facts of this case, we are of the clear view that the analysis undertaken by the Tribunal was justified. One has to take note of the circumstances in which the Tribunal undertook this exercise. In the instant case, as noted above, even before the Inquiry Officer, the petitioner had accepted the factum of absence, but had tried to justify the absence on the purported ground of serious medical problem faced by his wife. The Inquiry

Officer had thus gone into this aspect. He recorded that there was apparently no hindrance to the movement or travel nor was there any indication that the treatment could be done only in USA and not in India. The pertinent findings recorded by the Inquiry Officer which have been confirmed by the Disciplinary Authority are that the petitioner had been refused leave from 01.3.2004 onwards, whereas his wife's condition seemed to have been serious from end 2004 onwards, and she had been diagnosed with 'Vitiligo' and there was apparently no hindrance to movement or travel nor was there any indication that the treatment could be done only in USA and not in India. The explanation furnished by the petitioner was, thus, not found to be satisfactory and as mentioned above, the petitioner was dismissed from service.

10. We also find that in the order rejecting the revision of the petitioner, the pleas raised by him that he could not respond to the reminders dated 09.9.2004 and 19.1.2005 because these were sent to his old address; that he had informed CAG's office about the medical condition of his wife through e-mails dated 08.3.2005 and 07.8.2005; that the Inquiry Officer/Disciplinary Authority had relied upon the

observations of the Presenting Officer; and that since the Presenting Officer/Inquiry Officers are neither medical expert not holding any qualification in medical field, they could not have drawn such a conclusion on their own, have been noted. The pleas, as mentioned above, have been repelled by observing that the petitioner had previously also raised all these issues and the same had been considered before issuance of the penalty order, and that it was noted that the condition of his wife seemed to have become serious only from the end of 2004 onwards, and the medical opinion indicated that she had only recently been diagnosed with vitiligo, and that there were apparently no hindrances to her movements or travel nor there was any indication that the treatment could be done only in USA and not in India. It is also observed that no new material or evidence had been submitted by the applicant for reconsideration of the penalty order, which may have the effect of changing the nature of the case. It is also noted that the contentions raised by the petitioner did not deny his absence from 01.3.2004 without sanctioned leave, but he would rather attempt to justify the same on account of his wife's medical treatment, which would not constitute compelling reasons for his unauthorized

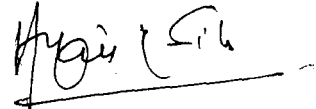
absence. The penalty imposed upon the applicant has also been held to be commensurate with the proved misconduct. It is also mentioned that there are no mitigating circumstances to warrant dispensation from the penalty already imposed.

11. It is in this backdrop when the petitioner has raised the contention about the seriousness of the medical problem with which his wife is suffering. Naturally, the Tribunal had no option but to deal with this contention as it is in that context that the Tribunal made this observation concurring with the view taken by the Inquiry Officer as well as the Disciplinary Authority. We have gone through the presidential orders imposing penalty as well as revisional order which is rightly taken note of by the Tribunal in the impugned judgment.
12. Examination of the facts which have been delineated above would clearly demonstrate that there was no intention on the part of the petitioner to return to India and resume duties after his assignment came to an end. First, he took umbrage of MBA course in which he had taken admission for extending his leave. In all fairness, the Government even acceded to his request. He was at Botswana at that time.

As per his own admission, after he completed his classroom studies and was only to complete dissertation, his physical presence in Botswana was not required. However, instead of coming to India and joining the duties, he chose to join his family in USA and sought extension of leave on that basis which was rightly turned down. At that time, there was no question of his wife's illness from which she allegedly started suffering in the end of 2004. It has come on record that even the illness of the petitioner's wife was not so serious that his wife or he could not come to India. It was bounded duty of the petitioner as a Government servant to discharge his functions by joining the service back in India after conclusion of foreign assignment. The petitioner instead wanted to go to USA and thereafter wanted to remain in USA. The Tribunal has remarked and rightly so that even at the time of hearing of the petition before the Tribunal, the petitioner was in USA. That may be the situation even today. It is, thus, clear that the petitioner has no intention to join the duties and was giving one pretext or the other for extension of his leave so he could remain in USA. If he was not interested in service, he could have resigned, but could

not depict such a conduct which would clearly be unbecoming of a Government servant.

13. In these circumstances, we do not even find that the punishment is shockingly disproportionate. Being devoid of any merit, this writ petition is dismissed *in limine*.



ACTING CHIEF JUSTICE



**(RAJIV SAHAI ENDLAW)
JUDGE**

NOVEMBER 11, 2011

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