

*

%

+

...

...

...

Advocates who appeared in this case:

: Mr.O.P.Agarwal

: Mr.Ravinder Agarwal, Central Government
Standing Counsel

CORAM:

HON'BLE MR. JUSTICE ANIL KUMAR

HON'BLE MR. JUSTICE SUDERSHAN KUMAR MISRA

ANIL KUMAR, J.

✻

CM No.3556/2012

Allowed subject to all just exceptions.

Application is disposed of.

W.P.(C) No.1629/2012

1. The petitioner has sought quashing of penalty of “censure” awarded by order dated 9th December, 2009 and dismissal of his appeal by order dated 15th May, 2010 and rejection of his revision petition by order dated 3rd February, 2011. The petitioner has also sought directions to the respondents to give the petitioner one more opportunity to appear in LDCE for the post of Assistant Commandant in future, as he was deprived of this opportunity when he had applied on 10th November, 2009.

2. The petitioner was issued a charge memorandum dated 14th November, 2009 imputing that the petitioner on 20th October, 2009 was posted at Domestic Airport from 0330 hours to 0700 hours, however, he reached his place of duty at 0405 hours instead of 0330 hours and thereafter, he remained absent from 0520 hours to 0535 hours from his frisking duty. He was posted at X Ray machine No.H where he did not take interest in his duty and intentionally operated X Ray machine slowly. The other charge imputed against the petitioner was that on 2nd November, 2009, the petitioner was posted from 0700 hours to 2000 hours on X Ray machine of terminal 2 and during his period of duty he remained absent without permission from any competent officer from 0759 hours to 0833 hours. The third charge imputed against the petitioner was that on 3rd November, 2009 he was posted from 2000 hours to 0700 hours at X Bis No.5 in SHA of terminal 2. It transpired that the petitioner on his own left X Bis No.5 for checking baggages separately which was checked by Constable A.K.Sharma.

3. The petitioner submitted a reply dated 17th November, 2009 contending, inter-alia, that he was posted at NITC for duty prior to his posting for duty at domestic Airport. However, no time was prescribed for going from NITC to Domestic Airport. Whenever the transport was provided and he was relieved from NITC, he went from NITC and joined the duty at domestic terminal. He further contended that he did not close frisking booth and X BIS/frisking was functioning. He contended

that he left for bathroom for 6 minutes after obtaining permission from Assistant Commandant. Regarding the first charge that he operated the X Ray machine slowly, the petitioner alleged that functioning of the machine depends on the type of baggage. He submitted that if any delay took place it was on account of the factors other than the petitioner deliberately operating the machine slowly.

4. Regarding the second charge about his posting on 2nd November, 2009, he contended that all force members go to take breakfast/food after adjusting duty. He admitted that he had gone after adjusting duty but the time mentioned in the charge was not correct and he had gone for breakfast from 0807 hours to 0830 hours, as about 20-25 minutes are spent for breakfast/lunch which can be confirmed from the register or can be ascertained from other force members.

5. Regarding the third charge, the petitioner alleged that category of bags of passengers are different and the stamp is affixed on bags by SOS and stamp is not affixed by guard/screener, nor there is any such circular to get the bags stamped by guard. He contended that in absence of clear and specific order, the guard checked bags with negligence which led to loss of time. The petitioner asserted that he did the work of operating hand machine and bag checking and also got it done from the guards for which, instead of charging him he should have been appreciated.

6. The petitioner also referred to his clean record of 16 years and that he had got only one chance in the year 2009 of consideration for promotion to the next post and any type of sentence will deprive him from this chance.

7. The pleas and contentions raised by the petitioner were considered and order dated 9th December, 2009 was passed holding that the reply of the petitioner was not completely satisfactory. It was held that any misconduct and negligence on the part of the petitioner could not be ignored on the ground that he had only one opportunity to be included in AC/LDCE. The Assistant Commandant found that the charges against the petitioner were made out, however, considering the earlier service of the petitioner and in order to give an opportunity to the petitioner to improve himself and taking a lenient view under Schedule I of Rule 32 of the CISF Manual, 2001, the sentence of “Parninda” (Censure) was passed against the petitioner. The petitioner was also communicated by order dated 9th December, 2009 that he could file an appeal within 30 days from the receipt of the order against his punishment.

8. Against the order dated 9th December, 2009 the petitioner filed an appeal before the Commandant, Central Industrial Security Force dated 28th December, 2009. The petitioner reiterated the pleas raised by him in the reply dated 17th November, 2009 to the chargesheet. Regarding

charge No.3, the petitioner contended that it was concocted as there was no standard as to how much time is to be taken in clearance of one baggage, as clearance of the bag depends on the type of bag also. The petitioner also asserted that the memorandum of charge against him was on account of conspiracy against him as only he was charged, whereas all the force members go for breakfast/food daily and the charge sheet had not been issued against any other member of the force on this account.

9. The appeal filed by the petitioner was, however, dismissed by the Appellate Authority by order dated 15th May, 2010. The Appellate Authority considered the charges framed against the petitioner, his reply and the order dated 9th December, 2009. The Appellate Authority held that it was apparent that the petitioner was unable to comply the instructions given by senior officers from time to time and he committed violations repeatedly. Considering the repeated violations committed by the petitioner, the Appellate Authority also held that the punishment of “Parninda” (Censure) was appropriate. The Appellate Authority categorically incorporated in the order that the petitioner has not produced and referred to any such fact which would require any interference by the Appellate Authority against the order of the Disciplinary Authority.

10. After the dismissal of the appeal, the petitioner filed an

application dated 15th May, 2010 seeking certain documents. The petitioner did not disclose the relevancy of the documents demanded by him, nor disclosed any reasons as to why he had not relied on or demanded these documents before the Appellate and Disciplinary Authority. The petitioner also did not disclose as to how he would be prejudiced, in case the copies of documents demanded by him are not supplied to him. The details of the documents which were sought by the petitioner are as under:-

1. Domestic ID X ray rotation register.
2. Standing order ID XBIS Number H
3. CCTV footage dated 20.10.09 time 0520 to 0535.
4. Bathroom (illegible) register
5. Deployment strength to XBIS number H.
6. Standing order NITL XBIS number 6
7. On dated 2.11.2009 GD Extract.
8. Lunch/breakfast system
9. Register/paper for outgoing lunch/breakfast.
10. Office order for leaving breakfast/lunch.
11. NITC XBIS Number 5 standing order.
12. XBIS number 5 on dated 3.11.09 deployment SOS strength
13. Order to Const./Screener Bagage checking.
14. CCTV footage on dated 3.11.09.
15. If have any complaint of pay/staff.
16. On dated 3.11.09 GD Extract.
17. Detail (illegible) of SI/E D.K.Pandey from XBIS number 09205 with GD Extract.

11. The petitioner asserted that since no attention was paid to his submissions, therefore, the documents sought by him were necessary. The petitioner, however, did not disclose in his application as to why the alleged documents were not sought by him earlier in reply to the charge

memo, in his reply dated 17th November, 2009. The petitioner also did not disclose any reason as to how the documents sought by him were relevant for the allegations made by him and how he would be prejudiced in absence of the documents sought by him. In reply to the application filed by the petitioner, before filing the revision petition it was communicated to the petitioner that under Rule 37 of the CISF Manual, 2001 there was no provision to make the documents available of any type along with the chargesheet which were not relied on or the basis of charge sheet. It is pertinent to notice that in the memorandum of charge dated 14th November, 2009 no documents were specifically referred to or relied by the respondents.

12. Later on, pursuant to the request made by the petitioner, he was, however, given the copies of NITC X Ray rotation Register; GD extract dated 2nd November, 2009 and GD extract dated 3rd November, 2009. The petitioner also sent other applications reiterating the demand for other documents, however, none of the applications detailed as to why these documents could not be sought by the petitioner prior to the order of 'censure' passed by the Disciplinary Authority. The petitioner also did not disclose as to why no grounds were taken by the petitioner in the appeal filed by him before the Appellate Authority in respect of the documents which were sought by the petitioner at the time of filing the revision petition. The petitioner thereafter, filed the revision petition, however, no new grounds were raised by the petitioner except

reiterating the pleas and contentions raised by the petitioner earlier. The petitioner, however, contended that non supply of documents to him was contrary to the fundamental principles of natural justice and that he has been deprived of his right to defend himself.

13. The revision petition was also dismissed by the Revisional Authority by order dated 3rd February, 2011 holding that the petitioner had committed the lapses repeatedly. It was held that he committed first lapse on 20th October, 2009 when he left the frisking duty unattended. Despite the lapse committed by him on 20th October, 2009 he committed the same mistake on 2nd November, 2009. His plea that he had left the X Bis Machine for physical checking of bags on 3rd November, 2009 on the ground that it could not be left to the constable was not accepted, holding that the constable also has the requisite experience and training and a constable understands his responsibility well. In the circumstances, it was held that not once but repeatedly the petitioner left his appointed place of duty without any justifiable reason and in the circumstances the Revisional Authority did not find any illegality or irrationality in the orders of the Disciplinary Authority or the Appellate Authority.

14. The Revisional Authority also considered the penalty of 'censure' awarded to the petitioner as proportional and appropriate for the misconduct on the part of the petitioner. The plea of the petitioner that he had an unblemished record was also negated, as, in fact, the

petitioner had been warned twice for various other acts of indiscipline by the Disciplinary and the Appellate Authority. The Revisional Authority held that the petitioner has not brought out any new points in the revision petition and has repeated the factual aspects and thus there was no merit in the revision petition and thus dismissed the revision petition.

15. The petitioner has challenged the order of the Disciplinary Authority, Appellate Authority and Revisional Authority in the present writ petition reiterating the pleas on the facts as had been raised by the petitioner before the Disciplinary Authority. The petitioner has laid emphasis that LDCE scheme which was introduced only for the departmental candidate and not for the open market personnel and that the penalty of 'censure' has restricted his last opportunity as the petitioner has now become overage. The petitioner also contended that the penalty of 'censure' could not be a bar in granting promotion to the petitioner, if found fit by the Departmental Promotion Committee. The petitioner also asserted that the respondents ought to have initiated action against him under Rule 36 of the CISF Rules, 2001 which was not done intentionally because no charge would have been proved against the petitioner in that case. The petitioner also contended that by penalizing him with the penalty of 'censure' he has been deliberately deprived of availing an opportunity of competing in LDCE-2009.

16. This Court has heard the learned counsel for the petitioner and Mr. Ravinder Agarwal, Central Government Standing Counsel who has appeared on advance notice. The learned counsel for the respondents has contended that if the petitioner was aggrieved of not considering his application for LDCE-2009, then the petitioner ought to have approached the authorities or this Court in 2009. Regarding the penalty of 'censure', the learned counsel for the respondents contended that the petitioner has failed to point out any such illegality, irregularity or perversity in the order of the authorities which will require any interference by this Court. The petitioner has repeated the factual aspects and this Court will not re-appreciate the facts and substitute the decision of the appropriate authorities with the different inferences if any, arrived at by this Court.

17. This cannot be disputed that for issuing a writ under Article 226 of the Constitution of India, it has always been in the discretion of the Court to interfere or not depending upon the facts and circumstances of each case. The Supreme Court in *Durga Prashad v. Chief Controller of Imports and Exports*, AIR 1970 SC 769 had held that even where there is an allegation of breach of certain rights, the grant of relief is discretionary and such discretion has to be exercised judiciously and reasonably. It is also no more res integra that the jurisdiction of the Court for judicial review is limited. The Court in exercise of its jurisdiction under Article 226 of the Constitution of India does not go

into the correctness and the truth of the charges, nor it can take over the functions of the disciplinary authority. This Court does not sit in appeal against the findings of the disciplinary authority and assume the role of the appellate authority.

18. It is also pertinent that no malafides or perversities have even been imputed by the petitioner except contending that the other members of the force also go for the call of nature and for breakfast etc. but no action has been taken against them. The respondents have categorically contended that the entries are made in the register, if any, when member of the force leave for the call of nature and for other absence. The petitioner gave the explanations which have been considered by the Disciplinary Authority and the Appellate Authority and were disbelieved. The petitioner admitted his absence, however, justified the same on the ground that other members of the force also do the similar things. This could not be a valid justification in the facts and circumstances and in law. The allegation of the petitioner is too vague and cannot be accepted. If this plea of the petitioner has been rejected by the Disciplinary and Appellate Authority, their orders cannot be faulted on the grounds raised by the petitioner.

19. The petitioner did not claim the copies of any documents before the Disciplinary Authority and the Appellate Authority and he claimed certain documents without disclosing the reasons for the same and

without disclosing as to why he could not sought the copies of the same before the Disciplinary and Appellate Authority, by filing applications before the Revisional Authority. Copies of three documents were also supplied to the petitioner. Even in the revision petition, the petitioner failed to disclose as to how he has been prejudiced in absence of other documents copies of which were sought by him and which were not supplied, as he had not given any reason for not demanding them before the Disciplinary and the Appellate Authority. The petitioner has not even alleged properly as to how he had been prejudiced on account of copies of certain documents not given to him. The petitioner ought to have established the prejudice as a matter of fact. The prejudice cannot be based on apprehension or even a reasonable suspicion, nor the disciplinary proceedings can be vitiated on hyper technical approach. The punishment awarded to the petitioner cannot be quashed on the basis of apprehended prejudice. The Supreme Court in para 89 of Alok Kumar Vs Union of India & ors., (2010) 5 SCC 349 had held as under:-

“89. The well-established canons controlling the field of bias in service jurisprudence can reasonably be extended to the element of prejudice as well in such matters. Prejudice de facto should not be based on a mere apprehension or even on a reasonable suspicion. It is important that the element of prejudice should exist as a matter of fact or there should be such definite inference of likelihood of prejudice flowing from such default which relates to statutory violations. It will not be permissible to set aside the departmental enquiries in any of these classes merely on the basis of apprehended prejudice....”

Violations of mandatory statutory rules would tantamount to prejudice. But where the rule is merely directory, element of de facto prejudice needs to be pleaded and shown. Where the authorities rely upon a large number of documents majority of which are furnished and an opportunity is granted to the delinquent to defend himself except some of the documents are not furnished, the onus is on the delinquent to show that non-furnishing of some of the documents had resulted in de facto prejudice and he has been put to a disadvantage as a result thereof. Element of prejudice should exist as a matter of fact or there should be such definite inferences of likelihood of prejudice flowing from such default which relates to statutory violations. Departmental actions cannot be set aside on the basis of apprehended prejudice. Prejudice normally would be a matter of fact and a fact must be pleaded and shown by cogent documentation to be true. The petitioner has failed on all counts in this regard. The documents were not demanded before the Disciplinary Authority, nor any grounds taken in the appeal filed before the Appellate Authority, nor any such grounds canvassed before the Appellate Authority. Even before the Revisional Authority it has not been averred as to how the petitioner got prejudiced on account of non-supply of the copies of some of the documents demanded by him out of which, copies of three main documents were given to him. The respondents had not relied on these documents in their Charge Sheet. How the petitioner got prejudiced has not been canvassed before the

revisional authority. Consequently, on this ground the punishment of 'censure' awarded to the petitioner cannot be vitiated.

20. The petitioner has also relied on his service record. The respondents have rightly contended that the repeated lapses on the part of the petitioner could not be condoned, as he was repeatedly given opportunities and the lapse on the part of the petitioner was not solitary as he committed the lapse on 20th October, 2009, thereafter on 2nd November, 2009 and yet again on 3rd November, 2009.

21. The respondents have also pointed out that the plea of the petitioner that his record is unblemished is also not correct as in other proceedings against him he had been warned by the disciplinary, as well as, the appellate authority which fact has not been denied by the petitioner in the writ petition.

22. The other grounds on which the action of the respondents could be challenged by the petitioner was by pointing out illegalities, irrationalities or procedural improprieties. The learned counsel for the petitioner cannot refute that whether the actions of the respondents fall within any of the categories has to be established and mere assertion in this regard is not sufficient. To be "irrational" it has to be held that on material, the decision of the respondents is so outrageous, as to be in total defiance of logic or moral standards. The petitioner has not denied

that he was not absent from the duty as has been alleged by the respondents except contending that this is a normal thing and that the exact timings as given by the respondents is not correct. Since the petitioner admitted his absence, it was for him to give plausible and justifiable reason and in the circumstances, if the respondents have held that the charges against the petitioner had been established, it cannot be held that the decision of the respondents is irrational. The petitioner has been awarded the penalty of 'censure' only which cannot be held to be so disproportionate as to be considered as outrageous and in total defiance of logic or moral standards. The learned counsel for the petitioner has also not been able to show any patent error or manifest error in the exercise of power by the respondents. The petitioner's counsel has failed to show any such relevant factor which will make the decision of the respondents unreasonable or that the respondents have taken into consideration irrelevant factors. The Supreme Court in (2006) 5 SCC 88, M.V.Bijlani v. Union of India & Ors had held that the judicial review is of decision making process and not of reappraisal of evidence. The Supreme Court in para 25 at page 95 had held as under:-

“25. It is true that the jurisdiction of the court in judicial review is limited. Disciplinary proceedings, however, being quasi-criminal in nature, there should be some evidence to prove the charge. Although the charges in a departmental proceeding are not required to be proved like a criminal trial i.e. beyond all reasonable doubt, we cannot lose sight of the fact that the enquiry officer performs a quasi-judicial function, who upon analyzing the documents must arrive at a conclusion that there had been a preponderance of probability to prove the charges on the basis of materials on record. While doing so, he cannot take into consideration

any irrelevant fact. He cannot refuse to consider the relevant facts. He cannot shift the burden of proof. He cannot reject the relevant testimony of the witnesses only on the basis of surmises and conjectures. He cannot enquire into the allegations with which the delinquent officer had not been charged with.....”

23. In the totality of facts and circumstances, it cannot be inferred that there is no application of mind on the part of the disciplinary authority and the appellate and revisional authority or that the charges against the petitioner were vague or that the punishment imposed is shocking to the conscience of the Court. None of the grounds which would entail interference by this Court in exercise of its power of review are made out in the facts and circumstances.

24. For the foregoing reasons and in the totality of facts and circumstances there is no such illegality, irregularity or perversity which will require any interference by this Court in exercise of its jurisdiction against the order of the respondents. The writ petition, in the facts and circumstances, is without any merit and it is, therefore, dismissed.

ANIL KUMAR, J.

SUDERSHAN KUMAR MISRA, J.

APRIL 10, 2012

‘k’