

* **IN THE HIGH COURT OF DELHI AT NEW DELHI**

% Date of Decision: 29.05.2012

+ **W.P.(C) No.3381/2012**

Ex.CT/GD Nakul Singh ... Petitioner

versus

Union of India & Ors. ... Respondents

Advocates who appeared in this case:

For the Petitioner : Mr.Anish Kumar, Advocate.
For Respondents : Mr.Sunil Kumar, Mr.Alok Kumar Shukla
& Mr.Rajiv Ranjan Mishra, Advocates.

CORAM:

HON'BLE MR. JUSTICE ANIL KUMAR

HON'BLE MR. JUSTICE SUDERSHAN KUMAR MISRA

ANIL KUMAR, J.

CM No.7153/2012

Allowed subject to all just exceptions.

Application stands disposed of.

W.P.(C) No.3381/2012

1. The petitioner has challenged the order dated 30th April, 2010 passed by the Commandant 21st Bn. ITBP, whereby the petitioner was removed from the service and the order dated 16th August, 2011 passed by the appellate authority dismissing his appeal and communication dated 6th April, 2011 declining the entitlement of the petitioner for

pensionary benefits. The petitioner has also sought directions to the respondents for the payment of the entire arrears of back wages with effect from 19th March, 1996 to 14th December, 2007.

2. Brief facts as canvassed by the petitioner are that the petitioner joined the Indo-Tibetan Border Police Force (ITBPF) on 2nd April, 1991 as Constable (Ground duty). The petitioner was involved in a murder case under Section 302 of the IPC and, therefore, in 1991 he was placed under suspension. On 17th August, 1995 a movement order had been served on the petitioner and he was directed to report at Leh.

3. The petitioner alleged that though he was ready to go to Leh on 17th August, 1995 however, he was informed by his elder brother that his wife's condition had become serious and that there was nobody to look after her except for his old parents. The petitioner alleged that on 18th August, 1995 there was nobody to consider his prayer that he had to go to his village for taking his wife for treatment to Firozabad hospital. The petitioner, therefore, instead of reporting at Leh went to his village and found that his wife's condition was very serious and that the doctor had also advised his wife for complete rest at least for one month, as the wife of the petitioner had developed jaundice. According to the petitioner, he had sent this information to the office of the respondents' at Leh. As per the petitioner, even though he had sent the intimation about his inability to come and join the post at Leh, he

received many letters and telegrams from the respondents directing him to join immediately at Leh.

4. The petitioner also disclosed that on 22nd January, 1996 the criminal case pending against the petitioner was decided and he was acquitted of the charge under Section 302 of Indian Penal Code. The petitioner thereafter, immediately went to Leh on 31st January, 1996 to resume his duty. However, a chargesheet containing two charges under Section 30(4)(a) and Section 43 of ITBPF Act, 1992 was served upon the petitioner. It was stipulated in the chargesheet that the petitioner had remained absent without permission from 17th August, 1995 upto 31st January, 1996 without permission which tantamount to the violation of good order and discipline of the force. The petitioner contended that he had replied in detail to the chargesheet issued against him with all the relevant documents.

5. The petitioner was, however, tried by the Summary Force Court and he was dismissed from service on 19th March, 1996.

6. The petitioner thereafter, filed an appeal to the Deputy IG through the proper channel by Commandant 21st Bn, ITB Police on 29th March, 1996, however, he was directed to file an appeal directly to the DIG (J&K) and, therefore, the petitioner preferred an appeal to the DIG which was also returned without deciding on merits.

7. The petitioner, therefore, preferred an appeal to DIGA which was rejected by the DIGA by his order dated 3rd October, 1996. Thereafter, the petitioner filed writ petition being WP(C) No.2146/1997 before High Court of Delhi praying for the quashing of the orders of dismissal passed against him and for his reinstatement in the service and for awarding of back wages and other benefits. The writ petition of the petitioner was disposed of by order dated 6th December, 2007 directing the respondents to hold de novo proceedings from the stage of the Court of Enquiry. The respondents, therefore, reinstated the petitioner, however, the question of back wages was left unanswered to await the outcome of further proceedings. The order passed by a Coordinate bench of this Court dated 6th December, 2007 in the case of the petitioner is as under:-

“ Hearings had been adjourned after arguments were heard in some detail in order to enable the Respondents to obtain instructions in the matter. What had engaged our attention 'was the fact that the Next Friend of the accused, nominated by the Respondents, was in fact the person who had recorded the evidence and had expressed an opinion adverse to the Petitioner on the case.

The instructions issued to the learned counsel for the Respondents, as conveyed by Mr.G.S.Virk, Additional DIG, who is present in Court, is that the Respondents shall hold de novo proceedings from the stage the Court of Inquiry. This is to obviate any argument of prejudice that may be raised by the Petitioner complaining that he did not get adequate and genuine legal assistance in the matter. We express our appreciation for the nature of the instructions given by the Respondents.

Accordingly we direct that the proceedings shall recommence from the stage of holding the Court of Inquiry.

The Respondents have also stated that the Petitioner shall be reinstated forthwith. They submit that the question of back-wages may be left unanswered, at this stage, to await the outcome of further proceedings. Learned counsel for the Petitioner submits that the Petitioner is in a state of penury and requires finance. Since the Petitioner will now be receiving salaries, we feel that ordering back-wages, at this stage, would not be appropriate.

The Writ Petition is allowed in the above terms.

The Petitioner will report before the Commandant of his Batallion which is presently posted in Leh. The Petitioner to appear before DIG, Personnel/ Administration, Headquarters, New Delhi, in order to facilitate his journey from Delhi today, at 11.00 hours on 10.12.2007.

A copy of this Order be given dasti under the signatures of the Court Master.”

8. On commencement of the de novo enquiry from the stage of the Court of Inquiry and thereafter, the Summary Court Force proceedings were conducted and by order dated 30th April, 2010, the order of removal of the petitioner from service was passed. The order of removal dated 30th April, 2010 was, however, modified to compulsory retirement by the DIG, SHQ, Ladakh, ITBP Force by order dated 14th June, 2010.

9. Aggrieved by the order commuting his sentence from removal from service to compulsory retirement, the petitioner filed a statutory appeal under Section 131 of ITBP Force Act before the Appellate Authority.

10 The petitioner also disclosed that pursuant to the compulsory retirement, the pension papers of the petitioner were forwarded, however, since the total service of the petitioner with the force was of 7 years 10 months and 18 days, whereas, to be entitled for pensionary benefits the petitioner required 10 years service, therefore, it was held that the petitioner is not entitled for pension by communication dated 6th April, 2011. Against the order declining the pension to the petitioner, an appeal was filed by the petitioner. The appeal filed by the petitioner was also dismissed by order dated 16th August, 2011. Aggrieved by the said order, the petitioner has filed the present writ petition, *inter-alia*, on the grounds that the petitioner had given sufficient reason for his absence of 167 days from the service which was on account of compelling family reasons as the wife of the petitioner was ill and as she was undergoing treatment and there was no one to look after her during that period. The petitioner also disclosed that he was facing trial during the relevant period in a criminal case under Section 302 IPC wherein he was acquitted later and immediately thereafter, the petitioner had joined his post at Leh. The petitioner contended that since the punishment of removal from service was

commuted to compulsory retirement, the petitioner ought to have been deemed to be in service for all intent and purposes and the back wages ought to have been granted to the petitioner. The petitioner also asserted that no adequate opportunity was given to him, nor was a defence assistant provided to him.

11. The writ petition is contested by the respondents by Mr. Sunil Kumar Advocate who has appeared on advance notice on their behalf. It is contended that after the de novo enquiry an adequate opportunity was given to the petitioner. The petitioner has not disclosed any cogent reasons on the basis of which it can be inferred that the principles of natural justice had been violated except for making a bald statement that the principles of natural justice were violated and adequate opportunity was not given to the petitioner.

12. This Court has perused the record produced along with the writ petition. From the record it is apparent that it was decided by the Commandant that the petitioner should be tried by a Summary Force Court. A ROE was ordered for the evidence against the petitioner. After the ROE, the petitioner was tried by a Force Court for the charge of absenting himself without leave as he was relieved from attachment duty from 20th Bn, ITBP Force on 17th August, 1995 and was directed to report at 21st Bn. ITBP Force Leh. However, he absented himself without leave for 167 days upto 31st January, 1996. It is also revealed

that during the course of the Summary Force Court trial, the petitioner had pleaded guilty to the charges framed against him and, therefore, the Court had awarded the punishment of dismissal from service. There are no facts disclosed by the petitioner on the basis of which it can be held that the petitioner had not pleaded guilty. If the petitioner had pleaded guilty then on the basis of the evidence before the ROE the respondents were justified to award punishment in accordance with the rules.

13. The petitioner had challenged his punishment of dismissal from service which was, however, set aside by this Court in W.P(C) No.2146/1997 titled as “Nakul Singh v. Union of India & ors.” and by order dated 16th December, 2007 the petitioner was reinstated in the service and de novo proceedings were initiated.

14. In the de novo proceedings, the Court of Enquiry was conducted and a ROE was ordered. On arraignment the petitioner had pleaded “not guilty”. During the Summary Force Court the petitioner was given opportunity to lead evidence in his defence and rebut the charges. The learned counsel for the petitioner has failed to show any facts on the basis of which it can be inferred that the petitioner was not given an opportunity to lead evidence in his defence and rebut the charges and cross examine the witnesses.

15. On the basis of the evidence led before the Summary Force Court, the petitioner was awarded the punishment of removal from service which was subsequently commuted by the DIG to compulsory retirement.

16. The respondents while declining to set aside the punishment awarded to him, duly observed that the wife of the petitioner was not admitted in the hospital, nor was she advised complete bed rest and in the circumstances it could not be inferred that there were compelling reasons for the petitioner to have not reported for duty pursuant to the movement order which was issued to him on 17th August, 1995. The respondents also noticed the over writing on the date mentioned in the outpatient ticket. The respondents have also noted that the suspension of the petitioner in the ITBP Force is different from under the CCS (CCA) Rules. The petitioner was granted a subsistence allowance for the entire period of suspension from 19th May, 1991 to 17th August, 1995 except for the period 18th August, 1995 to 31st January, 1996 that is the period of 167 days when the petitioner remained absent without leave.

17. From the orders passed by the respondents it is also apparent that on the acquittal of the petitioner by the criminal Court of the charge under Section 302 of the Indian Penal Code, the period of suspension was regularized as on duty and he was granted pay and allowances and the period of absence without leave was also regularized

as EOD.

18. It cannot be disputed that the grounds on which decision of Summary Security Force Court can be interfered by judicial review are, "illegality"; "irrationality" and "procedural impropriety". The Court will not interfere in such matters unless the decision is tainted by any vulnerability like illegality, irrationality and procedural impropriety. Whether action falls within any of the categories is to be established and mere assertion in that regard may not be sufficient. To be "irrational" it has to be held that on material, it is a decision "so outrageous" as to be in total defiance of logic or moral standards. If the power is exercised on the basis of facts which do not exist having which are patently erroneous, such exercise of power shall be vitiated. Exercise of power will be set aside if there is manifest error in the exercise of such power or the exercise of power is manifestly arbitrary. To arrive at a decision on "reasonableness" the Court has to find out if the respondents have left out a relevant factor or taken into account irrelevant factors. It was held in (2006) 5 SCC 88, M.V.Bijlani Vs Union of India & ors. that the Judicial review is of decision making process and not of re-appreciation of evidence. The Supreme Court in para 25 at page 96 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.'

19. In Judicial review of the decision of Summary Security Force Court this Court will not take over the functions of the Summary Security Force Court. The writ petition is not an appeal against the findings of Summary Security Force Court nor this court is exercising or assuming the role of the Appellate Authority. It cannot interfere with the findings of the fact arrived at by the Summary Court except in the case of mala-fides or perversity i.e where there is no evidence to support a finding or where the finding is such that no one acting reasonably or with objectivity could have arrived at or where a reasonable opportunity has not been given to the accused to defend himself or if it is a case where there has been non application of mind on the part of the Summary Court or if the charges are vague or if the punishment imposed is shocking to the conscience of the Court. Reliance for the scope of Judicial Review can be placed on State of U.P & Ors. Vs Raj Kishore Yadav & Anr., (2006) 5 SCC 673; V.Ramana Vs A.P. SRTC &

Ors., (2005) 7 SCC 338; R.S.Saini Vs State of Punjab & Ors., JT 1999 (6) SC 507; Kuldeep Singh Vs The Commissioner of Police, JT 1998 (8) SC 603; B.C.Chaturvedi Vs Union of India & Ors, AIR 1996 SC 484; Transport Commissioner, Madras-5 Vs A.Radha Krishna Moorthy, (1995) 1 SCC 332; Government of Tamil Nadu & Anr. Vs A. Rajapandia, AIR 1995 SC 561; Union of India & Ors. Vs Upendra Singh, (1994) 3 SCC 357.

20. In (1995) 6 SCC 749, B.C.Chaturvedi v. Union of India & Ors. Supreme Court at page 759 has held as under:-

‘12. Judicial review is not an appeal from a decision but a review of the manner in which the decision is made. Power of judicial review is meant to ensure that the individual receives fair treatment and not to ensure that the conclusion which the authority reaches is necessarily correct in the eye of the court. When an inquiry is conducted on charges of misconduct by a public servant, the Court/Tribunal is concerned to determine whether the inquiry was held by a competent officer or whether rules of natural justice are complied with. Whether the findings or conclusions are based on some evidence, the authority entrusted with the power to hold inquiry has jurisdiction, power and authority to reach a finding of fact or conclusion. But that finding must be based on some evidence. Neither the technical rules of Evidence Act nor of proof of fact or evidence as defined therein, apply to disciplinary proceeding. When the authority accepts that evidence and conclusion receives support therefrom, the disciplinary authority is entitled to hold that the delinquent officer is guilty of the charge. The Court/Tribunal in its power of judicial review does not act as appellate authority to reappreciate the evidence and to arrive at its own

independent findings on the evidence. The Court/Tribunal may interfere where the authority held the proceedings against the delinquent officer in a manner inconsistent with the rules of natural justice or in violation of statutory rules prescribing the mode of inquiry or where the conclusion or finding reached by the disciplinary authority is based on no evidence. If the conclusion or finding be such as no reasonable person would have ever reached, the Court/Tribunal may interfere with the conclusion or the finding, and mould the relief so as to make it appropriate to the facts of each case.'

21. In the totality of facts and circumstances and for the foregoing reasons, the learned counsel for the petitioner has failed to make out any such illegality, irregularity or perversity in the orders of the respondents which will entail any interference by this Court in exercise of its jurisdiction under Article 226 of the Constitution of India.

22. The writ petition, in the facts and circumstances, is without any merit and it is, therefore, dismissed.

ANIL KUMAR, J

SUDERSHAN KUMAR MISRA, J

MAY 29, 2012

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