

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

% *Judgment Reserved on: August 07, 2013*
Judgment Pronounced on: September 02, 2013

+ **W.P.(C) 1604/2002**

MAHIPAL SINGH Petitioner
Represented by: Mr.Yogesh Saini, Advocate

versus

UOI & ORS. Respondents
Represented by: Ms.Nandita Rao, Advocate with
Ms.Veronica Mohan, Advocate

CORAM:

HON'BLE MR. JUSTICE PRADEEP NANDRAJOG

HON'BLE MR.JUSTICE V.KAMESWAR RAO

PRADEEP NANDRAJOG, J.

1. Having succeeded before the Central Administrative Tribunal in the challenge to the order dated February 05, 1998 which was upheld in the departmental appeal vide order dated May 08, 1998, by which order the petitioner was dismissed from service, only issue which arises for consideration in the writ petition is to the correctness of the direction issued by the Tribunal declining back wages for the period interregnum petitioner was dismissed from service till he was reinstated in service firstly by the Tribunal and secondly as a result of the penalty order being one of dismissal from service converted in appeal into a penalty of permanent forfeiture of four years approved service.

2. The proceedings before the Tribunal were the second round of litigation fought by the petitioner on the subject of his employment with Delhi Police.

3. The petitioner was enrolled as a Constable with Delhi Police and in the year 1990 was posted at P.S. Pahar Ganj. He was sanctioned casual leave from October 12, 1990 to October 19, 1990. Required to report for duty on October 20, 1990 the petitioner remained absent till October 31, 1990 as he reported for duty on November 01, 1990.
4. While reporting for duty on November 01, 1990 the petitioner submitted a certificate issued by the Civil Hospital, Shahdara pertaining to the period October 20, 1990 till October 31, 1990; recording therein that the petitioner was medically unfit.
5. Departmental disciplinary proceedings were initiated against the petitioner by issuing him a Summary of Allegations as required by the Delhi Police (Punishment & Appeal) Rules, 1980 disclosing therein that petitioner's past conduct of absenteeism, on 44 occasions, would also be considered.
6. Evidence was recorded. As required by the Delhi Police (Punishment & Appeal) Rules, 1980 a charge was framed which we find reflects the indictment as per the Summary of Allegations. The petitioner was dismissed from service vide order dated January 10, 1992 against which appeal filed was rejected by the appellate authority on August 24, 1992.
7. Aggrieved, the petitioner approached the Central Administrative Tribunal by filing OA No.735/93 which was allowed by the Tribunal vide order dated July 21, 1997 with the finding returned that the inquiry conducted was not as per the procedure prescribed by the Delhi Police (Punishment & Appeal) Rules, 1980. Penalty of dismissal from service was set aside but the department was given permission to hold an inquiry afresh by following the procedure prescribed by the law.

8. In compliance with the order passed by the Tribunal an order was passed on August 18, 1997 by the competent authority reinstating the petitioner in service and for reasons we do not understand, a fresh charge-sheet was served upon the petitioner for the alleged misdemeanor of 13 days unauthorized absence for the period October 19, 1990 till October 31, 1990. The same also indicated that petitioner's previous conduct of absenteeism on 44 previous occasions would be considered.

9. There was no requirement to draw up a fresh charge-sheet because no taint was found therein by the Tribunal in its order dated July 21, 1997. The taint found was with the procedure followed while conducting the inquiry and thus what was required at the remanded stage was a proper inquiry.

10. At the resumed inquiry the petitioner examined two witnesses in defence. His brother-in-law Nanak Chand and SI Bhim Singh.

11. It had throughout been the case of the petitioner, by way of defence, that he had suffered a paralytic stroke due to which he was physically immobilized and mentally weak. He could not thus send any communication to the department of his medical condition. It was his case that on October 19, 1990 Nanak Chand had gone to the Police Station and had informed the Station House Officer that the petitioner had suffered a paralytic stroke.

12. Nanak Chand deposed that on October 19, 1990 he reached the Police Station and met the Duty Officer, SI Bhim Singh, who took him to the SHO and he handed over a medical certificate to the SHO at 11.00 A.M. SI Bhim Singh deposed that he was the Duty Officer at the Police Station at 11.00 A.M. on October 19, 1990 and that Nanak Chand had come to the Police Station to inform that the petitioner had been advised medical rest on

account of suffering a paralytic stroke. He further deposed that he spoke to the petitioner over the telephone who confirmed said fact.

13. The Inquiry Officer submitted a report dated December 01, 1997, in which he simply recorded the evidence of petitioner's past conduct of absenteeism and as regards the period of absence from duty from October 19, 1990 till October 31, 1990, the Inquiry Officer merely observed that it was yet another instance of unauthorized absence.

14. The Inquiry Officer did not even note, much less consider the defence evidence.

15. Overlooking the response of the petitioner to the report of the Inquiry Officer i.e. the Inquiry Officer had just not discussed the defence evidence, the disciplinary authority levied yet again a penalty of dismissal from service as per order dated February 05, 1998, against which appeal filed resulted in some relief to the petitioner when vide order dated May 08, 1998 the appellate authority reduced the penalty to one of permanent forfeiture of four years approved service entailing a reduction in pay by four stages. The period intervening February 05, 1998 till when the appellate order was passed on May 08, 1998 was directed to be treated as dies-non. The order made no reference to the previous period commencing January 10, 1992 till August 08, 1997 during which period the petitioner remained without a job, being dismissed from service on January 10, 1992 and reinstated in service on August 08, 1997 due to the Tribunal allowing OA No.735/1993 on July 21, 1997.

16. The petitioner challenged the penalty levied as per the appellate order, pleading therein that even the appellate authority had overlooked the defence evidence and had over emphasized the past conduct.

17. Vide order dated February 09, 2001, OA No.198/1999 filed by the petitioner, challenging the penalty imposed upon him was allowed with the reasoning given by the Tribunal that the Inquiry Officer had completely overlooked the defence evidence and so had the disciplinary as well as the appellate authority. The Tribunal reasoned that in view of the testimony of Nanak Chand and SI Bhim Singh it could not be said that the petitioner was unauthorizedly absent.

18. We need to speak a word. A person may be absent but the absence by itself cannot be made a ground to penalize unless the absence is found to be unauthorized. On the subject of the absence being unauthorized, the same would be a matter of fact, depending upon the defence. If the defence is that due to a paralytic stroke the delinquent could neither join nor inform of the infirmity nor submit a proper application, upon proof of the defence, it has to be held that the absence was not unauthorized. Thus, in such kinds of cases the focus of the Inquiry Officer has to be on the defence evidence led. And regrettably, in the instant case the the Inquiry Officer overlooked said fact as also the disciplinary and the appellate authority.

19. But the Tribunal did a good job. It noted the defence evidence being overlooked and factoring in the defence evidence opined that the charge of unauthorized absence has not been made good.

20. The penalty was quashed vide order dated February 09, 2001. The Tribunal, though has not expressly so said, but meaningfully read, has said that if the misdemeanor alleged as per a charge-sheet could not be proved, the past conduct was irrelevant.

21. It is trite that for past wrongs and for which a person has suffered the penalties for the wrongs cannot be visited with another penalty for the said wrongs. But, a persistent wrongdoer would be liable, on the subject of

penalty to be levied for a further wrong, to have his past conduct factored in on the quantum of penalty to be levied. For the argument by the department would be that past penalties have not chastened the man and the persistent behaviour on the same wrong would merit a stiffer penalty.

22. But, the Tribunal has declined to grant any back wages.

23. The petitioner is claiming back wages and for which he argues that in the facts of the instant case, back wages cannot be denied to him for the reason the first penalty levied : of dismissal from service, was found to be tainted due to the procedural defaults committed by the Inquiry Officer and the second penalty levied was found to be tainted with no evidence to justify the penalty; if the department was at fault, why should the petitioner suffer runs the argument.

24. The department has accepted the order dated February 09, 2001. The petitioner is aggrieved by denial of back wages.

25. Because the penalty of permanent forfeiture of four years approved service entailing a reduction in pay by four stages had been set aside, a formal order required to be passed fixing the wages and determining the arrears. On June 01, 2001 an order was passed by the disciplinary authority taking note that vide order dated February 09, 2001 the penalty levied as per the appellate order was set aside by the Tribunal; the period January 10, 1992 till August 18, 1997 and the period February 05, 1998 till May 08, 1998 were treated as period spent on duty. However, back wages were not to be paid.

26. From the facts noted above we find that petitioner's claim is for back wages for two different periods. The first is the period January 10, 1992 till August 18, 1997 and the second is the period February 05, 1998 till May 08, 1998.

27. Pertaining to the first period, the claim arises on account of the fact that vide order dated January 10, 1992 the petitioner was dismissed from service. OA No.735/1993 filed by the petitioner challenging the penalty levied was allowed on July 21, 1997 with a direction that the petitioner would be reinstated in service. But, the department was permitted to hold a fresh inquiry and follow the procedure prescribed by law. The penalty levied was found to be tainted with a procedural default. In terms of the order dated July 21, 1997 the petitioner was reinstated in service on August 18, 1997.

28. Order dated July 21, 1997 does not give any consequential benefits to the petitioner. The order records that consequential benefits would be determined with reference to the fate of the disciplinary proceedings for the reason the petitioner had won a victory on a procedural default and the merits of the charge had yet to be considered with reference to the evidence which would be led.

29. The second period is a short period commencing from February 05, 1998 when the disciplinary authority once again inflicted a penalty upon the petitioner but the appellate authority reduced the same vide order dated May 08, 1998, requiring petitioner to be reinstated in service and in place, suffer the penalty of permanent forfeiture of four years approved service.

30. A wage can be denied on the principle of '*No Work No Pay*'. But not when a person is deprived the right to work, which he otherwise had.

31. In cases of suspension followed by exoneration at a domestic inquiry, the period of suspension requiring to be treated as with full wages or by closing that period by treating the subsistence allowance paid as adequate, can be resolved easily by looking at the charges; for if the charges warranted a person being suspended merely because lack of evidence resulted in the

person being exonerated would not mean that back wages have to be paid. This reasoning is based upon the principle that justification for an act has to be considered with reference to the facts in existence when the act was committed and not from hindsight. But, issues of back wages when the department is found to be faulting in levying penalties create a problem.

32. In the decision reported as 1991 (4) SCC 109 UOI & Ors. vs. K.V.Jankiraman & Ors., in paragraphs 25 and 26 the Supreme Court had observed as under:-

“25. We are not much impressed by the contentions advanced on behalf of the authorities. The normal rule of "no work no pay" is not applicable to cases such as the present one where the employee although he is willing to work is kept away from work by the authorities for no fault of his. This is not a case where the employee remains away from work for his own reasons, although the work is offered to him. It is for this reason that F.R. 17(1) will also be inapplicable to such cases.

26. We are, therefore, broadly in agreement with the finding of the Tribunal that when an employee is completely exonerated meaning thereby that he is not found blameworthy in the least and is not visited with the penalty even of censure, he has to be given the benefit of the salary of the higher post along with the other benefits from the date on which he would have normally been promoted but for the disciplinary/criminal proceedings. However, there may be cases where the proceedings, whether disciplinary or criminal, are, for example, delayed at the instance of the employee or the clearance in the disciplinary proceedings or acquittal in the criminal proceedings is with benefit of doubt or on account of non-availability of evidence due to the acts attributable to the employee etc. In such circumstances, the concerned authorities must be vested with the power to decide whether the employee at all deserves any salary for the intervening period and if he does, the extent to which he deserves it. Life being complex, it is not possible to anticipate and enumerate exhaustively

all the circumstances under which such consideration may become necessary. To ignore, however, such circumstances when they exist and lay down an inflexible rule that in every case when an employee is exonerated in disciplinary/ criminal proceedings he should be entitled to all salary for the intervening period is to undermine discipline in the administration and jeopardise public interests. We are, therefore, unable to agree with the Tribunal that to deny the salary to an employee would in all circumstances be illegal. While, therefore, we do not approve of the said last sentence in the first sub-paragraph after Clause (iii) of paragraph 3 of the said Memorandum, viz., "but no arrears of pay shall be payable to him for the period of notional promotion preceding the date of actual promotion", we direct that in place of the said sentence the following sentence be read in the Memorandum:

However, whether the officer concerned will be entitled to any arrears of pay for the period of notional promotion preceding the date of actual promotion, and if so to what extent, will be decided by the concerned authority by taking into consideration all the facts and circumstances of the disciplinary proceeding/criminal prosecution. Where the authority denies arrears of salary or part of it, it will record its reasons for doing so."

33. In the decision reported as (2011) 5 SCC 142 Chairman-Cum-M.D. Coal India Ltd. & Ors.Vs. Ananta Saha & Ors., the Supreme Court had observed as under :-

"The issue of entitlement of back wages has been considered by this Court time and again and consistently held that even after punishment imposed upon the employee is quashed by the court or tribunal, the payment of back wages still remains discretionary. Power to grant back wages is to be exercised by the court/tribunal keeping in view the facts in their entirety as no straitjacket formula can be evolved, nor a rule of universal application can be laid for such cases. Even if the delinquent is re-instated, it would not automatically make him entitled for back wages as

entitlement to get back wages is independent of re-instatement. The factual scenario and the principles of justice, equity and good conscience have to be kept in view by an appropriate authority/court or tribunal. In such matters, the approach of the court or the tribunal should not be rigid or mechanical but flexible and realistic. (Vide: U.P.S.R.T.C. v. Mitthu Singh AIR 2006 SCC 3018; Secy., Akola Taluka Education Society and Anr. v. Shivaji and Ors. (2007) 9 SCC 564; and Managing Director, Balasaheb Desai Sahakari S.K. Limited v. Kashinath Ganapati Kambale (2009) 2 SCC 288). ”

34. Taking guidance from the aforesaid opinions and applying the facts of the instant case we find that on October 19, 1990 itself i.e. a date prior to when the petitioner, after availing casual leave from October 12, 1990 to October 19, 1990, was to resume duties on October 20, 1990 his brother-in-law Nanak Chand had gone to the Police Station armed with a medical certificate to hand over the same to the SHO of the concerned Police Station where petitioner worked so as to inform the department that the petitioner had suffered a paralytic stroke. SI Bhim Singh was working as the Duty Officer and he took Nanak Chand to the SHO to whom information of petitioner suffering from a paralytic stroke was given. Further, when the petitioner reported for duty on November 01, 1990 he handed over a certificate issued by Civil Hospital, Shahdara recording therein that the petitioner had suffered a paralytic stroke but was now fit to resume duty. In that view of the matter no disciplinary proceedings ought to have been initiated against the petitioner for the reason it was a case of mere absence but not unauthorized absence. It was a case where the petitioner would be entitled to medical leave for the period he remained medically infirm. Further, the first inquiry held violated the principles of natural justice and regretfully in spite of said fact being highlighted by the petitioner when he

was required to give his response to the report of the Inquiry Officer to the disciplinary authority, the disciplinary authority acted mechanically. Further, even the appellate authority acted mechanically.

35. We are finding that in virtually every case where the Inquiry Officer has indicted a delinquent police officer, the disciplinary authority as also the appellate authority merely reiterate the indictment and write that the contentions urged before the Inquiry Officer are being re-agitated, overlooking the fact, as in the instant case, that the grievance related to not the report of the Inquiry Officer in the context of the evidence discussed by the Inquiry Officer but related to an illegality in the procedure followed by the Inquiry Officer. Such contention can inherently not be found discussed in the report of the Inquiry Officer. Thus, such kinds of pleas need to be discussed and reflected in the order passed by the disciplinary authority and if the disciplinary authority does not do so, by the appellate authority. If said authorities do not discharge their duties as required by law i.e. with an application of mind and at a judicial fora, the said illegality results in the penalty being set aside, the delinquent officer would certainly be entitled to urge that for no fault of his and rather on account of a fault of the department he was deprived the opportunity to work. Further, if the report of the Inquiry Officer does not consider relevant evidence and it is brought to the notice of the disciplinary authority that the Inquiry Officer has not discussed the relevant evidence, it would not be sufficient for the disciplinary authority to hold that the contentions urged before the Inquiry Officer are re-urged. For the reason the contention before the disciplinary authority would be that a point of evidence has not been discussed by the Inquiry Officer. In said situation also it would be the duty of the disciplinary authority to show an application of mind by discussing the evidence overlooked by the Inquiry

Officer and a conclusion drawn thereafter. As in the instant case, if the disciplinary authority also does not perform its function and the judicial for a quashes the penalty imposed the delinquent would be entitled to urge that for no fault of his he was deprived the opportunity to work.

36. Regretfully, neither authority has given any reasons as to why back wages were denied.

37. For the reasons aforementioned and in particular the ones in paragraph 35 we direct that the petitioner be paid back wages for the period January 10, 1992 till August 18, 1997 and for the period February 05, 1998 till May 08, 1998.

38. No costs.

(PRADEEP NANDRAJOG)
JUDGE

(V.KAMESWAR RAO)
JUDGE

SEPTEMBER 02, 2013

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