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

+ **W.P.(C) 7765/2014**

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Date of decision: 17.08.2015

SANJEEV CHAUDHRY

..... Petitioner

Through: Mr.Srieenivas K., Advocate

versus

**DIRECTOR GENERAL, INDO TIBETAN BORDER POLICE
FORCE & ORS.**

..... Respondents

Through: Mr. Rishi Kapoor, proxy for Mr.Arun
Bhardwaj, Advocate for R-1 & R-2.

CORAM:

HON'BLE MR. JUSTICE S. RAVINDRA BHAT

HON'BLE MS. JUSTICE DEEPA SHARMA

MS. JUSTICE DEEPA SHARMA (OPEN COURT)

1. Aggrieved by the order of his dismissal from service, the petitioner, a Head Constable/GD in ITBP (who overstayed his leave) has invoked the jurisdiction of this court challenging the said order on the grounds that it was passed without affording any opportunity to him and that the overstay was not wilful and that the authorities had failed to consider his compelling family circumstances including the illness of his mother of which she died on 17.04.2013 while imposing the penalty of dismissal. Reliance is also placed on *Krushnakant B. Paramar vs. Union of India* 2012 (3) SCC 178.

2. The brief facts relevant for the purpose of disposal of the writ petition are that the petitioner had proceeded on sanctioned leave from 26.10.2012 to 27.12.2012 but had overstayed without any intimation/information and was dismissed from service on 01.04.2013 after a Court of Inquiry. The contention of the petitioner is that he had reported for duty on 23.05.2013, but was denied. He thereafter gave a legal notice dated 29.09.2013 and filed W.P.(C) 5688/2013 which was disposed of with certain directions to the respondents. On failure of the respondents to comply with all those directions, a Contempt Case (Civil) No.8181/2013 was filed and it was then that the copy of the ex-parte departmental proceedings were supplied to him. He approached the appellate authority i.e. Deputy Inspector General, SHQ (Barreilly), ITBP, under Rule-28 of ITBP Rules, 1994 and his appeal was dismissed vide order dated 19.03.2014 on the ground of delay. Petitioner then filed revision petition dated 09.04.2014 against the order of the appellate authority. He again approached this court in W.P.(C) 4426/2014 and the said writ was disposed of with a direction to the respondents to decide the Revision Petition dated 09.04.2014 by a reasoned order. The revision petition was finally dismissed by the Revisional Authority vide impugned order dated 21.08.2014.

3. The contention of the respondent is that when the petitioner overstayed his sanctioned leave of 60 days and did not report for duty, two letters dated 04.01.2013 and 11.02.2013 were sent by registered post at the address of his home town, asking him to report for duty, but he failed to honour the letters. An apprehension roll was issued. A Court of Inquiry was ordered under Section 74 of Indo-Tibetan Border Police Force Act, 1992 (hereinafter referred to as 'the ITBP Act') to enquire into the circumstances of his absence from leave without permission/leave from competent authority. On the basis of the Court of Inquiry, he was declared a deserter, copy of which was sent to the petitioner at the address given by him in his leave application. Thereafter, a Show Cause Notice was issued and sent by registered post and also published in the newspaper in circulation in the area where the petitioner was residing during his leave period (the address was disclosed by him in his leave application). When no communication/explanation was received from the petitioner, he was dismissed from service under Rule 17 and 20 of ITBP Rules, 1994. Copy of dismissal order was also sent by registered post at his given address. It is also urged that earlier on five occasions (details of which are given in the impugned order dated 21.08.2014) he had overstayed his leave period for

which he was suitably punished and since it was his sixth misconduct of the same nature, the penalty of dismissal from service was imposed.

4. On hearing the rival contentions and considering the record it is clear that the plea of petitioner of denial of opportunity of being heard during the Court of Inquiry is of no consequence in view of the facts that the respondents had done their best to communicate with the petitioner but could not succeed. All the letters were sent at the address supplied by the petitioner himself in the leave application i.e. Village Khedi Sundiyana, P.O.Sisoli, Tehsil-Budhana, Distt-Muzaffar Nagar (Uttar Pradesh). It is the case of the petitioner that he was not residing at that address but was living at Railpaar, Gali No.11, in front of Punjab Colony, Shaamli (Uttar Pradesh) during his leave period. In that case it was the duty of the petitioner to inform his office of the change of his address. It was also his duty to seek permission/apply for extension of his leaves. He had failed to discharge both his duties. He had subsequently in his appeal and revision had explained the reasons of his overstay, which authorities did not find satisfactory.

5. The learned counsel for the petitioner has urged that in view of the findings of the Supreme Court in **Krushanakant B. Paramar's** case (*supra*),

the respondents were bound to return a finding that the absence of the petitioner from leave was wilful and since no such findings have been given, the dismissal order is liable to be set aside. Learned counsel for the respondent has submitted that the dismissal order cannot be set aside on this ground alone and that the facts of this case differ from the facts in ***Krushanakant B. Paramar's*** case (*supra*).

6. The findings of the Supreme Court in ***Krushanakant B. Paramar's*** case (*supra*) has been discussed and distinguished in ***Chennai Metropolitan Water Supply and Sewerage Board and Others vs. T. T. Murali Babu*** (2014) 4 SCC 108. In this case the respondent who was a Junior Engineer, had remained absent from duty without any intimation from 28.08.1995 and did not respond to the letters/reminders issued to him asking him to report for duties and to explain his unauthorized absence from duty. He only reported on 01.04.1997 with a medical certificate. He was issued a charge-sheet on 11.09.1996 for failing to submit any explanation to the several reminders and notices sent to him and secondly that he deserted his post while remaining unauthorizedly absent from duty. He subsequently was dismissed and he challenged his dismissal. The learned Single Judge returned the findings in favour of the respondent and ordered for

reinstatement of the respondent. In appeal, the division bench of the High Court had accepted the conclusion of the learned Single Judge. The order of the Division Bench was challenged before the Supreme Court. The respondent had relied on the findings of **Krushnakant B. Parmar's** case (supra). The Supreme Court has dealt with the case as under:

*21. Learned Counsel for the Respondent has commended us to the decision in **Krushnakant B. Parmar v. Union of India and Anr.** : (2012) 3 SCC 178 to highlight that in the absence of a finding returned by the Inquiry Officer or determination by the disciplinary authority that the unauthorized absence was willful, the charge could not be treated to have been proved. To appreciate the said submission we have carefully perused the said authority. In the said case, the question arose whether "unauthorized absence from duty" did tantamount to "failure of devotion to duty" or "behavior unbecoming of a Government servant" inasmuch as the Appellant therein was charge-sheeted for failure to maintain devotion to duty and his behavior was unbecoming of a Government servant. After adverting to the rule position the two-Judge Bench expressed thus:*

16. In the case of the Appellant referring to unauthorized absence the disciplinary authority alleged that he failed to maintain devotion to duty and his behavior was unbecoming of a government servant. The question whether "unauthorized absence from duty" amounts to failure of devotion to duty or behavior unbecoming of a government servant cannot be decided without deciding the question whether absence is willful or because of compelling circumstances.

17. If the absence is the result of compelling circumstances under which it was not possible to

report or perform duty, such absence cannot be held to be willful. Absence from duty without any application or prior permission may amount to unauthorized absence, but it does not always mean willful. There may be different eventualities due to which an employee may abstain from duty, including compelling circumstances beyond his control like illness, accident, hospitalization, etc., but in such case the employee cannot be held guilty of failure of devotion to duty or behavior unbecoming of a government servant.

18. In a departmental proceeding, if allegation of unauthorized absence from duty is made, the disciplinary authority is required to prove that the absence is willful, in the absence of such finding, the absence will not amount to misconduct.

22. We have quoted in extenso as we are disposed to think that the Court has, while dealing with the charge of failure of devotion to duty or behavior unbecoming of a Government servant, expressed the aforesaid view and further the learned Judges have also opined that there may be compelling circumstances which are beyond the control of an employee. That apart, the facts in the said case were different as the Appellant on certain occasions was prevented to sign the attendance register and the absence was intermittent. Quite apart from that, it has been stated therein that it is obligatory on the part of the disciplinary authority to come to a conclusion that the absence is willful. On an apposite understanding of the judgment we are of the opinion that the view expressed in the said case has to be restricted to the facts of the said case regard being had to the rule position, the nature of the charge levelled against the employee and the material that had come on record during the enquiry. It cannot be stated as an absolute proposition in law that whenever there is a long unauthorized absence, it is obligatory on the part of the disciplinary authority to record a finding that the said

absence is willful even if the employee fails to show the compelling circumstances to remain absent.

7. In the light of these findings of the Supreme Court, we find no merit in the arguments of learned counsel for the petitioner.

8. Learned counsel for the petitioner has further argued that the overstay was due to the compelling circumstances which include the prolonged illness of his mother. He sought leave also due to illness of his mother who was suffering with Carcinoma Lung Left Side (Post CT-RT), Hepatic Metasis, Chronic Cough from which she could not recover and her condition continued to deteriorate, and so petitioner had to stay to take care of her and finally he lost her on 17.04.2013 and after completing all the other post death ceremonies of his mother, he reported for duty. It is submitted that the punishment of dismissal from service is unduly harsh. Learned counsel for the respondents had submitted that the petitioner belongs to a force wherein it is necessary to maintain a high standard of discipline among its cadre and that is why in view of the repeated misconduct of the petitioner (five times previously) this time he was dismissed from service.

9. There is no doubt that the petitioner belongs to a force of which discipline is the backbone. However, one should not forget the fact that these personnel work in formidable terrains and most of the times remain

away from their families for long periods. They mostly come from the villages and their wives are generally uneducated and homely and the wives as well as old parents are totally dependent on them. On leave when they reach home, have to complete all the tasks ranging from showing old parents to good hospitals, to repair of house, to taking care of children's education including their school admission etc. within that limited period of leave which a civilian living with his family discharges on day to day basis. The personnel of such services therefore are required to be dealt with compassion and understanding. It is necessary that while maintaining the discipline in the cadre, the difficulties of an individual personnel be understood with an open mind and a human approach be adopted. It is apparent from the record that petitioner had sought leave due to the ill health of his mother. The fact that she could not recover and ultimately succumbed to her illness on 17.04.2013 certifies that the leaves were sought for a genuine reason, which continued even after the expiry of period of sanctioned leave. There is no doubt that his absence from duty beyond the period of sanctioned leave is an unauthorized absence but the nature of punishment depends on various factors. The Supreme Court has so held in ***State of Punjab vs. Dr. P .L. Singla*** (2008) 8 SCC 469 as under:

“10. Where the employee who is unauthorisedly absent does not report back to duty and offer any satisfactory explanation, or where the explanation offered by the employee is not satisfactory, the employer will take recourse to disciplinary action in regard to the unauthorized absence. Such disciplinary proceedings may lead to imposition of punishment ranging from a major penalty like dismissal or removal from service to a minor penalty like withholding of increments without cumulative effect. The extent of penalty will depend upon the nature of service, the position held by the employee, the period of absence and the cause/explanation for the absence”

10. It is a well settled proposition of law that where the disciplinary authority has the discretion to quantify punishment on a proven charge, such discretionary power is open to judicial review (***Chairman-cum-Managing Director, Coal India Limited and Anr. Vs. Mukul Kumar Choudhuri and Ors.***, (2009) 15 SCC 620).

11. There is no doubt that on earlier five occasions (when petitioner had overstayed his leave), the respondent had been very considerate in imposing penalty for his misconduct. We are of the opinion that this time also, given the reasons for overstay which of course were beyond the petitioner's control, the imposition of extreme form of penalty of dismissal, is definitely disproportionate.

12. For the reasons discussed above, the petition has to succeed in part. The impugned order whereby the petitioner was declared a deserter is

hereby quashed. We are of the opinion that the penalty of dismissal imposed upon the petitioner be substituted and should be one of reduction to the induction level of the pay scale/initial stage of pay enjoyed by him as Head Constable. However, the period of service spent by him in the cadre of Head Constable shall be taken into consideration for all other consequential benefits.

13. The writ petition is partly allowed in the above terms.

DEEPA SHARMA, J.

S. RAVINDRA BHAT, J.

AUGUST 17, 2015

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