

**IN THE HIGH COURT OF JUDICATURE AT BOMBAY
BENCH AT AURANGABAD**

WRIT PETITION NO. 9668 OF 2012

Samadhan Vishnu Ingle

Age: 46 years, Occu.: Ex-Librarian and now

Unemployed, R/o Wagh Nagar, Jalgaon,

Tq. & Dist. Jalgaon.

..PETITIONER

VERSUS

1. Chairman, Manavta Shikshan Prasarak Mandal,
Shivaji Nagar, Jalgaon,
Khubchand Sagarmal Vidhyalaya,
Shivaji Nagar, Jalgaon.

2. Headmaster,
Khubchand Sagarmal Vidhyalaya,
Shivaji Nagar, Jalgaon.

3. Educational Officer,
Jilha Parishad, Jalgaon.

..RESPONDENTS

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Mr. S.R. Chaukidar, Advocate for petitioner.

Mr. S.R. Patil, Advocate for Respondent Nos.1 and 2.

Mr. P.G. Borade, AGP for Respondent No.3.

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CORAM : RAVINDRA V. GHUGE, J.

DATED : 21st MARCH, 2016

ORAL JUDGMENT :

1. Rule. Rule made returnable forthwith and heard finally by the consent of the parties.

2. The petitioner is aggrieved by the judgment and order dated 21.09.2012 delivered by the School Tribunal, Nashik by which Appeal No. 61/2010 filed by the petitioner has been dismissed.

3. The petitioner submits that he is a double graduate in the Arts faculty as well as Library and Information Science from Savitribai Phule University, Pune and North Maharashtra University respectively. He was appointed as Librarian on a part-time basis in the Education Department, Zilla Prishad, Jalgaon. He has worked from 15.04.1987 till his date of dismissal 14.09.2010.

4. Mr. Chaukidar, learned Counsel for the petitioner submits that he was charge-sheeted on 09.11.2009 followed by a supplementary charge-sheet dated 20.02.2010. The respondent-management has drawn up the details of his unauthorised absenteeism from March 1998 till November 2008 and for the remaining portion of about two months vide charge-sheet dated 20.02.2010. Mr. Chaukidar submits that for the period March, 1998 till March 2004, the absenteeism has been minor. It was only in May 1999, March 2002 and January 2003 that the petitioner was absent for the entire months.

5. He further submits that though the charge-sheet indicates unauthorised absenteeism for a large spell, the petitioner had always filed leave applications either before proceeding on leave or after he had reported for duties. From January 2006 till November 2008, the petitioner is shown to be absent for 356 days, 365 days and for about 330 days respectively. It was in this period that the management declined to allow the petitioner to sign the muster roll and kept him away from work despite the petitioner having offered himself for work.

6. He further submits that the charge-sheet also mentions the charge of reporting on duties in drunken state, misbehaving with the Head Master and colleague teachers and threatening the Head Master with registering of cases under Scheduled Castes and Scheduled Tribes (Prevention of Atrocities) Act, 1989. He however hastens to add that besides the charge of absenteeism, there was no evidence of any nature whatsoever which can be said to have proved the charges of drunkenness while on duty and indulging in abusive behavior. Yet the enquiry officer has held the petitioner guilty of the charges.

7. He further submits that his father was unwell and his mother was rendered a patient of Cancer. Eventually, both passed away prior to

2009. The petitioner had to frequently proceed on leave for their treatment. Said leave was never sanctioned by the management. It was in these circumstances that though the petitioner was compelled by reasons beyond his control to take his parents for treatment, the management declined to grant leave.

8. Mr. Chaukidar relies upon the judgment of the Hon'ble Supreme Court in the case of *Ranjit Thakur Vs. Union of India*, AIR 1987 SC 2386 and in the matter of *Chairman-cum-Managing Director, Coal India Ltd. and Another Vs. Mukul Kumar Choudhari and Others*, AIR 2010 SC 75.

9. Mr. Patil, learned Counsel appearing on behalf of the respondent-management has strenuously supported the impugned judgment of the School Tribunal. He submits that the management was eventually fed-up by the frequent absenteeism of the petitioner who was a librarian. The work in the school suffered. On many occasions the petitioner had never filed any application for leave. On several occasions he proceeded on leave despite his applications having been rejected.

10. He further submits that the petitioner had once submitted an

application dated 25.11.2008 which was produced before the School Tribunal at Exhibit 28 in which he had stated that he was addicted to drinking and because of his addiction, he could not remain present on duties. The management had therefore stated the instances of the petitioner having indulged in abusive behavior after reporting for duties in a drunken stage.

11. Mr. Patil further submits that the management led evidence before the Enquiry Officer. The documents with regard to the unauthorised absenteeism of the petitioner clearly indicate that the charges were proved. The earlier warning letters and memo issued by the management on various occasions, were considered by the Enquiry Officer as sufficient proof of the petitioner reporting for duties in a drunken stage and he having been warned and cautioned on several occasions. Mr. Patil therefore submits that no interference is called for and this petition be dismissed. He relies on the judgment of the Hon'ble Supreme Court in the matter of *Union of India and Others Vs. P. Gunasekaran, (2015) 2 SCC 610*.

12. I have considered the submissions of the learned Counsels. Record and Proceedings from the Tribunal are before the Court.

13. In so far as the charge-sheet is concerned, it is trite law that old and stale charges cannot be dug out by an employer. In the instant case, in the charge-sheet dated 09.11.2009, the management has considered the absence of the petitioner from March 1998 till November 2008 which is for a period of almost 10 and half years. It is settled law that an employer can at the most go back four years while issuing a charge-sheet upon an employee. In my view, therefore the absence of the petitioner from January 2006 till February 2010 could be considered in the instant case.

14. It is clear from the charge-sheet that the petitioner is charged of remaining absent for the entire year from January 2006 till February 2010. He is charged with remaining absent for 365 days in each year. I therefore find that the respondent-management has included even the national holidays and weekly holidays as a part of the unauthorised absenteeism by the petitioner. It is stated that the number of working days in a school in a year are about 210 days. It would be therefore about 630 days that the petitioner was held to be unauthorisedly absent from January 2006 till February 2010.

15. In the light of the above, it is apparent that the petitioner has

been held unauthorisedly absent for a long duration of about 630 days. It was contended by Mr. Chaukidar that the petitioner was refused permission to sign on the muster roll during the said period from January 2006 to February 2010 on numerous occasions. As such, despite offering himself for work, he was prevented from performing his duties and hence the charge of unauthorised absenteeism and the principle of 'no work no pay' would not have become applicable to the petitioner.

16. The above contention of Mr. Chaukidar has been considered by the School Tribunal. Under Section 9 of the M.E.P.S. Act, 1977, refusal to allow an employee to mark his presence and perform his duties can be said to be oral termination which would fall within the ambit of 'otherwise termination'. The petitioner could have approached the School Tribunal under Section 9 of the M.E.P.S. Act, 1977 which reads as under:-

“Section 9: Right of appeal to Tribunal to employees of a private school.

1) Notwithstanding anything contained in any law or contract for the time being in force, any employee in a private school,-

(a) who is dismissed or removed or whose services are otherwise terminated or who is reduced in rank, by the order passed by the Management; or

*(b) who is superseded by the Management while making an appointment to any post by promotion;
and who is aggrieved, shall have a right to appeal and may appeal against any such order or supersession to the Tribunal constituted under section 8:*

Provided that, no such appeal shall be lie to the Tribunal in any case where the matter has already been decided by a Court of competent jurisdiction or is pending before such Court, on the appointed date or where the order of dismissal, removal, otherwise termination of service or reduction in rank was passed by the Management at any time bfore the 1st July, 1976.

2) Such appeal shall be made by the employee to the Tribunal, within thirty days from the date of receipt by him of the order of dismissal, removal, otherwise termination of service or reduction in rank, as the case may be:

Provided that, where such order was made before the appointed date, such appeal may be made within sixty days from the said date.

3) Notwithstanding anything contained in sub-section (2), the Tribunal may entertain an appeal made to it after the expiry of the said period of thirty or sixty days, as the case may be, if it is satisfied that the appellant has sufficient cause for not preferring the appeal within that period.

4) Every appeal shall be accompanied by a fee of Five hundred rupees, which shall not be refunded and shall be credited to the Consolidated Fund of the State.”

17. It is not in dispute that the petitioner has not resorted to this remedy despite the fact that he did not earn his salary for the entire duration from January 2006 to February 2010. Reasons for not approaching the School Tribunal against the purported refusal by the management to allow the petitioner to sign the muster roll and attend duties, are best known to the petitioner.

18. It is trite law that in service jurisprudence, the charges against an employee can be proved on preponderance on the principles of probabilities. The earlier caution notes, memo and the application submitted by the petitioner would indicate that the management had taken cognizance of his drinking habit. Based on such evidence, the enquiry officer came to a conclusion on the principle of probabilities that the petitioner seem to have developed the habit of drinking.

19. This Court, in its supervisory and/or writ jurisdiction would not be able to consider the entire evidence recorded before the enquiry officer, thread-bare. The consideration of the enquiry officer's report on the basis of the oral and documentary evidence produced is to be left to the employer for arriving at the quantum of punishment. The Wednesbury principles as laid down in the matter of *Associated*

Provincial Picture Houses Ltd. Vs. Wednesbury Corporation, (1947) 2

All ER 680 have been the fetters on the Court's supervisory jurisdiction while considering the effect of the employer's administrative functions as under:-

“What, then, is the power of the courts? They can only interfere with an act of executive authority if it be shown that the authority has contravened the law. It is for those who assert that the local authority has contravened the law to establish that proposition. On the face of it, a condition of the kind imposed in this case is perfectly lawful. It is not to be assumed prima facie that responsible bodies like the local authority in this case will exceed their powers; but the court, whenever it is alleged that the local authority have contravened the law, must not substitute itself for that authority. It is only concerned with seeing whether or not the proposition is made good. When an executive discretion is entrusted by Parliament to a body such as the local authority in this case, what appears to be an exercise of that discretion can only be challenged in the courts in a strictly limited class of case. As I have said, it must always be remembered that the court is not a court of appeal. When discretion of this kind is granted the law recognizes certain principles upon which that discretion must be exercised, but within the four corners of those principles the discretion, in my opinion, is an absolute one and cannot be questioned in any court of law. What then are those principles? They are well understood. They are

principles which the court looks to in considering any question of discretion it must have regard to those matters. Conversely, if the nature of the subject matter and the general interpretation of the Act make it clear that certain matters would not be germane to the matter in question, the authority must disregard those irrelevant collateral matters. There have been in the cases expressions used relating to the sort of things that authorities must not do, not merely in cases under the Cinematograph Act but, generally speaking, under other cases where the powers of local authorities came to be considered. I am not sure myself whether the permissible grounds of attack cannot be defined under a single head. It has been perhaps a little bit confusing to find a series of grounds set out. Bad faith, dishonesty- those of course, stand by themselves- unreasonableness, attention given to extraneous circumstances, disregard of public policy and things like that have all been referred to, according to the facts of individual cases, as being matters which are relevant to the question. If they cannot all be confined under one head, they at any rate, I think, overlap to a very great extent. For instance, we have heard in this case a great deal about the meaning of the word “unreasonable.”

This case, in my opinion, does not really require reference to authority when once the simple and well known principles are understood on which alone a court can interfere with something prima facie within the powers of the executive authority, but reference has been made to a number of cases.

I can deal, I think, quite shortly with them. First, Mr. Justice Henn Collins followed a decision of Mr. Justice Atkinson in the case I have mentioned of Harman V. Butt (1944) Kings Bench 491. In that case a condition of this charter had been imposed and I think the only difference between the two cases is that in Harman V. Butt (1944) Kings Bench 491. The licence to open on Sundays originated in a representation by the commanding officer of forces stationed in the neighbourhood. Mr. Justice Atkinson dealt with the matter thus (1944) Kings Bench, 491 at page 499:

I am satisfied that the defendants were entitled to consider matters relating to the welfare, including the spiritual well-being, of the community and of any section of it and I hold that this condition that no child under the age of sixteen should be admitted to this cinematograph theatre on Sunday is not ultra vires on the grounds that it is not confined to the user of the premises by the licensee, but relates to the interest of a section of the community.

Then he goes on to deal with the question of reasonableness. That a case in which the decision, in my opinion, is unassailable. There are two other cases relied upon. One is R. v Burnley Justices 85 Law Journal Reports, King's Bench 1565 and another not dissimilar case on one point, Ellis V. Dubowski (1921) 3 Kings Bench 621. Those were cases where the illegal element which the authority had imported into the conditions imposed consisted of a delegation of their powers to some outside body. It was not that the delegation was a

thing which no reasonable person could have thought was a sensible thing to do. It was outside their powers altogether to pass on this discretion which the legislature had confided to them to some outside body. Another case on which Mr. Gallop relied is Roberts V. Hopwood (1925) AC 578. That was a totally different class of case. The district auditor had surcharged the members of a council who had made payments of a minimum wage of 4l. A week to their lowest grade of workers. That particular sum had been fixed by the local authority not by reference to any of the factors which go to determine a scale of wages, but by reference to some other principle altogether and the substance of the decision was that they had not fixed 4l. A week as wages at all and that they had acted unreasonably. When the case is examined, the word "unreasonable" is found to be used rather in the sense that I mentioned a short while ago, namely, that in fixing 4l. They had fixed it by reference to a matter which they ought not to have taken into account and to the exclusion of those elements which they ought to have taken into consideration in fixing a sum which could fairly be called a wage. That is no authority whatsoever to support the proposition that the court has power, a sort of overriding power, to decide what is reasonable and what is unreasonable. The court has nothing of the kind.

In the result, this appeal must be dismissed. I do not wish to repeat myself but I will summarize once again the principle applicable. The court is entitled to investigate the action of

the local authority with a view to seeing whether they have taken into account matters which they ought not to take into account, or, conversely, have refused to take into account or neglected to take into account matters which they ought to take into account. Once that question is answered in favour of the local authority, it may be still possible to say that, although the local authority have kept within the four corners of the matters which they ought to consider, they have nevertheless come to a conclusion so unreasonable that no reasonable authority could ever have come to it. In such a case, again, I think the court can interfere. The power of the court to interfere in each case is not as an appellate authority to override a decision of the local authority, but as a judicial authority which is concerned and concerned only, to see whether the local authority have contravened the law by acting in excess of the powers which Parliament has confided in them. The appeal must be dismissed with costs.”

20. The Hon'ble Supreme Court in the matter of ***Syed Yakoob Vs. K.S. Radhakrishnan, AIR 1964 SC 477*** has dealt with the scope of interference of this Court in its supervisory and/or writ jurisdiction. The same has been once again considered by the Hon'ble Supreme Court in the matter of ***Suryadev Rai Vs. Ramchander Rai, AIR 2003 SC 3044***.

21. Mr. Chaukidar has placed reliance on the Ranjit Thakur

judgment (supra) wherein the Hon'ble Supreme Court has considered the quantum of punishment being imposed on an individual. The judgment in the Ranjit Thakur case (supra) has been referred to by the Hon'ble Supreme Court in the case of Coal India Ltd. (supra). Paragraph Nos. 27, 28, 29 and 30 (wrongly numbered as 26 and 27) of the Coal India judgment (supra) read as under:-

“27) In Rajnit Thakur referred to earlier, an army officer did not obey the lawful command of his superior officer by not eating food offered to him. Court-martial proceedings were initiated and a sentence of rigorous imprisonment of one year was imposed. He was also dismissed from service, with added disqualification that he would be unfit for future employment.

28) Applying the doctrine of proportionality and following CCSU, Venkatachaliah, J (as His Lordship then was) observed: (SCC p. 620, para 25)

The question of the choice and quantum of punishment is within the jurisdiction and discretion of the court martial. But the sentence has to suit the offence and the offender. It should not be vindictive or unduly harsh. It should not be so disproportionate to the offence as to shock the conscience and amount in itself to conclusive evidence of bias. The doctrine of proportionality, as part of the concept of judicial review, would ensure that even on an aspect which is, otherwise, within the exclusive province of the court martial, if the

decision of the court even as to sentence is an outrageous defiance of logic, then the sentence would not be immune from correction. Irrationality and perversity are recognised grounds of judicial review. (emphasis supplied)

29. The doctrine of proportionality is, thus, well recognized concept of judicial review in our jurisprudence. What is otherwise within the discretionary domain and sole power of the decision maker to quantify punishment once the charge of misconduct stands proved, such discretionary power is exposed to judicial intervention if exercised in a manner which is out of proportion to the fault. Award of punishment which is grossly in excess to the allegations cannot claim immunity and remains open for interference under limited scope of judicial review. One of the tests to be applied while dealing with the question of quantum of punishment would be : would any reasonable employer have imposed such punishment in like circumstances? Obviously, a reasonable employer is expected to take into consideration measure, magnitude and degree of misconduct and all other relevant circumstances and exclude irrelevant matters before imposing punishment. In a case like the present one where the misconduct of the delinquent was unauthorised absence from duty for six months but upon being charged of such misconduct, he fairly admitted his guilt and explained the reasons for his absence by stating that he did not have any intention nor desired to disobey the order of higher authority or violate any of the Company's Rules and Regulations but the

reason was purely personal and beyond his control and, as a matter of fact, he sent his resignation which was not accepted, the order of removal cannot be held to be justified, since in our judgment, no reasonable employer would have imposed extreme punishment of removal in like circumstances. The punishment is not only unduly harsh but grossly in excess to the allegations. Ordinarily, we would have sent the matter back to the appropriate authority for reconsideration on the question of punishment but in the facts and circumstances of the present case, this exercise may not be proper. In our view, the demand of justice would be met if the Respondent No.1 is denied back wages for the entire period by way of punishment for the proved misconduct of unauthorized absence for six months.

30. Consequently, both these appeals are allowed in part. The appellants shall reinstate Respondent No.1 forthwith but he will not be entitled to any back wages from the date of his removal until reinstatement. Parties will bear their own costs.”

22. I am in respectful agreement with the view expressed by the Hon'ble Supreme Court as regards the doctrine of proportionality. It is trite law that merely because the punishment awarded appears to be disproportionate, would not entitle a Court to cause interference with the quantum of punishment. The punishment must appear to be shockingly

disproportionate in the sense that no prudent employer would have reasonably imposed the punishment of dismissal on an employee considering the seriousness and the gravity of the misconducts proved against him.

23. I find from the facts of this case that even if the working days available to an employee are to be considered while reckoning the period of unauthorised absenteeism, the petitioner can be said to be unauthorisedly absent for 630 days besides the fact that the charge of abusive behavior and drunkenness has also been proved against him.

24. In the light of the above, I do not find that any interference is called for in the impugned judgment of the School Tribunal. I do not find that grave injustice has been caused to the petitioner by his dismissal from service for proved misconducts. This petition therefore fails and is dismissed. Rule is discharged.

25. Record and Proceedings from Appeal No. 61/2010 be returned to the School Tribunal, Jalgaon forthwith.

(RAVINDRA V. GHUGE, J.)