

THE HONOURABLE SRI JUSTICE M. SATYANARAYANA MURTHY

WRIT PETITION No.39111 OF 2014

ORDER:

This Writ Petition is filed challenging the Order dated 22.11.2012 passed by the 4th respondent, whereby the dismissal order passed by 5th respondent dated 30.05.2011 was confirmed.

02. The petitioner was appointed as Constable in Border Security Force (for short 'BSF') in the year 2004. Due to his mother's illness, he proceeded on 15 days Casual Leave from 12.08.2010 to 31.08.2010. During leave period, the petitioner met with an accident on 28.08.2010 and hospitalized for one month, as he received grievous injuries to elbow joint and sustained fracture to his hand. Further, the petitioner was discharged on 27.09.2010 with doctor's advice to take bed rest upto 27.11.2010. It is the case that, in the month of October, 2010 the family members of the petitioner were affected with Dengue Fever and admitted in Shanthi Nursing Home at Kanigiri, Prakasam District, where his presence was required. In view of the above circumstances, the petitioner sent a letter to the respondents/authorities seeking extension of leave as Emergency Leave for a period of six months and the same was received and acknowledged by the respondents on 20.09.2010. Instead of considering the application of the petitioner, the respondents/authorities issued a show cause notice dated 26.03.2011, to which the petitioner submitted his explanation. But, without considering the same, the 5th respondent passed dismissal order from service. He also filed review petition. But, the 5th respondent without giving an opportunity of personal hearing, dismissed the same.

03. The respondents filed a detailed counter admitting the appointment of the petitioner. It is stated that after completion of basic training, the petitioner joined on 26.12.2005 in 21st Bn, BSF. While

the Unit was deployed in Anti-Naxal Operations duty in Chhattishgarh, with its Tactical HQ at Pakhanjore, he was sanctioned 15 days leave w.e.f. 12.08.2010 to 31.08.2010 due to his mother's illness. As the petitioner did not report after expiry of said leave, he was issued letters dated 13.09.2010 and 03.10.2010 intimating his unauthorized absence and directing to report back, but the petitioner failed to do so. It is further stated that in the meantime, the petitioner sent an application with some medical documents issued by Shanti Nursing Home at Kanigiri, Prakasam District to prove that he was admitted in the hospital due to fracture and discharged on 27.09.2010 with an advice of bed rest. Though the medical certificate shows that the petitioner was fit to resume duty on 29.10.2010, he did not report back. Again, a letter was addressed to the petitioner directing him to join duty, immediately. As the petitioner neither joined nor applied for extension of leave, an inquiry was ordered and apprehension roll was sent to the petitioner. In response to the same, the petitioner replied vide letter stating that he resigned from service. Since the presence of the petitioner could not be secured, which is mandatory for initiating disciplinary action, a show cause notice was issued proposing to dismiss him from service. But, the petitioner neither responded to the notice nor resumed his duties, accordingly, dismissed the petitioner from service w.e.f. 30.05.2011. The petitioner preferred appeal after expiry of stipulated time. But, the said appeal was rejected being devoid of merit. During enquiry, it was found that the petitioner was overstayed without sufficient cause. It is further stated that the petitioner was given all opportunities available to him and finally his case was rejected on merits only as per the BSF Act and the Rules thereunder.

04. The learned counsel for the petitioner, during the course of hearing the writ petition at the stage of admission, contended that overstay after expiry of leave does not warrant termination and such

a penalty is harsh. To support his contention, he placed reliance on the Judgment of this Court in **CH.PRABHAKAR RAO VS. DEPUTY INSPECTOR GENERAL OF POLICE, NEW DELHI RANGE CRPF, R.K.PURAM, NEW DELHI AND OTHERS**^[1] and also relied on the Judgment of the Apex Court in **KRUSHNAKANT B PARMAR VS. UNION OF INDIA AND ANOTHER**^[2].

05. Whereas the learned Assistant Solicitor General representing the respondents did not advance any argument.

06. Undisputedly, the petitioner overstayed after expiry of the leave period and the reason assigned by him is that he met with an accident and admitted in hospital with severe injuries. Medical Certificate dated 28.10.2010 issued by Shanti Nursing Home, Kanigiri, shows that the petitioner was admitted in hospital on 28.08.2010 for injury on elbow joint of right hand upper arm due to motor accident, sustained fracture, POP was applied and was discharged on 27.09.2010 with an advice to take rest for one month. It further shows that the petitioner was fit to resume duty from 29.10.2010 onwards. After conducting inquiry, an apprehension roll was sent to apprehend the petitioner and hand over him to nearest BSF Unit. Then, the petitioner stated that he had resigned to his duties.

07. The contention of the respondents is that despite addressing letters directing the petitioner to join duty and issuing show cause notice, the petitioner neither joined duty nor applied for extension of leave.

08. The petitioner being an employee in BSF is governed by the BSF Act and Rules. Rule 20 of the BSF Rules deals with termination of service of officers by the Central Government on account of misconduct. Rule 22 deals with Dismissal or removal of persons other than officers on account of misconduct. Therefore, Rule 22 is appropriately applicable to the petitioner's case as he was not an Officer working in the BSF. It is relevant to extract Rule 22 of BSF

Rules for better appreciation, accordingly extracted hereunder-

"22. Dismissal or removal of persons other than officers on account of mis-conduct.

(1) When it is proposed to terminate the service of a person subject to the Act other than an officer, he shall be given an opportunity by the authority competent to dismiss or remove him, to show cause in the manner specified in sub-rule (2) against such action:

Provided that this sub-rule shall not apply -

(a) where the service is terminated on the ground of conduct which has led to his conviction by a criminal court or a Security Force Court; or

(b) where the competent authority is satisfied that, for reasons to be recorded in writing, it is not expedient or reasonably practicable to give the person concerned an opportunity or showing cause.

(2) When after considering the reports on the misconduct of the person concerned, the competent authority is satisfied that the trial of such a person is inexpedient or impracticable, but, is of the opinion that his further retention in the service is undesirable, it shall so inform him together with all reports adverse to him and he shall be called upon to submit, in writing, his explanation and defence:

Provided that the competent authority may withhold from disclosure any such report or portion thereof, if, in his opinion its disclosure is not in the public interest.

(3) The competent authority after considering his explanation and defence if any may dismiss or remove him from service with or without pension:

Provided that a Deputy Inspector General shall not dismiss or remove from service, a Subordinate Officer of and above the rank of a Subedar.

(4) All cases of dismissal or removal under this rule, shall be reported to the Director General."

09. In view of mandatory procedure prescribed under Rule 22 of BSF rules, a show cause notice in the manner as provided in sub-rule (2) is required to be issued, afford an opportunity to the person employed in BSF by the authority competent to dismiss or remove from service. Here, the show cause notice was issued, but it was not replied by the petitioner.

10. Section 48 of BSF Act, 1968 deals with the punishment awardable by Security Force Courts and according to it, Punishments may be inflicted in respect of offences committed by persons subject to this Act and convicted by Security Force Courts according to the scale following, that is to say:-

- (a) death;
- (b) imprisonment which may be for the term of life or any other lesser term but excluding imprisonment for a term not exceeding three months in Force custody,
- (c) dismissal from the service;
- (d) imprisonment for a term not exceeding three months in Force custody;
- (e) reduction to the ranks or to a lower rank or grade or place in this list of their rank in the case of an under-officer;
- (f) forfeiture of seniority of rank and forfeiture of all or any part of the service for the purpose of promotion;
- (g) forfeiture of service for the purpose of increased pay, pension or any other prescribed purpose;
- (h) fine, in respect of civil offences;
- (i) severe reprimand or reprimand except in the case of persons below the rank of an under officer;
- (j) forfeiture of pay and allowances for a period not exceeding three months for an offence committed on active duty;
- (k) forfeiture in the case of person sentenced to dismissal from the service of all arrears of pay and allowances and other public money due to him at the time of such dismissal;
- (l) Stoppage of pay and allowance until any proved loss or damage occasioned by the offence for which he is convicted is made good.

11. Here, the petitioner did not commit any offence, the punishment under BSF Act, 1968 except absenting himself on account of injuries sustained by him in an accident and hospitalization. Therefore, Section 48 of the Act has no application. Section 40 of the BSF Act, 1968 deals with violation of good order and discipline, according to it, any person subject to this Act who is guilty of any act or omission which, though not specified in this Act, is prejudicial to good order and discipline of the Force shall, on conviction by a Security

Force Court, be liable to suffer imprisonment for a term which may extend to seven years or such less punishment as is in this Act mentioned.

12. In the present facts of the case, the petitioner was guilty of violation of good order and discipline, if he is unable to prove it for any reason or failed to establish that he was prevented by sufficient cause or his overstay was without sufficient cause. Therefore, it is for the petitioner to prove that his overstay was due to sufficient cause. According to the petitioner, he was on leave from 12.08.2010 to 31.08.2010 it is his case that he met with an accident on 28.08.2010 sustained grievous injuries to his elbow joint, a fracture to his hand and thereafter, he was hospitalized for one month and discharged on 27.09.2010 with an advise to take bed rest upto 27.11.2010. Even if the plea of the petitioner that he was hospitalized is accepted, he has to report to duty on 27.11.2010, in view of the medical certificate, issued to the petitioner by the doctor who treated him. But, unfortunately, the petitioner avoided reporting to duty without obtaining any prior sanction of leave. The petitioner further contended that he sent a letter to the respondent authorities requesting for extension of leave for a period of six months considering it as emergency leave and the same was allegedly received on 27.09.2010. But, no piece of paper is produced to substantiate his contention that he submitted a leave letter to the respondents for sanction of six months emergency leave and acknowledging receipt of the same by the respondent authorities concerned, except bare allegation in the affidavit filed along with the writ petition, but no iota of evidence is brought on record to substantiate his contention, non production of such letter for extension of leave, led me to conclude that the petitioner made false allegations. The findings of the Enquiry Officer and the Appellate Authority is that the petitioner did not apply for extension of any kind of leave and he overstayed for long period of six months after expiry of leave sanctioned by the respondents. The specific observation of the

Enquiry Officer and the Appellate Authority is that, on the date of discharge i.e. 27.09.2010, the doctor certified that he is fit to discharge duty. Therefore, the medical certificate dated 28.10.2010 and discharge summary issued by Shanti Nursing Home would establish that the petitioner underwent treatment in Shanti Nursing Home for the injuries sustained by him in the road accident. The doctor who treated the petitioner in Shanti Nursing Home specifically stated that the petitioner was treated in the hospital as in-patient upto 27.09.2010 and advised to take treatment and bed rest for about one month upto 28.10.2010. The patient was examined again on 28.10.2010 and found absolutely fit to resume duty from 29.10.2010. This itself indicates that the petitioner, though fit to discharge his duties with absolute fitness, he intentionally avoided to report to duty without applying for grant of any kind of leave or sanction of the same. The petitioner being a constable in BSF, which is a highly disciplined force in the Country, is not expected to disobey the good order and discipline and that amounts to misconduct.

13. The respondents issued a show cause notice on 03.10.2010 cautioning the petitioner to report to duty, otherwise, it amounts to misconduct. In spite of show cause notice, the petitioner did not report to duty. However, in view of injuries sustained by him, he was admitted into hospital on 28.08.2010 and discharged on 27.09.2010 and thereafter, the doctor in Shanthi Nursing Home, who treated the petitioner has suggested one month bed rest upto 28.10.2010. Though he was fit to attend and discharge his duties, as certified by the doctor in Shanthi Nursing Home, he failed to report to duty. Thereupon, the respondents issued show cause notice dated 26.03.2011 calling upon the petitioner to show cause as to why he shall not be dismissed from the service within 30 days from the date of receipt of the notice, but no reply was submitted by the petitioner either of the show cause notices dated 03.10.2010 or 26.03.2011. That itself indicates that the petitioner was callous or negligent in discharging his

duties, as a member of the disciplined force, BSF. Such conduct would directly amount to misconduct within the meaning of Rule 22 of the BSF Rules.

14. As per the material available on record and the allegations made in the affidavit filed along with the writ petition, the petitioner was discharged from the hospital on 27.09.2010, after undergoing treatment as in-patient in Shanthi Nursing Home. However, the doctor advised him to take rest for one month i.e. till 28.10.2010 and on 28.10.2010 again the doctor examined the petitioner and certified that he is absolutely fit to discharge his duties from 29.10.2010. But, he did not report to duty, though he was fit to discharge his duties and invented a different story that his family members were suffering from severe illness, which is not supported by any piece of paper. In those circumstances, failure to report to duty after 28.10.2010 is absolutely without any excuse or sufficient cause which is beyond his reasonable control and such conduct amounts to misconduct within Rule 22 of the BSF Rules.

15. The order of respondents recorded that the petitioner is guilty of misconduct liable for penalty as per Section 11(2) of the BSF Act read with Rule 177 of the BSF Rules in conformity to the Rule 22(2) of the BSF Rules. Section 11(2) of the BSF Act permits an officer not below the rank of Deputy Inspector General or any prescribed officer may dismiss or remove from the service any person under his command other than an officer or a subordinate officer of such rank or ranks as may be prescribed.

16. Thus, sub-Section (2) of Section 11 of the BSF Act conferred authorization on the Deputy Inspector General to take action. Any order of dismissal on the ground of absence without leave, inquire into absence without obtaining any kind of leave as contemplated under Sections 19 and 62 of the BSF Act and Rules 20 and 22 of BSF Rules is illegal, void and ultravires to the powers of authority. Section 11 of the BSF Act is an independent provision not depending upon the

award of the punishment by the security force.

17. Section 62 of the BSF Act deals with inquiry into absence without leave. It reads as follows,

(1) when any person subject to this Act has been absent from duty without due authority for a period of thirty days, a court of inquiry shall, as soon as practicable, be appointed by such authority and in such manner as may be prescribed, and such court shall, on oath or affirmation administered in the prescribed manner, inquire respecting the absence of the person, and the deficiency, if any, in the property of the Government entrusted to his care or in any arms, ammunition, equipment, instruments, clothing or necessities, and if satisfied of the fact of such absence without due authority or other sufficient cause, the court shall declare such absence and the period thereof and the said deficiency, if any, and the Commandant of the unit to which the person belongs shall make a record thereof in the prescribed manner.

(2) If the person declared absent does not afterwards surrender or is not apprehended, he shall for the purposes of this Act, be deemed to be a deserter.

18. Thus, a specific procedure is prescribed under Section 62 of the BSF Act, to inquire into unauthorized absence of a person of an Army and BSF.

19. Rule 22 of the BSF Rules prescribed the procedure to be followed for dismissal or removal of a person other than officers on account of misconduct by issuing show cause notice in the manner specified in sub-rule (2) intimating the proposed action of termination from the services of a person by the authority competent, affording an opportunity to him to reply. Provided that, this sub-rule shall not apply - (a) where the service is terminated on the ground of conduct which has led to his conviction by a criminal court or a Security Force Court; or (b) where the competent authority is satisfied that, for reasons to be recorded in writing, it is not expedient or reasonably practicable to give the person concerned an opportunity or showing cause. Sub-rule (2) of Rule 22 of the BSF Rules further says that When after considering the reports on the misconduct of the person concerned, the competent authority is satisfied that the trial of such a person is inexpedient or impracticable, but, is of the opinion that his further retention in the service is undesirable, it shall so inform him together with all reports adverse to him and he shall be called upon to submit, in writing, his

explanation and defence: Provided that the competent authority may withhold from disclosure any such report or portion thereof, if, in his opinion its disclosure is not in the public interest.

20. Thus the show cause notice is mandatory to remove the personnel of BSF and in strict adherence to the said Rule, the respondents issued show cause notice dated 26.03.2011 and receipt of the same was acknowledged by the petitioner.

21. Chapter VIII of Fundamental Rules deals with Dismissal, Removal and Suspension of the personnel of BSF or Military. It is clear from the order under challenge that the petitioner was removed from service only for the reason that he was overstayed after the expiry of the leave without sufficient cause. What is sufficient cause depends upon various attending circumstances.

22. The circumstances narrated by the petitioner in the affidavit are not supported by any evidence, except his undergoing treatment as in-patient and thereafter the doctor advised him to take bed for one month. No sufficient explanation was offered for his overstayal after 28.10.2010. Therefore, the cause shown by the petitioner is not a sufficient cause which means a cause beyond the reasonable control of the petitioner.

23. The Enquiry Officer, after following necessary procedure, recorded a finding that the petitioner did not explain sufficient cause for his overstayal after expiry of leave period. According to the Rules, if any person of BSF overstayal after expiry of leave period, without any sufficient cause, he is liable for penalty. The word 'sufficient cause' assumes importance and the enquiry officer if found that the overstayal of the petitioner or after expiry of leave period is without sufficient cause, recording a specific finding thereon, penalty of removal from service, prescribed under the rules, can be imposed. The report of the Enquiry Officer and the Appellate Authority is fully supported by reasoning for their conclusion that the petitioner overstayed after expiry of the leave sanctioned to him and even after re-examining his fitness,

he was certified vide certificate dated 28.10.2010 by the doctor, Shanthi Nursing Home to be absolutely fit. Hence, the findings recorded by both the respondents warrant no interference, since, I find no procedural irregularity in recording the findings.

24. The main grievance of the learned Assistant Solicitor General is that on account of overstayal of the petitioner after expiry of leave period, the respondents caused serious enquiries about the whereabouts of the petitioner and issued show cause notice dated 03.10.2010, but no purpose was served. Failure to report to duty even after he became absolutely fit and discharge duties, directly attracts misconduct. No doubt, there is force in the argument advanced by the learned Assistant Solicitor General, as the petitioner is found to be absolutely fit to discharge his duties, from 29.10.2010, but neither he discharged his duties nor even he cared to submit any reply to the show cause notices, which clearly shows callousness on the part of the petitioner to discharge his duties. No doubt such conduct amounts to misconduct, if the petitioner was not prevented by cause which is beyond his reasonable control. In fact, the material on record clearly establishes that he was not prevented by sufficient cause.

25. The general principle is that courts cannot interfere with the penalty imposed by the departmental authorities except to the extent of the procedure followed or proportionality of penalty.

26. Before going into the legality of the punishment, I would like to advert to scope of interference under Article 226 of the Constitution of India in such an administrative matter. Normally, the courts would not interfere while exercising the power of judicial review, in the penalty proceedings imposed by the departmental or administrative authorities, unless it is perverse.

27. In **NAGENDRANATH BORA AND ANOTHER VS. THE COMMISSIONER OF HILLS DIVISION AND APPEALS, ASSAM AND OTHERS**^[3], the Apex Court held that the nature of the error

which can be said to be an error apparent on the face of the record which would be one of the grounds to attract the supervisory jurisdiction of the High Court under Article [226](#) of the Constitution. The ancient writ of *certiorari* which now in England is known as the order of Certiorari, could be issued on very limited grounds. These grounds have been discussed by this Court in the cases of *Parry and Company Vs. Commercial Employee's Association, Madras* {(1952) ILLJ 769 SC}, *Veerappa Pillai Vs. Raman and Raman Limited and others* {[1952] 1 SCR 583}, *Ibrahim Aboobakar Vs. Custodian General of Evacuee Property* {[1952] 1 SCR 696} and *T.C. Basappa Vs. T. Nagappa* { [1955] 1 SCR 250} .

28. All these cases have been considered by the Apex Court in the case of **HARI VISHNU KAMATH VS. [SYED AHMAD ISHAQUE AND OTHERS](#)**^[4] and concluded that the Court while issuing writ of Certiorari acts in exercise of a supervisory and not appellate jurisdiction. One consequence of this is that the Court will not review findings of fact reached by the inferior Court or Tribunal, even if they be erroneous.

29. While considering the proposition referred above, whether the writ can be issued in the case of a decision which was erroneous in law, after considering the recent Authorities, the Apex Court held that the powers of judicial interference under Article [227](#) of the Constitution with orders of judicial or quasi-judicial nature, are not greater than the powers under Article [226](#) of the Constitution. Under Article [226](#), the power of interference may extend to quashing an impugned order on the ground of a mistake apparent on the face of the record. But under Article [227](#) of the Constitution, the power of interference is limited to see that the Tribunal functions within the limits of its authority.

30. In view of the law declared by the Apex Court in the

decisions referred supra, the scope of judicial interference in the penalty imposed in departmental enquiry is limited and if the Court finds that the findings are perverse or the punishment is shockingly disproportionate to the gravity of the misconduct, the Court can interfere with such proceedings.

31. In **OM KUMAR AND OTHERS VS. UNION OF INDIA**^[5], held as follows:

“24. We agree that the question of the quantum of punishment in disciplinary matters is primarily for the disciplinary authority and the jurisdiction of the High Courts under Article 226 of the Constitution or of the Administrative Tribunals is limited and is confined to the applicability of one or other of the well-known principles known as Wednesbury principles, (See Associated Provincial Picture Houses Vs. Wednesbury Corporation [(1948) 1 KB 223]). This Court had occasion to lay down the narrow scope of the jurisdiction in several cases. The applicability of the principle of proportionality in administrative law was considered exhaustively in Union of India Vs. Ganayutham [1997] 7 SCC 463] where the primary role of the administrator and the secondary role of the Courts in matters not involving fundamental freedoms, was explained.

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.....

28. By proportionality, we mean the question whether, while regulating exercise of fundamental rights, the appropriate or least-restrictive choice of measures has been made by the legislature or the administrator so as to achieve the object of the legislation or the purpose of the administrative order, as the case may be. Under the principle, the court will see that the legislature and the administrative authority maintain a proper balance between the adverse effects which the legislation or the administrative order may have on the rights, liberties or interests of persons keeping in mind the purpose which they were intended to serve. The legislature and the administrative authority are, however, given an area of discretion or a range of choices but as to whether the choice made infringes the rights excessively or not is for the court. That is what is meant by proportionality."

32. From the principles laid down in **OM KUMAR**'s case referred to supra, followed by the Division Bench of this Court in **TSRTC V/S. JANAKI RAMUDU**^[6], limited interference of this Court is permissible when the administrative authority did not exercise its discretion in penalty imposed. This Court also observed further that the sheer failure on the part of the departmental authorities, the employee

cannot be put to hardship.

33. Thus, in view of the Judgments referred to supra, the interference of this Court under Article 226 of Constitution of India is limited. Learned counsel for the petitioner while contending that when the overstay is not intentional, it does not amount to misconduct and he places reliance on the Judgment reported in **CH. PRABHAKAR RAO** wherein, this Court held as follows:

"23. In the present case, the circumstances for overstaying the leave submitted by the petitioner before the authorities are that during the relevant period some unforeseen calamities occurred in his family, such as, his son who was aged 4 years broke his leg in an accident, he and his mother fell sick and the situation made him to spent nearly six months in the hospitals. He also stated that due to the calamities occurred in his family, he became somewhat imbalanced and sent a representation dated 08.09.1997 to the Commandant -3rd respondent stating that he may be discharged from service. It does not appear that while passing orders, the Disciplinary Authority did take into consideration any of the circumstances pleaded by the petitioner. Basing on the evidence of the witnesses in the course of the enquiry, the Enquiry Officer held that overstaying of leave by the petitioner was beyond his control and also that he never overstayed the leave, he was sincere to his duty and his work and conduct are exemplary. If the Disciplinary Authority if wants to take a different stand is under obligation to assign convincing reasons, but, the Disciplinary Authority without assigning any convincing reasons, simply passed the order of dismissal in a casual manner. The respondents are not able to show that the medical record produced by the petitioner was considered before passing the order by the Enquiry Officer or the Disciplinary Authority. The order passed by the Disciplinary Authority is not in accordance with the evidence which was forthcoming before the Enquiry Officer in the course of the enquiry. This Court, therefore, considers that the enquiry was not conducted in accordance with the procedure prescribed by law and as a result of non-observation of principles of natural justice, the order of dismissal passed by the Disciplinary Authority which is confirmed by the Appellate Authority is liable to be set aside in this writ petition.

24. Then the question comes up for consideration is as to whether the petitioner is entitled for the remuneration which he would have earned had he been permitted to work. The Supreme Court in *Devendra Pratap Narain Rai Sharma v. State of Uttar Pradesh* and others, AIR 1962 SC 1334, held that when the order of suspension or dismissal is set aside by a Court of law, the effect would be that the employee never been lawfully suspended or dismissed and that he was wrongfully prevented from attending to his duties as a public servant, in such a contingency, it would not be open to the authority to deprive the public servant the remuneration which he would have earned had he been permitted to work. The Supreme Court held that when the dismissal order is set aside by a Court of law the employee

is entitled for the remuneration which he would have earned had he been permitted to work."

34. There is a variation in the facts of the above Judgment and facts in the present case. The authorities concerned recorded specific finding and followed necessary procedure prescribed under the Rules. Therefore, the principle laid down in the above judgment has no application.

35. So far as interference with the punishment is concerned i.e. dismissal, the Court can interfere with the punishment imposed against the petitioner for his misconduct. Normally, the Courts following the *Wednesbury* principles to find out whether the administrative action is reasonable or not, if the Court found that the act of the administrative authorities is irrational or unreasonable, the Court can interfere with the penalty also.

36. The main endeavour of the learned counsel for the petitioner is that the action of the respondents is irrational and the penalty of removal imposed against the petitioner is shockingly disproportionate, since the petitioner explained the reason for his overstayal after expiry of the leave granted to him and he met with an accident and his family members suffered from severe ill health, and they underwent treatment in a private hospital as inpatient and out patient for prolonged period, which prevented him to attend the duty after expiration of leave period. Thus the petitioner made out sufficient cause which prevented him to report duty after expiry of leave period. The respondents would have taken into consideration of cause shown by the petitioner while imposing penalty of removal, but disregarded the cause, having found insufficient. Therefore, the penalty of removal imposed by the respondents against the petitioner if found irrational and unreasonable, the Court can interfere by applying the principle of *Wednesbury* test.

37. In **INDIAN RAILWAY CONSTRUCTION COMPANY LIMITED VS. AJAY KUMAR**^[7], the Apex Court discussed about the

scope of *Wednesbury* principle and held as follows in Para 8:

“8. The famous case commonly known as "The *Wednesbury's* case" is treated as the landmark so far as laying down various basic principles relating to judicial review of administrative or statutory direction.

Before summarizing the substance of the principles laid down therein we shall refer to the passage from the judgment of Lord Greene in *Associated Provincial Picture Houses Vs. Wednesbury Corporation* ([1948] 1 KB 223) at page 229, which reads as follows:

".....It is true that discretion must be exercised reasonably. Now what does that mean? Lawyers familiar with the phraseology used in relation to exercise of statutory discretions often use the word 'unreasonable' in a rather comprehensive sense. It has frequently been used and is frequently used as a general description of the things that must not be done. For instance, person entrusted with discretion must, so to speak, direct himself properly in law. He must call his own attention to the matters which he is bound to consider. He must exclude from his consideration matters which are irrelevant to what he has to consider. If he does not obey those rules, he may truly be said, and often is said, to be acting 'unreasonably'. Similarly, there may be something so absurd that no sensible person could even dream that it lay within the powers the authority..... In another, it is taking into consideration extraneous matters. It is unreasonable that it might almost be described as being done in bad faith; and in fact, all these things run into one another."

38. The principles of judicial review of administrative action were further summarized in 1985 by Lord Diplock in *CCSU* case as illegality, procedural impropriety and irrationality. He said more grounds could in future become available, including the doctrine of proportionality which was a principle followed by certain other members of the European Economic Community; Lord Diplock observed in that a case as follows:

".....Judicial review has I think, developed to a stage today when, without reiterating any analysis of the steps by which the development has come about, one can conveniently classify under three heads the grounds on which administrative action is subject to control by judicial review. The first ground I would call 'illegality', the second 'irrationality' and the third 'procedural impropriety'. That is not to say that further development on a case-by-case basis may not in course of time add further grounds. I have in mind particularly the possible adoption in the future of the principle of 'proportionality' which is recognized in the administrative law of several of our fellow members of the European Economic Community."

Lord Diplock explained "irrationality" as follows:

By 'irrationality' I mean what can by now be succinctly referred to as Wednesbury unreasonableness." It applies to a decision which is so outrageous in its defiance of logic or of accepted moral standards that no sensible person who had applied his mind to the question to be decided could have arrived at it."

In other words, to characterize a decision of the administrator as "irrational" the Court has to hold, on material, that it is a decision "so outrageous" as to be in total defiance of logic or moral standards. Adoption of "proportionality" into administrative law was left for the future.

These principles have been noted in aforesaid terms in [Union of India and Another Vs. G. Ganayutham](#), ([1997] 7 SCC 463). In essence, the test is to see whether there is any infirmity in the decision making process and not in the decision itself.

Neither learned Single Judge nor the Division Bench has examined the question as to practicability or otherwise of holding the enquiry in the correct perspective. They have proceeded on the footing as if the order was mala fide; even when there was no specific allegation of mala fides and without any specific person against whom mala fides were alleged being impleaded in the proceedings. Except making a bald statement regarding alleged victimization and mala fides no specific details were given."

39. Thus, from the principles laid down by the Apex Court, in the decisions referred supra, the test to determine the administrative order

is reasonableness. The Apex Court in **CHAIRMAN-CUM-MANAGING DIRECTOR, COAL INDIA LIMITED AND ANOTHER VS. MUKUL KUMAR CHOUDHURI AND OTHERS**^[8], while extracting the principles laid down in **UNION OF INDIA VS. G. GANAYUTHAM**^[9], and other decisions, after reviewing other decisions, laid down the principles to be followed while exercising power of judicial review in administrative order and they are as follows:

“(1) To judge the validity of any administrative order or statutory discretion, normally the *Wednesbury* test is to be applied to find out if the decision was illegal or suffered from procedural improprieties or was one which no sensible decision-maker could, on the material before him and within the framework of the law, have arrived at. The court would consider whether relevant matters had not been taken into account or whether irrelevant matters had been taken into account or whether the action was not bona fide. The court would also consider whether the decision was absurd or perverse. The court would not however go into the correctness of the choice made by the administrator amongst the various alternatives open to him. Nor could the court substitute its decision to that of the administrator. This is the *Wednesbury* test.

(2) The court would not interfere with the administrator's decision unless it was illegal or suffered from procedural impropriety or was irrational -- in the sense that it was in outrageous defiance of logic or moral standards. The possibility of other tests, including proportionality being brought into English administrative law in future is not ruled out. These are the *CCSU* principles.

(3)(a) As per *Bugdaycay* 1987 AC 514, Brind and Smith as long as the Convention is not incorporated into English law, the English courts merely exercise a secondary judgment to find out if the decision-maker could have, on the material before him, arrived at the *primary judgment* in the manner he has done.

(3)(b) If the Convention is incorporated in England making available the principle of proportionality, then the English courts will render *primary judgment* on the validity of the administrative action and find out if the restriction is disproportionate or excessive or is not based upon a fair balancing of the fundamental freedom and the need for the restriction thereupon.

(4)(a) The position in our country, in administrative law, where no fundamental freedoms as aforesaid are involved, is that the courts/tribunals will only play a secondary role while the primary judgment as to reasonableness will remain with the executive or administrative authority. The secondary judgment of the court is to be based on Wednesbury and CCSU principles as stated by Lord Greene and Lord Diplock respectively to find if the executive or administrative authority has reasonably arrived at his decision as the primary authority.

(4)(b) Whether in the case of administrative or executive action affecting fundamental freedoms, the courts in our country will apply the principle of "proportionality" and assume a primary role, is *left open*, to be decided in an appropriate case where such action is alleged to offend fundamental freedoms. It will be then necessary to decide whether the courts will have a primary role only if the freedoms under Articles [19](#), [21](#) etc., are involved and not for Article [14](#)."

40. In view of the principles laid down by the Apex Court in **MUKUL KUMAR CHOUDHURI** referred to above, the Court has to decide whether the order passed by the administrator is irrational and when there is no finding that the decision is one which no sensible person who weighed the pros and cons could have arrived at nor is there a finding, based on material, that the punishment is in "outrageous" defiance of logic. Neither Wednesbury nor CCSU tests are satisfied.

41. The petitioner being a member of BSF is expected to maintain high degree of discipline and punctuality, instead he avoided to report duty, inventing conveniently, story of illness of family member which is not proved. When statute prescribed penalty of removal/dismissal, the disciplinary authority have no discretion to impose penalty other than one prescribed under the statute.

42. In the facts of the present case, the petitioner went to his native place after obtaining Casual Leave from 12.08.2010 to 31.08.2010 as per guidelines of BSF, he is supposed to report to duty immediately after expiry of leave period, but he met with an accident

and his family members suffered from severe ill health and they underwent treatment in a private hospital, and thereby he could not report to duty and such cause is beyond the control of the petitioner, the said fact is not supported by any material, hence cause shown by the petitioner cannot be said to be reasonable or sufficient cause.

43. A similar case came up before the Apex Court reported in **UNION OF INDIA AND OTHERS VS. GIRIRAJ SHARMA** [\[10\]](#)

wherein the Apex Court in second paragraph of the Judgment held that when the employee had explained the circumstances in which it was inevitable for him to continue on leave as he was forced to do so on account of unexpected circumstances, over stayed after expiry of leave period does not warrant said harsh punishment since it was not his intention to willfully flout the order, therefore set aside the penalty of dismissal. The Apex Court, while dealing with the case of overstayal, passed the said Order.

44. But in the present case, the petitioner had overstayed for a prolonged period after expiry of leave period, even though, the doctor who treated him issued the medical certificate dated 28.10.2010 certifying that the petitioner was totally recovered and fit to resume duty from 29.10.2010 but the petitioner contended that his family members suffered from severe ill health, but he did not prove the same. Therefore, prevention of the petitioner from reporting duty after expiry of leave period is not beyond his reasonable control. Hence, the principle laid down by the Apex Court in Giriraj Sharma has no application.

45. In the present facts of the case, BSF rules provided, dismissal from service as penalty for such serious misconduct for absconding from duty. According to the Judgment of this Court in **K.C. NARAYANA vs. MANAGING DIRECTOR, APSRTC and Ors** [\[11\]](#) and the Judgment of the Apex Court in **STATE BANK OF INDIA vs.**

T.J. PAUL. ^[12], the authorities are bound to impose penalty prescribed for such misconduct and not entitled to impose any penalty, other than the one prescribed under the Rules. Under the BSF Rules, the punishment prescribed under Rule 22(2) read with Rule 177 is dismissal. Thus, in view of law declared by this Court and the Apex Court, the enquiry officer in the proceedings dated 30.05.2011 imposed punishment of dismissal from service with effect from 30.05.2011 while treating the period of absence from 01.09.2010 to 30.05.2011 as “Dies-Non”. The order of the Commandant, 21st Battalion, BSF, was challenged by way of an appeal before the Inspector General, BSF (Special Operations), Bangaluru and by their order dated 22.11.2012, confirmed the penalty of dismissal imposed by the Commandant. Thus, both the authorities imposed penalty and dismissal which is prescribed under the BSF Rules. Therefore, this Court cannot interfere with such findings of the respondents. Hence, I find no ground to interfere with the penalty imposed by the respondents.

46. Accordingly, the writ petition is dismissed confirming the order passed by the respondents. No costs. Consequently, Miscellaneous petitions, if any, pending in this writ petition shall stand closed.

M. SATYANARAYANA MURTHY, J

01.07.2016

BV/SP

^[1] 2012 (1) ALD 57

^[2] 2012 Law Suit (SC) 110

^[3] AIR 1958 SC 398

^[4] 1955 1 SCR 1104

^[5] AIR 1959 SC 725

[\[6\]](#) Manu/AP/0073/2016

[\[7\]](#) JT 2003 (2) SC 295

[\[8\]](#) AIR 2010 SC 75

[\[9\]](#) 1997 (7) SCC 463

[\[10\]](#) (1994) 3 SCC page 755

[\[11\]](#) 2007 (5) ALD 416

[\[12\]](#) AIR 1999 SC 1994