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

+ **W.P.(C) 12665/2005**

Ex. CONST. GD RAJBIR SINGH

..... Petitioner

Through: Ms. Rekha Palli, Sr. Advocate with
Ms. Garima Sachdeva and Ms. Shruti Munjal,
Advocates with petitioner in person
versus

UNION OF INDIA & ORS.

..... Respondents

Through: Mr. Vivek Goyal, CGSC with
Mr. Prabhakar Srivastava, Advocate.

CORAM:

HON'BLE MS. JUSTICE HIMA KOHLI

HON'BLE MR. JUSTICE SUNIL GAUR

ORDER

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09.05.2016

1. The petitioner is aggrieved by the order dated 19.8.2003, passed by the Disciplinary Authority dismissing him from service having been found guilty of remaining absent without leave for a period of four years three months and six days, i.e., between 10.9.1998, the date when he was relieved by the CBI on repatriation, to 16.12.2002, the date when he had reported to the Directorate General, ITBP Police Force, and the order dated 17.1.2004 passed by the Appellate Authority, dismissing his appeal.

2. The undisputed facts of the case are that the petitioner was enrolled with the ITBP as a Constable (GD) on 22.9.1987 and was sent on deputation to the CBI on 24.1.1989. He was repatriated from the CBI on 16.4.1998. Aggrieved by his repatriation, the petitioner had filed OA No.958/1998 before the Central Administrative Tribunal (CAT). The said petition was allowed

and based on the order dated 29.7.1998 issued by the CAT, the petitioner had rejoined CBI on 11.8.1998. However, on 10.9.1998, the CBI had again relieved the petitioner for him to report back to his parent cadre. Aggrieved by the relieving order dated 10.9.1998, the petitioner had approached the Supreme Court directly by filing WP(C)No.22/1999, which was dismissed, vide order dated 22.1.2002. Thereafter, the petitioner had filed an application on 20.2.2002, for seeking recall of the dismissal order dated 22.1.2002, which was also rejected by the Supreme Court on 3.5.2002.

3. It is the petitioner's stand that in the interregnum, he had fallen seriously ill and was suffering from hepatitis and when he had fully recovered on 15.12.2002, he resumed his normal duty by presenting himself before the Directorate General, ITBP on 16.12.2002. On reporting for duty, the petitioner was posted to 15th BN, ITBP on 17.1.2013. Thereafter, he was issued a charge sheet under Section 21(a) and 43 of the ITBP Force Act, 1992 (in short '**the Act**') on account of remaining absent without leave and for violating good order and discipline on the ground that after being relieved by the CBI on 10.9.1998, he had reported to the Directorate General, ITBP only on 16.12.2002, after remaining absent without leave for a period spanning over four years, three months and six days.

4. In the Summary Force Court held against the petitioner, he had pleaded guilty and vide order dated 19.8.2003, was awarded a sentence of dismissal

from service. Aggrieved by his dismissal order, the petitioner had preferred an appeal dated 11.9.2003, which had remained undecided, thus compelling him to file a writ petition in the High Court. Vide order dated 19.3.2004, passed in WP(C)No.3939/2004, directions were issued to the respondents to decide the petitioner's pending appeal. Finally, an order dated 17.1.2004 was passed by the Appellate Authority upholding the dismissal order, which the petitioner claims was received by him on 14.5.2004. Aggrieved by the dismissal order, the petitioner had filed the present petition in the year 2005.

5. Ms. Palli, learned Senior Advocate appearing for the petitioner states at the outset that the petitioner does not propose to assail the legality of the impugned orders on merits, but contends that the punishment of dismissal from service imposed on him is absolutely disproportionate to the offence in respect whereof he had pleaded guilty. She submits that on 10.9.1998, the date when the petitioner was relieved by the CBI on repatriation, he had completed almost eleven years of service, (which is short by a week or ten days) and after completing ten years of service, the respondents could have imposed a lesser penalty of compulsory retirement on the petitioner taking into consideration his service records which are unblemished. She states, on instructions, that the petitioner had received approximately one hundred cash awards during his service of almost eleven years, which was a factor that was not taken into consideration by the respondents at the time of inflicting the

punishment of dismissal from service on him. In support of her submission that a lesser punishment could have been imposed on the petitioner, which would have been commensurate with the offence, reliance is placed on the following decisions :-

- i) Chairman-cum-Managing Director, Coal India Ltd. & Anr. vs. Mukul Kumar Choudhury & Ors., (2009) 13 (ADDL.) SCR 487
- ii) State of Uttar Pradesh & Ors. vs. Ram Daras Yadav, (2010) 2 SCC 236
- iii) Sunil Kumar vs. UOI & Ors., passed in WP(C)No.2610/2010 on 7.3.2011.
- iv) Gayatri Sarkar vs. UOI & Ors. passed in WP(C)No.3063/2014 on 22.1.2016

6. Ms. Palli, learned Senior Advocate also draws our attention to Section 51 of the ITBP Act, which prescribes the punishment awardable by Force Court, and submits that compulsory retirement from service is a punishment, which is lesser than dismissal or removal from service and would have met the ends of justice in this case.

7. In the course of arguments heard on 29.2.2016, it had been inquired from Mr. Vivek Goyal, learned counsel for the respondents as to whether the respondent/ITBP had initiated any steps against the petitioner after they were informed by the CBI that they had relieved him on 10.9.1998, till 16.12.2002, when the petitioner had on his own reported at the office of the Directorate

General, ITBP and was posted to the 15th Battalion, ITBP on 17.1.2003. Learned counsel had sought time to obtain necessary instructions from the department on this aspect and pursuant thereto, an affidavit dated 18.4.2016 has been filed by the respondents stating *inter alia* that they had written a letter dated 11.3.2016 to the CBI informing them that the correspondence file of the petitioner is not available with the Directorate and the CBI was requested to provide the relevant information. However, vide letter dated 17.3.2016, the CBI had stated that the petitioner's case is over seventeen years old and no records relating to him are available with them. In support of his argument that the punishment inflicted on the petitioner is commensurate with the gravity of the offence, learned counsel for the respondents relies on the following decisions:-

- (i) State of UP & Ors. vs. Ashok Kumar Singh & Anr., (1996) 1 SCC 302
- (ii) Maan Singh vs. UOI & Ors., 2003 II AD (SC) 453
- (iii) UOI & Ors. vs. Ghulam Mohd. Bhat, (2005) 13 SCC 228

8. We have heard the arguments advanced by learned counsels for the parties and considered the submissions made by them in the light of the decisions cited. We may note that unlike the facts in the case of Ashok Kumar Singh (supra), relied on by the counsel for the respondents, wherein the delinquent officer had remained absent from duty without leave on several

occasions, in the present case, this was the first occasion when the petitioner had committed such an offence. Further, the explanation offered for remaining absent in the case in hand is that the petitioner had become seriously sick between 16.4.2002 to 15.12.2002 due to which, he could not report to duty. A copy of the medical certificate to evidence the petitioner's sickness has been enclosed with the writ petition. The additional explanation offered by the petitioner for his absence is that due to the mistaken advice received from his previous counsel, he did not join duty under the impression that till the writ petition filed by him and pending before the Supreme Court is decided, he need not join duty. The petitioner has also taken a stand that in all this duration, he was never issued any notice to show cause or warning by the respondents, calling upon him to join duty.

9. We did make an endeavour to call upon the respondents to inform us as to whether any action had been taken by the department at its end against the petitioner when he had failed to report for duty after being repatriated by the CBI on 10.9.1998. However, learned counsel for the respondents has not been able to throw any light on this aspect and has explained that the records being old, are no longer available with the department.

10. We are of the opinion that the mitigating circumstances in this case as noted above, ought to have weighed with the respondents but were not considered while deciding the punishment inflicted on the petitioner, unlike

the fact position of the decisions relied on by counsel for the respondents. In the given facts and circumstances, ends of justice would be met if the impugned order dated 19.8.2003 passed by the Disciplinary Authority and the order dated 17.1.2004 passed by the Appellate Authority are set aside, limited to the punishment inflicted on the petitioner and the matter is remanded back to the Appellate Authority for reconsideration after taking into account the gravity of the offence, the petitioner's past service records and the meritorious certificates, if any, awarded to him during his service. Thereafter, fresh orders shall be passed by the respondents inflicting an appropriate penalty on him, which would be lesser than dismissal from service as imposed earlier. Needful shall be done within eight weeks from today, under written intimation to the petitioner.

11. If the petitioner is aggrieved by the order that may be passed, he shall be entitled to seek his remedies in accordance with law.

12. The writ petition is disposed of.

HIMA KOHLI, J

SUNIL GAUR, J

MAY 09, 2016

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