

IN THE HIGH COURT OF JUDICATURE AT MADRAS

DATED: 03.01.2017

CORAM:

THE HON'BLE MR.JUSTICE S.MANIKUMAR
AND
THE HON'BLE MR.JUSTICE M.GOVINDARAJ

Writ Appeal No.278 of 2010

K.Sampath Kumar ...Appellant/Petitioner
vs.

1. Union of India
Rep. by its Secretary to Government
Ministry of Home Affairs
New Delhi
 2. The Director General of Police
Central Reserve Police Force
C.G.O. Complex
Lodhi Road, New Delhi
 3. The Deputy Inspector General of Police
GC-II, CRPF,
Foy Sagar Road, Ajmer, Rajasthan
 4. The Commandant
61 Bn CRPF
Jammu and Kashmir
- ...Respondents/Respondents

Writ Appeal filed under clause 15 of the Letters Patent against the order of the writ court dated 21.12.2009 made in W.P.No.31023 of 2007. Writ Petition presented under Article 226 of the Constitution of India, to issue a Writ of certiorarified mandamus to call for the records relating to the order No. P.VIII-04/06-EC-III (61) order 146/2007 dated 14.07.2007 passed by the 3rd respondent and to quash the same and to direct the respondents to take the petitioner into the strength of CRPF as constable with all monetary benefits.

For Appellant : Mr.I.Jesu

For Respondents: Mr.N.Siva Bharathi,
Central Govt. Standing Counsel
for R1 to R4

JUDGMENT
(delivered by S.MANIKUMAR, J)

Challenge in this writ appeal is to an order dated 21.12.2009 made in W.P.No.31023 of 2007, by which, the writ court, declined to quash the order No.P.VIII-04/06-EC-III(61) and order No.146/2007 dated 02.06.2001 passed by the Deputy Inspector General of Police, GC-II, CRPF, Foy Sagar Road, Ajmer, Rajasthan, namely the third respondent herein, and consequently, refused to issue any directions to reinstate the appellant as Constable with all monetary benefits.

2. Facts leading to the writ appeal are that on 28.08.1988 the appellant herein was enlisted as Constable in Central Reserve Police Force. While serving in 61st Battalion, he was sanctioned 15 days casual leave from 14.6.2005 to 4.7.2005. After expiry of leave, he did not join duty. But he sent a telegram to the Officer Commanding, A/61 Battalion, CRPF, stating that he was not well and requested to extend his leave for one month from 05.07.2005 to 03.08.2005. The Officer Commanding A/61 Battalion informed the petitioner that his leave was not extended as he did not submit any document in support of his illness and directed him to report for duty or to submit documents to prove his illness.

3. The Officer Commanding, A/61 Battalion, received a registered letter in which the appellant, has sent a medical certificate for extension of 30 days leave. The said officer received another letter from the appellant for extension of 60 days leave with effect from 04.08.2005 enclosing another Medical Certificate issued by Dr.V.M.S.Prabhuraj, stating that his absence from duty for 60 days from 04.08.2005 to 02.10.2005 was absolutely necessary for restoration of the appellant. Even after expiry of 90 days, the appellant did not join duty and continued to remain absent from duty without sanction of leave from the Competent Authority. Hence Commandant 61 Battalion initiated disciplinary action against the petitioner vide memorandum dated 14.02.2006.

4. It is the case of the respondents that during the enquiry, the appellant, neither reported before the Enquiry Officer nor sent any document to defend his case. Therefore, the charges framed against him were held to be proved and that the appellant was found guilty of offence under Section 11(1) of the Central Reserve Police Act, 1949 read with Rule 27(A) of Central Reserve Police Rules, 1955. Vide order dated 15.06.2006, he was dismissed from service.

5. Being aggrieved, the appellant herein, preferred a statutory appeal before the Appellate Authority/Deputy Inspector General of Police, GC-II, CRPF, Foy Sagar Road, Ajmer, Rajasthan, to review his case. Vide order dated 18.09.2006, the Appellate Authority, set aside the order of dismissal and ordered for reinstatement. A further direction was given to the Commandant 61 Battalion to conduct a de novo enquiry by serving fresh memorandum of charges and to proceed in accordance with law.

6. Material on record further discloses that appellant joined duty on 09.10.2006, as per the order of reinstatement and he was served with fresh memorandum for de novo enquiry. During the enquiry, the appellant applied for 15 days Earned Leave so that he could produce documents in support of his defence 15 days leave was sanctioned from 14.12.2006 to 28.12.2006 by the Officer Commanding. But the appellant did not report for duty after 15 days leave nor produced any document in support of the defence. The Enquiry Officer has sent two letters dated 17.03.2007 and 02.04.2007 to the appellant directing him to report for duty, but he failed to do so. Therefore, the Enquiry Officer, completed his enquiry and submitted his report to competent authority. According to the respondents, though sufficient opportunity was given to the appellant in the de novo enquiry, the appellant failed to report as well as submit necessary documents in support of his defence that he has not committed any misconduct/over stayal, as alleged. After conclusion of the de novo enquiry, once again, an order of dismissal dated 14.07.2007 has been passed.

7. The said order is assailed on the grounds that punishment of dismissal imposed on the appellant is disproportionate to the alleged misconduct and when Section 11(1) of Central Reserve Police Act, 1949 speaks only about the minor penalty, dismissal cannot be ordered. Contention has also been made that the Enquiry Officer has failed to accept the Medical Certificate produced by the appellant. There was no application of mind. Unblemished past record of 18 years has not been considered before imposing penalty. Adverting to the rival contentions, and considering the decisions of the Hon'ble Supreme Court in Union of India and others vs. Datta Linga Toshatwad reported in 2005 (13) SCC 709, Union of India v. Giriraj Sharma reported in 1994 Supp (3) SCC 755, State of Meghalaya and others vs. Mecken Sing N.Mark reported in 2008 (7) SCC 580 and Chairman & Managing Director, V.S.P and others vs. Goparaju Sri Prabhakara Hari Babu reported in 2008 (5) SCC 569, at paragraph Nos.5 to 7, in W.P.No.31023 of 2007, dated 21.12.2009, the writ court ordered as follows:

"5. The Supreme Court in Union of India and others vs. Datta Linga Toshatwad reported in 2005 (13) SCC 709 held in paragraphs 6 to 8 as follows:

"6. One cannot ignore the large number of cases which come to this court of members of uniformed forces remaining absent from duty without any reasonable explanation. Whenever action is taken, the usual plea taken is of having been ill or some such false pretext, and even fake or false medical certificates are produced in support of such a plea. We would not have taken a serious view of the matter had it not been a case of a constable belonging to CRPF remaining absent for an indefinite period. Even if we assume that the respondent was suffering from depression and was being treated as an outdoor patient, the medical certificates produced by him show that he was restored to normalcy on 4-4-1998 yet the respondent did not choose to report for duty. The order of dismissal was passed seven months later i.e. on 2.11.1998. This itself discloses the hollowness of the claim of the respondent regarding mental depression and imbalance which he claims to have suffered.

7. Reliance was placed on a judgment of this court in Union of India v. Giriraj Sharma (1994 Supp (3) SCC 755), which was also a case of a constable employed in CRPF. In that case the respondent had been punished by an order of dismissal for overstaying on leave by 12 days. The High Court took the view that for such misconduct the punishment of dismissal from service was not justified and was also harsh. This court, while agreeing with the High Court, dismissed the appeal by holding that in the facts of the case, instead of a major penalty, a minor penalty would have been sufficient.

8. The present case is not a case of a constable merely overstaying his leave by 12 days. The respondent took leave from 16.6.1997 and never reported for duty thereafter. Instead he filed a writ petition before the High Court in which the impugned order has been passed. Members of the uniformed forces cannot absent themselves on frivolous pleas, having regard to the nature

of the duties enjoined on these forces. Such indiscipline, if it goes unpunished, will greatly affect the discipline of the forces. In such forces desertion is a serious matter. Cases of this nature, in whatever manner described, are cases of desertion particularly when there is apprehension of the member of the force being called upon to perform onerous duties in difficult terrains of an order of deputation which he finds inconvenient, is passed. We cannot take such matters lightly, particularly when it relates to uniformed forces of this country. A member of a uniformed force who overstays his leave by a few days must be able to give a satisfactory explanation. However, a member of the force who goes on leave and never reports for duties thereafter, cannot be said to be one merely overstaying his leave. He must be treated as a deserter. He appears on the scene for the first time when he files a writ petition before the High Court, rather than reporting to his Commanding Officer. We are satisfied that in cases of this nature, dismissal from the force is a justified disciplinary action and cannot be described as disproportionate to the misconduct alleged."

6. The Supreme Court in *State of Meghalaya and others vs. Macken Singh N. Marak* reported in 2008 (7) SCC 580 has held that punishment unless shockingly disproportionate cannot be interfered with and the judicial review conferred on the court is very limited and restricted to exceptional cases.

7. The Supreme Court in *Chairman & Managing Director, V.S.P. and others Vs. Goparaju Sri Prabhakara Hari Babu* reported in 2008 (5) SCC 569 held that the court has got only a limited jurisdiction to go into the validity of the proportionality and a well reasoned order of the departmental authority cannot be interfered with on the basis of sympathy and sentiments. Once procedural formalities are complied with by the authorities, the courts should ordinarily not disturb the penalty."

8. Mr.I.Jesu, learned counsel for the appellant, reiterated the same grounds, and further added that the appellant was put to hardship and inconvenience, by conducting the enquiry at Assam, while his residence was at Vellore. Earlier, in 2006, when disciplinary proceedings, initiated vide Memorandum dated 14.06.2006 culminated into a punishment of dismissal on 15.06.2006, the Deputy Inspector of Police, GC-II, CRPF, Ajmer/the Appellate Authority, vide order dated 18.09.2006, has set aside the order of dismissal, directed reinstatement and ordered a de novo enquiry. Accordingly, the petitioner joined duty on 09.10.2006. He has been issued with a fresh memo. During the enquiry, he had applied for 15 days earned leave and that the same was sanctioned from 14.12.2006 to 28.12.2006. After the expiry of 15 days leave, he did not report for duty nor produced any documents. Despite two letters dated 17.03.2007 and 02.04.2007 of the Enquiry Officer, the appellant failed to appear before the Enquiry Officer. Therefore, on the basis of the materials, and records, the Enquiry Officer, has completed the enquiry and submitted a report.

9. Material on record further discloses that the Enquiry Report sent to him by the Commanding Officer vide letter dated 03.05.2007 has been received by the appellant on 14.05.2007. Despite several opportunities given to the appellant, he has failed to avail the same. By accepting the finding of the Enquiry Officer, once again he has been dismissed from service. Though Mr.I.Jesus, learned counsel for the appellant submitted that an order of dismissal cannot be imposed in exercise of the powers under Section 11 of the Central Reserve Police Force Act, 1949, which deals with imposition of punishments, Rule 27 of the Central Reserve Police Rules, 1955, empowers the authority, to impose a punishment of dismissal for misconduct of overstayal or unauthorised absence.

10. It is well settled that merely because a wrong provision is mentioned in the order, that would not render the same as invalid. Reference can be made to few decisions:

i) In M.S.Mariappa Nadar vs. The State of Madras represented by the Commercial Tax Officer, North, Madras, reported in 73 Law Weekly 183, a Division Bench of this Court held that it should be taken as well settled that even a wrong reference to a statutory provision, may not invalidate an order passed by an authority, if that authority had the requisite power to pass that order, that is the jurisdiction in the exercise of which, he could pass such an order.

ii) In State of Karnataka vs. Krishnaji Srinivasa Kulkarni and others reported in 1994(2) SCC 558, the Supreme Court held

that quoting of wrong provision does not take away the jurisdiction of authorities/Court, under the Act.

iii) In N.Mani V. Sangeetha Theatres and Others, reported in (2004) 12 SCC 278, the Supreme Court at Paragraph 9, held as follows:

"9. It is well settled that if an authority has a power under the law merely because while exercising that power the source of power is not specifically referred to or a reference is made to a wrong provision of law, that by itself does not vitiate the exercise of power so long as the power does exist and can be traced to a source available in law."

iv) In Ram Sunder Ram V. Union of India reported in 2007 (13) SCC 255:2007 (9) SCALE 197, it was held:

"....It appears that the competent authority has wrongly quoted Section 20 in the order of discharge whereas, in fact, the order of discharge has to be read having been passed under Section 22 of the Army Act. It is well settled that if an authority has a power under the law merely because while exercising that power the source of power is not specifically referred to or a reference is made to a wrong provision of law, that by itself does not vitiate the exercise of power so long as the power does exist and can be traced to a source available in law (see N.Mani V.Sangeetha Theatre and Ors. (2004) 12 SCC 278). Thus, quoting of wrong provision of Section 20 in the order of discharge of the appellant by the competent authority does not take away the jurisdiction of the authority under Section 22 of the Army Act. Therefore, the order of discharge of the appellant from the army service cannot be vitiated on this sole ground as contended by the Learned Counsel for the appellant."

v) The principles of law laid down in the abovesaid decisions have been affirmed in the recent decision of the Supreme Court in P.K.Palanisamy V. N.Arumugham reported in 2009 (9) SCC 173.

11. In the light of the above discussion and the decisions stated supra, we find no manifest illegality in the order of the writ court warranting interference.

In the result, the writ appeal is dismissed. However, there shall be no order as to cost.

Sd/-
Assistant Registrar

//True Copy//

Sub Assistant Registrar

asr
To

1. The Secretary to Government,
Government of India,
Ministry of Home Affairs,
New Delhi.
2. The Director General of Police,
Central Reserve Police Force,
C.G.O. Complex,
Lodhi Road, New Delhi.
3. The Deputy Inspector General of Police,
GC-II, CRPF,
Foy Sagar Road, Ajmer, Rajasthan.
4. The Commandent,
61 Bn CRPF,
Jammu and Kashmir.

+1cc to Mr.Jesu, Advocate, S.R.No.560

+1cc to Mr.Sivabharathi, Advocate, S.R.No.587

TM(CO)
RS (24/01/2017)

W.A. No.278 of 2010

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