

THE HON'BLE SRI JUSTICE M.S.K. JAI SWAL

WRIT PETITION No.20597 of 2008

ORDER:

This writ petition is filed against the award of the 1st respondent- the Labour Court-III, A.P.Hyderabad, dated 04.04.2008 in I.D.No.70 of 2006, by and under which, the industrial dispute filed by the petitioner was dismissed.

2. Heard the learned counsel for the petitioner as well as the learned Standing Counsel for the 2nd respondent Corporation.

3. The petitioner is conductor of the 2nd respondent Corporation and he was appointed in 1979. While he was discharging duties as such in the bus bearing registration No.APZ-5029, on the route Kodad to Khammam, on 19.01.2002, a check was conducted and he was issued a charge memo for certain ticket irregularities, alleging that he issued used tickets to 3 passengers, travelling from Khammam to Kodad, which are already accounted and committed misconduct. The petitioner has submitted his explanation to the charges on 16.02.2002, but without considering his explanation, the corporation initiated enquiry proceedings and the Enquiry Officer, without appreciating the evidence on record, submitted his report on 29.04.2002. Basing on the enquiry report, the respondent Corporation issued a show cause notice, dated 22.05.2002, for which the petitioner submitted his explanation. The 2nd respondent Corporation, without considering his explanation, basing on the report of the enquiry officer, erroneously removed him from service. The appeal filed by the petitioner was also rejected vide proceedings, dated 24.02.2004. Questioning the same, the petitioner preferred I.D.No.70/2006 and the same was also

dismissed by award dated 04.04.2008. Aggrieved by the same, the petitioner filed the present writ petition.

4. The 2nd respondent Corporation filed counter denying the allegations of the writ petitioner. It is stated that the petitioner is bereft of any clean service record. He was imposed number of punishments in his service. He was censured 9 times, increments deferred 22 times, pay reduced twice, suspended 4 times, removed from service 4 times, and was reinstated once by award and twice on an appeal and fourth time, the removal order was confirmed in I.D.No.70/2006, by award dated 04.04.2008, against which, the present writ petition is filed. It is stated that in the enquiry, the charges against the petitioner were proved, hence the removal order was passed. The appellate authority as well as the Labour Court, having considered the service record of the petitioner, did not consider the case of the petitioner. Therefore, the respondent corporation prayed for dismissal of the writ petition.

5. Learned Counsel appearing for the petitioner submits that the petitioner has joined as Conductor in 1979 and has been removed from service on 19.06.2002 on the charge that he re-issued three tickets worth Rs.10/- and also failed to observe the rule issue & start. It is further submitted that in the year 2010, the petitioner could have retired on superannuation and got the terminal benefits. Learned Counsel submits that the punishment of removal for the irregularity is too harsh, hence the same to be modified.

6. Learned Counsel appearing for the Corporation submits that the ticket irregularities are serious violations and there are catena of authorities which lay down that no indulgence can be shown to a Conductor who indulges in such an activity. The Industrial Tribunal has

considered all the aspects in proper perspective and also relied upon the decision of the Supreme Court for holding that the Conductor who allows the passengers to travel in the bus without issuing tickets cannot be directed to be continued in service by the Court when the management removes him from service. Learned Counsel for the Corporation further refers to the past conduct of the petitioner which clearly disentitles him from the benefit of any sympathetic consideration.

7. It is on record that the petitioner in the past has been indulging in similar activities for which he has been mulcted with punishment. It is said that he was censured nine times, increments were deferred 22 times, pay was reduced on seven occasions, suspended from service for four times, removed from service four times including the present removal and was re-instated once in pursuance to the Award and twice on an appeal and this is the fourth time removal which has been confirmed by the Industrial Tribunal.

8. Learned Counsel appearing for the Corporation relies upon a decision of the Supreme Court reported in CHAIRMAN CUM MANAGING DIRECTOR COAL INDIA LIMITED v. MUKUL KUMAR CHOUDHURI¹ wherein reference is made to the previous decision of the Supreme Court in State of Andhra Pradesh and others v. Chitra Venkata Rao (1975) 2 SCC 557). Paragraph Nos.21, 23 and 24 of the Judgment in the case of Chitra Venkat Rao's case has been extracted which reads as under:-

“In the case of State of Andhra Pradesh and Ors. v. Chitra Venkata Rao, this Court considered the scope of judicial review in dealing with departmental enquiries and held:

¹ (2009) 15 SCC 620

21. The scope of Article 226 in dealing with departmental inquiries has come up before this Court. Two propositions were laid down by this Court in *State of A.P. v. S. Sree Rama Rao* MANU/SC/0222/1963 : AIR 1963 SC 1723. First, there is no warrant for the view that in considering whether a public officer is guilty of misconduct charged against him, the rule followed in criminal trials that an offence is not established unless proved by evidence beyond reasonable doubt to the satisfaction of the Court must be applied. If that rule be not applied by a domestic tribunal of inquiry the High Court in a petition under Article 226 of the Constitution is not competent to declare the order of the authorities holding a departmental enquiry invalid. The High Court is not a court of appeal under Article 226 over the decision of the authorities holding a departmental enquiry against a public servant. The Court is concerned to determine whether the enquiry is held by an authority competent in that behalf and according to the procedure prescribed in that behalf, and whether the rules of natural justice are not violated. Second, where there is some evidence which the authority entrusted with the duty to hold the enquiry has accepted and which evidence may reasonably support the conclusion that the delinquent officer is guilty of the charge, it is not the function of the High Court to review the evidence and to arrive at an independent finding on the evidence. The High Court may interfere where the departmental authorities have held the proceedings against the delinquent in a manner inconsistent with the rules of natural justice or in violation of the statutory rules prescribing the mode of enquiry or where the authorities have disabled themselves from reaching a fair decision by some considerations extraneous to the evidence and the merits of the case or by allowing themselves to be influenced by irrelevant considerations or where the conclusion on the very face of it is so wholly arbitrary and capricious that no reasonable person could ever have arrived at that conclusion. The departmental authorities are, if the enquiry is otherwise

properly held, the sole judges of facts and if there is some legal evidence on which their findings can be based, the adequacy or reliability of that evidence is not a matter which can be permitted to be canvassed before the High Court in a proceeding for a writ under Article 226.

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23. The jurisdiction to issue a writ of certiorari under Article 226 is a supervisory jurisdiction. The Court exercises it not as an appellate court. The findings of fact reached by an inferior court or tribunal as a result of the appreciation of evidence are not reopened or questioned in writ proceedings. An error of law which is apparent on the face of the record can be corrected by a writ, but not an error of fact, however grave it may appear to be. In regard to a finding of fact recorded by a tribunal, a writ can be issued if it is shown that in recording the said finding, the tribunal had erroneously refused to admit admissible and material evidence, or had erroneously admitted inadmissible evidence which has influenced the impugned finding. Again if a finding of fact is based on no evidence, that would be regarded as an error of law which can be corrected by a writ of certiorari. A finding of fact recorded by the Tribunal cannot be challenged on the ground that the relevant and material evidence adduced before the Tribunal is insufficient or inadequate to sustain a finding. The adequacy or sufficiency of evidence led on a point and the inference of fact to be drawn from the said finding are within the exclusive jurisdiction of the Tribunal. See *Syed Yakoob v. K.S. Radhakrishnan* MANU/SC/0184/1963 : AIR 1964 SC 477.

24. The High Court in the present case assessed the entire evidence and came to its own conclusion. The High Court was not justified to do so. Apart from the aspect that the High Court does not correct a finding of fact on the ground that the evidence is not sufficient or adequate, the evidence in the present case which was considered by the Tribunal cannot be scanned by the High Court to justify the conclusion that there is no evidence which would justify the finding of the Tribunal

that the respondent did not make the journey. The Tribunal gave reasons for its conclusions. It is not possible for the High Court to say that no reasonable person could have arrived at these conclusions. The High Court reviewed the evidence, reassessed the evidence and then rejected the evidence as no evidence. That is precisely what the High Court in exercising jurisdiction to issue a writ of certiorari should not do.”

After referring to the above observations, the Supreme Court in para 18 held as under:-

“It has been time and again said that it is not open to the High Court to examine the findings recorded by the Inquiry Officer as a Court of Appeal and reach its own conclusions and that power of judicial review is not directed against the decision but is confined to the decision making process. In a case such as the present one where the delinquent admitted the charges, no scope is left to differ with the conclusions arrived at by the Inquiry Officer about the proof of charges. In the absence of any procedural illegality or irregularity in conduct of the departmental enquiry, it has to be held that the charges against the delinquent stood proved and warranted no interference.”

The Supreme Court has also considered the aspect of the proportionality of the punishment and made the following observations in paras 23, 24, and 25:-

23. In order to answer the aforesaid question (*is the punishment of removal grossly disproportionate to the proved charge of unauthorized absence for more than six months?*), it would be appropriate to refer to a few of decisions of this Court wherein doctrine of proportionality has been considered. In *Union of India and Anr. v. G. Ganayutham* MANU/SC/0834/1997 : (1997) 7 SCC 463, this Court elaborately considered the proportionality in the administrative law in England as well as in our own country. The court considered some important English decisions, viz.,

Associated Provincial Picture Houses Ltd. v. Wednesbury Corporation (1947) 2 All ER 680; Council of Civil Service Unions v. Minister for Civil Service (1984) 3 All ER 935; R. v. Goldstein (1983) 1 All ER 434 and R. v. Secretary for Home Dept. ex. p. Brind (1991) 1 All ER 720 and few decisions of this Court, viz., Ranjit Thakur v. Union of India MANU/SC/0691/1987 : (1987) 4 SCC 611; State of Maharashtra v. M.H. Mazumdar MANU/SC/0485/1988 : (1988) 2 SCC 52; Ex-Naik Sardar Singh v. Union of India MANU/SC/0594/1991 : (1991) 3 SCC 213; Tata Cellular v. Union of India MANU/SC/0002/1996 : (1994) 6 SCC 651; State of A.P. v. McDowell & Co. MANU/SC/0427/1996 : (1996) 3 SCC 709 and summed up position of proportionality in administrative law in England and India thus:

(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.

24. Dealing with the question of proportionality with regard to punishment in disciplinary matters, the court said:

32. Finally, we come to the present case. It is not contended before us that any fundamental freedom is affected. We need not therefore go into the question of "proportionality". There is no contention that the punishment imposed is illegal or

vitiated by procedural impropriety. As to "irrationality", there is no finding by the Tribunal 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. We have still to explain "Ranjit Thakur".

33. In Ranjit Thakur this Court interfered with the punishment only after coming to the conclusion that the punishment was in outrageous defiance of logic and was shocking. It was also described as perverse and irrational. In other words, this Court felt that, on facts, Wednesbury and CCSU tests were satisfied. In another case, in B.C. Chaturvedi v. Union of India MANU/SC/0118/1996 : (1995) 6 SCC 749 a three-Judge Bench said the same thing as follows: (SCC p. 762, para 18)

18. ... The High Court/Tribunal, while exercising the power of judicial review, cannot normally substitute its own conclusion on penalty and impose some other penalty. If the punishment imposed by the disciplinary authority or the appellate authority shocks the conscience of the High Court/Tribunal, it would appropriately mould the relief, either directing the disciplinary authority/appellate authority to reconsider the penalty imposed, or to shorten the litigation, it may itself, in exceptional and rare cases, impose appropriate punishment with cogent reasons in support thereof.

Similar view was taken in Indian Oil Corporation Ltd. v. Ashok Kumar Arora MANU/SC/0236/1997 : (1997) 3 SCC 72 that the Court will not intervene unless the punishment is wholly disproportionate.

34. In such a situation, unless the court/tribunal opines in its secondary role, that the administrator was, on the material before him, irrational according to Wednesbury or CCSU norms, the punishment cannot be quashed. Even then, the matter has to be remitted back to the appropriate authority for reconsideration. It is only in very rare cases as pointed out in

B.C. Chaturvedi case that the Court might -- to shorten litigation -- think of substituting its own view as to the quantum of punishment in the place of the punishment awarded by the competent authority. (In B.C. Chaturvedi and other cases referred to therein it has however been made clear that the power of this Court under Article 136 is different.) For the reasons given above, the case cited for the respondent, namely, State of Maharashtra v. M.H. Mazumdar cannot be of any help.

25. Again, in the case of Coimbatore District Central Cooperative Bank v. Coimbatore District Central Cooperative Bank Employees Assn. and Anr. MANU/SC/2117/2007 : (2007) 4 SCC 669 this Court considered the doctrine of proportionality and it was held:

17. So far as the doctrine of proportionality is concerned, there is no gainsaying that the said doctrine has not only arrived in our legal system but has come to stay. With the rapid growth of administrative law and the need and necessity to control possible abuse of discretionary powers by various administrative authorities, certain principles have been evolved by courts. If an action taken by any authority is contrary to law, improper, irrational or otherwise unreasonable, a court of law can interfere with such action by exercising power of judicial review. One of such modes of exercising power, known to law is the "doctrine of proportionality".

18. "Proportionality" is a principle where the court is concerned with the process, method or manner in which the decision-maker has ordered his priorities, reached a conclusion or arrived at a decision. The very essence of decision-making consists in the attribution of relative importance to the factors and considerations in the case. The doctrine of proportionality thus steps in focus true nature of exercise--the elaboration of a rule of permissible priorities.

19. de Smith states that "proportionality" involves "balancing test" and "necessity test". Whereas the former (balancing test) permits scrutiny of excessive onerous penalties or infringement of rights or interests and a manifest imbalance of

relevant considerations, the latter (necessity test) requires infringement of human rights to the least restrictive alternative. [Judicial Review of Administrative Action (1995), pp. 601-05, para 13.085; see also Wade & Forsyth: Administrative Law (2005), p. 366.]

20. In Halsbury's Laws of England (4th Edn.), Reissue, Vol. 1(1), pp. 144-45, para 78, it is stated:

The court will quash exercise of discretionary powers in which there is no reasonable relationship between the objective which is sought to be achieved and the means used to that end, or where punishments imposed by administrative bodies or inferior courts are wholly out of proportion to the relevant misconduct. The principle of proportionality is well established in European law, and will be applied by English courts where European law is enforceable in the domestic courts. The principle of proportionality is still at a stage of development in English law; lack of proportionality is not usually treated as a separate ground for review in English law, but is regarded as one indication of manifest unreasonableness.

21. The doctrine has its genesis in the field of administrative law. The Government and its departments, in administering the affairs of the country, are expected to honour their statements of policy or intention and treat the citizens with full personal consideration without abuse of discretion. There can be no "pick and choose", selective applicability of the government norms or unfairness, arbitrariness or unreasonableness. It is not permissible to use a "sledgehammer to crack a nut". As has been said many a time; "where paring knife suffices, battle axe is precluded".

22. In the celebrated decision of Council of Civil Service Union v. Minister for Civil Service 1985 AC 374 : (1984) 3 WLR 1174 : (1984) 3 All ER 935 (HL) Lord Diplock proclaimed: (All ER p. 950h-j) "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'.... (emphasis supplied)

23. CCSU has been reiterated by English courts in several subsequent cases. We do not think it necessary to refer to all those cases.

24. So far as our legal system is concerned, the doctrine is well settled. Even prior to CCSU, this Court has held that if punishment imposed on an employee by an employer is grossly excessive, disproportionately high or unduly harsh, it cannot claim immunity from judicial scrutiny, and it is always open to a court to interfere with such penalty in appropriate cases.”

9. Reference can also be made to a Constitution Bench Judgment of the Supreme Court reported in **THE STATE OF MYSORE v. K.MANCHE GOWDA**² wherein in paras 8 and 9 it is laid down as under:-

“Before we close, it would be necessary to make one point clear. It is suggested that the past record of a Government servant, if it is intended to be relied upon for imposing a punishment, should be made a specific charge in the first stage of the enquiry itself and, if it is not so done, it cannot be relied upon after the enquiry is closed and the report is submitted to the authority entitled to impose the punishment. An enquiry against a Government servant is one continuous process, though for convenience it is done in two stages. The report submitted by the Enquiry Officer is only recommendatory in nature and the final authority which scrutinises it and imposes punishment is the authority empowered to impose the same.

² AIR 1964 SC 506

Whether a particular person has a reasonable opportunity or not depends, to some extent upon the nature of the subject matter of the enquiry. But it is not necessary in this case to decide whether such previous record can be made the subject matter of charge at the first stage of the enquiry. But, nothing in law prevents the punishing authority from taking that fact into consideration during the second stage of the enquiry, for essentially it, relates more to the domain of punishment rather than to that of guilt. But what is essential is that the Government servant shall be given a reasonable opportunity to know that fact and meet the same.

In the present case the second show cause notice does not mention that the Government intended to take his previous punishments into consideration in proposing to dismiss him from service. On the contrary, the said notice put him on the wrong scent, for it told him that it was proposed to dismiss him from service as the charges proved against him were grave. But, a comparison of paragraphs 3 and 4 of the order of dismissal shows that but for the previous record of the Government servant, the Government might not have imposed the penalty of dismissal on him and might have accepted the recommendations of the Enquiry Officer and the Public Service Commission. This order, therefore, indicates that the show cause notice did not give the only reason which influenced the Government to dismiss the respondent from service. This notice clearly contravened the provisions of Art. 311(2) of the Constitution as interpreted by Courts.”

10. Similarly, in *V.RAMANA v. APSRTC AND OTHERS*³ the following observations are made by the Supreme Court in paras 11 and 12:-

“The common thread running through in all these decisions is that the Court should not interfere with the administrator's decision unless it was illogical or suffers from procedural impropriety or was shocking to the conscience of the

³ (2005) 7 SCC 338

Court, in the sense that it was in defiance of logic or moral standards. In view of what has been stated in the *Wednesbury's* case (supra) the Court would not go into the correctness of the choice made by the administrator open to him and the Court should not substitute its decision to that of the administrator. The scope of judicial review is limited to the deficiency in decision-making process and not the decision.

To put differently unless the punishment imposed by the Disciplinary Authority or the Appellate Authority shocks the conscience of the Court/Tribunal, there is no scope for interference. Further to shorten litigations it may, in exceptional and rare cases, impose appropriate punishment by recording cogent reasons in support thereof. In a normal course if the punishment imposed is shockingly disproportionate it would be appropriate to direct the Disciplinary Authority or the Appellate Authority to reconsider the penalty imposed.”

11. In *UNION OF INDIA AND OTHERS v. P.GUNASEKARAN*⁴ the Supreme Court held as under in paras 19 and 20:-

“The disciplinary authority, on scanning the inquiry report and having accepted it, after discussing the available and admissible evidence on the charge, and the Central Administrative Tribunal having endorsed the view of the disciplinary authority, it was not at all open to the High Court to re-appreciate the evidence in exercise of its jurisdiction Under Article 226/227 of the Constitution of India.

Equally, it was not open to the High Court, in exercise of its jurisdiction Under Article 226/227 of the Constitution of India, to go into the proportionality of punishment so long as the punishment does not shock the conscience of the court. In the instant case, the disciplinary authority has come to the conclusion that the Respondent lacked integrity. No doubt, there are no measurable standards as to what is integrity in service jurisprudence but certainly there are indicators for such

⁴ (2015) 2 SCC 610

assessment. Integrity according to Oxford dictionary is "moral uprightness; honesty". It takes in its sweep, probity, innocence, trustfulness, openness, sincerity, blamelessness, immaculacy, rectitude, uprightness, virtuousness, righteousness, goodness, cleanness, decency, honour, reputation, nobility, irreproachability, purity, respectability, genuineness, moral excellence etc. In short, it depicts sterling character with firm adherence to a code of moral values."

12. In determining the quantum of punishment, the past conduct of an employee can also be taken into consideration even though that may not be forming part of the charge in the present enquiry. No doubt, the past conduct cannot be taken into consideration for determining the guilt or otherwise, but the past conduct can certainly be taken into account while quantifying the punishment to be imposed. Lenient view in the matter of punishment can be taken if it is shown that the alleged lapse was committed for the first time. If an employee repeatedly commits similar or identical violations and delinquencies, the punishment can certainly be more deterrent than in case of an employee who has committed such a misconduct for the first time in his long span of service. In the instant case, as already stated, the petitioner having joined the service in 1979 and before the present enquiry was initiated, he has been visited with several punishments including censures, deferment of increments and was even removed from service on three previous occasions but he could succeed in his appeals on two occasions and in the Industrial Tribunal on once occasion. This is the fourth time that the petitioner had been removed from service and this time he was unsuccessful in the appeal and the Industrial Tribunal as well.

13. Not only the above aspect, but even on facts, the petitioner do not deserve any sympathetic consideration on the ground that by the year 2010 itself the petitioner has superannuated from service and he is made to retire compulsorily instead of being removal he will get certain terminal benefits. Such a discretion cannot be exercised in favour of the persons such as the petitioner who appears to be incorrigible and no amount of punishment has changed his attitude towards discharging his duties as a Conductor in the Road Transport Corporation.

14. In the result, the writ petition is dismissed. No order as to costs.

Miscellaneous petitions, if any, pending in this writ petition shall stand closed.

October, 2017

Dsr/smr



M.S.K.Jaiswal, J