

IN THE HIGH COURT OF JUDICATURE AT MADRAS

DATED : 06.02.2018

CORAM

THE HONOURABLE THIRU JUSTICE V. PARTHIBAN

W.P.No.14234 of 2011

K.Muththamizhan

.. Petitioner

versus

1. The Government of Tamil Nadu,
Represented by Secretary to Government,
Home [Prisons] Department,
Chennai-9.
2. The Additional Director General of Police/
Inspector General of Prisons,
Chennai-600 008.
3. The DIG of Prisons,
Tiruchirapalli.
4. The Superintendent,
Central Prison,
Cuddalore-4. ... Respondents

Prayer: This Writ Petition is filed under Article 226 of the Constitution of India, praying for issuance of Writ of Certiorarified Mandamus, to call for the records relating to the orders [1] Pro.No.13485/Po.1/2007 dated 20.03.2009 of the 4th respondent (2) Pro.No.2293/Mu.Vu/2009 dated 16.09.2009 of the 3rd respondent and (3) Pro.No.47342/EW2/2009 dated 01.04.2010 of the 2nd respondent and (4) G.O.(D) No.465, Home (Prison.2) Dept. dated 12.05.2011 of the 1st respondent to quash the same and to issue consequential directions to the respondents to reinstate the petitioner in service with consequential service and monetary benefits.

[Prayer amended as per order dated 11.12.2017
in M.P.No.1 in W.P.No.14234/2011]

For Petitioner : Mr.M.Ravi

For Respondents: Mr.T.M.Pappiah
Spl. Government Pleader

ORDER

The petitioner has approached this Court, seeking the following relief:

"To issue Writ of Certiorarified Mandamus, to call for the records relating to the orders [1]

Pro.No.13485/Po.1/2007 dated 20.03.2009 of the 4th respondent (2) Pro.No.2293/Mu.Vu/2009 dated 16.09.2009 of the 3rd respondent and (3) Pro.No.147342/EW2/2009 dated 01.04.2010 of the 2nd respondent and (4) G.O.(D) No.465, Home (Prison.2) Dept. dated 12.05.2011 of the 1st respondent to quash the same and to issue consequential directions to the respondents to reinstate the petitioner in service with consequential service and monetary benefits."

2. The petitioner was employed as Warder Grade II on 15.03.1989 and was promoted as Warder, Grade I. He was serving as Warder Grade I in the Central Prison, Cuddalore and according to him, he was not well for some time and he proceeded on medical leave from 01.09.2007. Originally, he obtained leave for a few days and thereafter, he extended his leave, according to him, as he was not recovered from his illness.

3. In 2007, he remained absent for a period of 120 days and the leave was extended on medical grounds, but the petitioner has not submitted proper leave applications and also failed to report before the Medical Board when he was summoned by the Board.

4. In the above said circumstances, he was charge sheeted under Section 17(b) of the Tamil Nadu Civil Services (D & A) Rules, vide a charge memo dated 08.01.2008. An enquiry was conducted on the charges and in the enquiry, an explanation was given that he has taken leave on medical grounds. However, the enquiry officer after adverting to the materials placed before him for consideration, held the charges proved and a copy of the report was also furnished to the petitioner. The petitioner submitted his representation dated 22.09.2008. Since the petitioner's explanation was not satisfactory, the disciplinary authority/4th respondent herein, by his proceedings, dated 20.03.2009, imposed penalty of 'dismissal from service'. While imposing the said penalty, the fourth respondent had taken into consideration his past records of service as he had been involved in similar acts of misconduct in the past by remaining absent on few occasions.

5. Aggrieved by the order of the disciplinary authority on 20.03.2009, an appeal was preferred to the third respondent and the third respondent, by his proceedings, dated 16.09.2009, rejected the appeal and the same was also confirmed by the revisional authority, the second respondent herein vide his proceedings, dated 01.04.2010. Further appeal to Government was also turned down by G.O(D) No.465, Home Department dated 12.05.2011. These orders are put to challenge in the present writ petition.

6. Mr. M. Ravi, learned counsel for the petitioner would stoutly submit that the orders passed by the authorities are non speaking orders and the same are contrary to the disciplinary and appeal rules. More over, he would submit that unless the

past record is made as a part of charge memorandum, the same cannot be relied upon for the purpose of imposing extreme penalty of dismissal from service. In this case, the petitioner was not put on notice about the past misconduct and therefore, he was not given due opportunity to offer explanation the circumstances under which he was absent on certain occasions in the past. Therefore, reliance placed by the authorities on the past records of the petitioner cannot be countenanced in law and as well as on fact.

7.The learned counsel for the petitioner would also submit that the punishment imposed on the petitioner i.e., dismissal from service is excessive and disproportionate, since the petitioner was forced to remain absent due to ill-health, such absence cannot invite serious punishment of dismissal from service. He would rely on the following decisions passed by this Court in support of his contentions wherein this Court on a few occasions interfered with the quantum of penalty while considering similar misconduct committed by employees concerned.

8.The learned counsel for the petitioner would draw the attention of this Court to the decision passed in W.P.No.23999 of 2012, dated 05.09.2017 wherein this Court in similar circumstances, i.e., the petitioner therein was a Grade I Police Constable and due to his absence, he was declared as deserter and ultimately, imposed penalty of removal from service. The penalty order was ultimately interfered with and the same was substituted by penalty of compulsory retirement. Even in that case, the petitioner therein committed similar offence. Paragraphs 7 and 8 of the order are reproduced below:

"7.This Court after considering the rival submissions of the learned counsel and after perusing the materials and pleadings placed on record is of the view that although the petitioner was imposed with minor punishment earlier for minor lapses, the same cannot be taken into consideration for the purpose of imposition of harsh penalty of removal from service. This is more so, considering long years of service put in by the petitioner since 1976. A penalty of removal from service will not only cause harm to him but also to his family members and therefore it has to be seen whether such harsh penalty of removal from service would be the only option to be imposed on the petitioner in the circumstances of the case. The order of compulsory retirement is also one of the major penalties enumerated in the Rules and therefore, in the fitness of things, it would be appropriate that the penalty of removal from service is to be substituted by penalty of compulsory retirement, since the retention of the petitioner in Police force is not in public interest.

8. In the above circumstances, the writ petition is allowed. The impugned orders dated 10.10.2009 & 16.01.2010 are set aside and the penalty of compulsory retirement is imposed on the petitioner with effect from the date on which he was removed from service on 10.10.2009. The competent authorities are directed to pass consequential orders within a period of two months from the date of receipt of a copy of this order. It is needless to mention that the petitioner is entitled to all consequential monetary benefits, to which, he is entitled to. No costs. Consequently, connected miscellaneous petitions are closed."

9. The learned counsel for the petitioner has also drawn the attention of this Court to the order passed in W.P.Nos.49541 of 2006 and 17900 of 2007, dated 10.10.2011, wherein the learned Single Judge of this Court had interfered with the quantum of punishment of removal from service and substituted the same with compulsory retirement on the ground of proportionality. The learned Single Judge after adverting to decision of the Division Bench judgment and had allowed the writ petition by modifying the penalty. The relevant portion of the learned Judge's findings as found in paragraphs 17 to 20, are reproduced below:

17. Furthermore, the learned counsel for the petitioner relied on the Division Bench judgment of this Court in RM.PALANIAPPAN's case (cited supra) for modification of punishment of compulsory retirement to any other punishment. That was a case of Motor Vehicles Inspector Grade II. The allegation made against the appellant therein was that he engaged a tout and collected money through the tout. He was removed from service based on the charges. A Division Bench of this Court, interfered with the punishment and modified the punishment into deprivation of annual increments and other benefits for five year. In this regard, paragraphs 28 to 30 of the said judgment are extracted hereunder:

"28. Moreover, when the petitioner is vested with the power of issuing licenses to the persons and the vehicle as well, it cannot be expected of him that he would give licence to the persons who are eligible in all aspects or the vehicles fit for running on the road, when he has decided to mint money by engaging a tout. This is not a good omen to the civilized and democratic Society, when especially, the nature of work of the petitioner directly plays a vital role with the lives of the people moving on

the road.

29. Considering the above aspects, though we are disinclined to impose extreme punishment of dismissal from service, we are of the view that the imposition of stringent punishment on the petitioner would meet the ends of justice.

30. Accordingly, the first and second respondents are directed not to give any effect to and pay Annual Increments, Dearness allowance, Bonus, if any, and any other monetary benefits alike, due after the date of this order with cumulative effect and also any service benefits like considering his name for promotion etc., for five years from the date of this order. In other words, the petitioner has to go home with his monthly salary alone i.e. what is drawing as on date for five years from the date of this order. The orders of the first respondent as well as the Tribunal with regard to punishment are set aside".

18. Even in W.A.No.58 of 2011, the appellant has committed series of allegations, the Division Bench, taking into account the position of the family of the Government employee, interfered with the extreme punishment of dismissal from service and modified into some other punishment. Likewise, I am of the view that the said judgment is also applicable to this case.

19. Likewise, in the judgment dated 1.10.2007 in W.P.(MD)No.4024 of 2005, (K. PERIYASAMY VS. THE DIRECTOR GENERAL OF POLICE AND TWO OTHERS), the petitioner therein was charged for demanding and accepting bribe of Rs.100/- and he was removed from service. The learned Single Judge of this Court, in W.P.(MD)No.4024 of 2005, modified the punishment of removal from service into compulsory retirement. The relevant portion of Paragraph 9 of the said judgment is extracted hereunder:

"In this context, it is relevant to refer to a recent decision of the Division Bench of this Court in W.P.No.22983 of 2005, disposed on 13.8.2007, (V.C.RAJAMANICKAM V. STATE OF TAMIL NADU AND ANOTHER) and the following passage found in paragraph 18 of the said order is reproduced below:

"As contended by the learned senior counsel for the petitioner the petitioner has put in a long number of years of service and there is no adverse entries in his annual confidential reports and in such circumstances if the punishment of dismissal

from service is imposed not only the petitioner but his entire family will be put to great hardship. Therefore we are of the considered view that the ends of justice will be met if punishment of dismissal from service is modified into one of compulsory retirement since both the penalties are major penalties and the punishment of dismissal from service appears to be disproportionate and not commensurate with the act of delinquency of the petitioner. Hence we modify the dismissal from service into one of compulsory retirement."

20. In view of the aforesaid judgments, I am of the view that W.P.No.17900 of 2007 has to be allowed and accordingly, the order dated 8.4.2004 removing the petitioner from service is quashed. W.P.No.49541 of 2006 (O.A.No.6661 of 2001) questioning the order dated 31.8.2001 compulsorily retiring the petitioner from service has to be dismissed. Accordingly, W.P.No.17900 of 2007 is allowed and W.P.No.49541 of 2006 is dismissed. The respondent is hereby directed to pay pension payable to the petitioner pursuant to the compulsory retirement as expeditiously as possible. No costs."

10. The learned counsel for the petitioner would place reliance upon the order of this Court in W.P.No.30199 of 2012 dated 23.08.2017, wherein this Court has placed reliance upon another order while interfering the quantum of punishment and setting aside the penalty of removal from service and remitted the matter back to the authorities for reconsideration of imposing penalty by reinstating the petitioner therein. The paragraphs 4 to 9 of the order are reproduced here:

"4. Learned counsel appearing for the petitioner would at the outset submit that as regards the proportionality of punishment meted out to the petitioner, the same is covered directly by the order passed by the Division Bench of this Court in W.A.No.58 of 2011 dated 27.01.2011. The operative portion of the order is extracted below:

After hearing the learned senior counsel for the appellant and the learned Government Pleader, we are prima facie of the view that the punishment imposed on the appellant is disproportionate to the charge leveled against him and it is in fact, shocking the conscience of this court. We, therefore, allow this writ appeal, set aside the impugned judgment passed by the learned single Judge and remit

back the matter to the disciplinary authority viz., the second respondent herein, to reconsider the matter with regard to the quantum of punishment imposed on the appellant and to take a decision within six weeks from today. It is made clear that in the event, the quantum of punishment imposed on the appellant is reduced, he shall not make any claim with regard to the wages for the period he has not performed his duty, but the continuity in service will not be affected. There shall be no order as to costs. Consequently, M.P.No.1 of 2010 is closed.

5.Learned counsel for the petitioner would also refer to the other Division Bench decision of this Court dated 26.02.2013 in W.A.No.1608 of 2011 in regard to the proportionality of punishment in respect of desertion of service by the uniformed personnel. Following the Division Bench decision, according the learned counsel, series of decisions have been passed by the learned single Judges of this Court. Two such orders have been referred to, one was passed in W.P.No.16415 of 2009 dated 19.06.2011 and other on 07.10.2016 in respect of W.P.No.34535 of 2016. Learned single Judges of this Court have followed the order passed by the Division Bench in W.A.No.58 of 2011 dated 27.01.2011. Learned counsel would submit that in view of series of decisions passed by this Court, the same order may be passed in the present case also.

6.Upon notice, Mr.T.M.Pappiah, learned Special Government Pleader entered appearance on behalf of the respondents and also resisted the claim of the petitioner. However, he has not disputed the decisions passed by this Court as stated supra.

7.In the said circumstances, this Court is of the view that the order passed by the Division Bench in W.A.No.58 of 2011 dated 27.01.2011 squarely applies to the facts and circumstances of the case.

8.In the said circumstances, the impugned orders of removal from service by the disciplinary authority and the confirmation by the appellate authority dated 19.06.2012 and 11.09.2012 respectively are set aside and the matter is remanded back to the respondents to reconsider the issue of

imposing lesser penalty by reinstating the petitioner forthwith. It is also made clear that the petitioner is not entitled to backwages for the period in question on the ground of No work No pay. The respondents are directed to pass orders on the above stated lines within a period of two months from the date of receipt of a copy of this order.

9.The writ petition stands disposed of on the above terms. No costs"

11.In the above circumstances, the learned counsel for the petitioner would submit that the punishment of dismissal from service imposed on the petitioner is liable to be interfered with as it is too harsh and disproportionate to the gravity of misconduct alleged against the petitioner.

12.Upon notice, Mr.T.M.Pappiah, the Special Government Pleader entered appearance on behalf of the respondents and filed his counter affidavit.

13.The Special Government Pleader would submit that the petitioner was charged for the act of misconduct on five occasions and he was imposed minor penalties. However, despite such penalties imposed earlier, the petitioner did not correct himself and in the year 2007 itself, he was again absented for 120 days. Therefore, the authorities felt that it was not in the interest of the prison administration to retain him in service and therefore, after due process of law, he was imposed with the penalty of dismissal from service. In the said circumstances of the case, the punishment imposed on the petitioner cannot said to be too harsh and excessive. According to the learned Special Government Pleader, any interference of the punishment would only affect interest of the prison administration and therefore, he would pray for dismissal of the writ petition.

14. This Court has considered the rival submissions of the learned counsel for both the parties and perused the pleadings and materials placed on record.

15. This Court is conscious of the fact that the petitioner has committed some act of misconduct in the past and remained absent unauthorizedly on few occasions for which, he was proceeded with disciplinary action and imposed penalty. However, despite such penalties being imposed, the petitioner did not show any act of corrective behaviour and remained absent once again in 2007 that too for a period of 120 days. Although such conduct of the petitioner would entail serious action from the authorities concerned, however in the past, his absence was dealt with leniently by imposing minor penalties. Be that as it may, the fact remains that the punishment of dismissal from service not only would affect the employee himself but also his family members as the livelihood of the petitioner and his family is irreversibly affected.

16.While imposing the penalty of dismissal from service, it is incumbent upon the authorities to take into consideration the fact that the livelihood of the employee is at stake. As rightly contended by the learned Special Government Pleader, the retention of service of the petitioner was not in public interest and therefore, he was rightly dismissed from service. Such submission on the part of the learned Special Government Pleader cannot be brushed aside and at the same time, this Court is inclined to interfere with the quantum of penalty as the dismissal from service is like sentencing the employee and his family to live without livelihood for life.

17.At the same time, this Court has consistently taken a view that for the charge of unauthorized absence, the penalty of dismissal from service is rather excessive and not warranted. This Court is in agreement with the submission of the learned counsel for the petitioner in regard to the legal principles laid down by this Court in the aforesaid decisions cited by the learned counsel for the petitioner. Ultimately, this Court has to see the balance between the application of rule and the application of justice by adopting a balanced approach in both protecting the welfare of the employee and his family as well as the interest of the administration. In the said circumstances, this Court has to adopt fine balance between the welfare of the employee as well as the interest of the department. However, by taking into consideration the overall circumstances of the present case and also the legal principles laid down by this Court through the decisions as aforementioned, this Court is of the considered view that the petitioner having rendered more than 20 years of service, may be imposed with the penalty of 'compulsory retirement' instead of 'dismissal from service'. Such punishment can bestow upon the petitioner to get some retirement benefits and at the same time, the interest of the department is also protected by not putting the petitioner back in service even notionally. In any event, during the pendency of the writ petition, the petitioner has attained the age of superannuation.

18.In view of the above said reasons, the impugned orders viz., [1] Pro.No.13485/Po.1/2007 dated 20.03.2009 of the 4th respondent [2] Pro.No.2293/Mu.Vu/2009 dated 16.09.2009 of the 3rd respondent and [3] Pro.No.147342/EW2/2009 dated 01.04.2010 of the 2nd respondent and [4] G.O.(D) No.465, Home (Prison.2) Dept. dated 12.05.2011 of the 1st respondent, are set aside and the punishment of dismissal from service is modified as one of compulsory retirement and the said punishment shall be imposed on the petitioner with effect from the date when he was dismissed from service by the fourth respondent. On such modified penalty being imposed, the petitioner shall be entitled to all attendant benefits of such compulsory retirement. The respondents are directed to pass orders, within a period of eight weeks from the date of receipt of a copy of this order.

19.With the above observations, this writ petition stands disposed of. No costs.

Sd/-
Assistant Registrar(CS V)

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Sub Assistant Registrar

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To

1. The Secretary to Government,
Home [Prisons] Department,
Chennai-9.
2. The Additional Director General of Police/
Inspector General of Prisons,
Chennai-600 008.
3. The DIG of Prisons,
Tiruchirapalli.
4. The Superintendent,
Central Prison,
Cuddalore-4.

+1cc to Mr.M.Ravi, Advocate Sr.No.9135
+1cc to Government Pleader Sr.No.9718

sm:28.2.2018

W.P.No.14234 of 2011

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