

IN THE HIGH COURT OF JUDICATURE AT MADRAS

DATED : 23.03.2018

CORAM

THE HONOURABLE Mr.JUSTICE V.PARTHIBAN

W.P.No.22611 of 2011

M.Baskar

... Petitioner

Vs

1.The Dy Commissioner of Police,
Armed Reserve, Coimbatore City.

2.The Commissioner of Police,
Coimbatore City.

3.The Director General of Police,
Tamil Nadu, Chennai 4.

... Respondents

Prayer : Petition filed under Article 226 of the Constitution of India, praying to issue a Writ of Certiorari, calling for the records of the respondents in connection with the impugned order passed by the 1st respondent in PR No.48/F4/2008 dated 18.02.2009 and confirmed by the 3rd respondent in RC No.160692/API(1)/2009, dated 10.11.2009 and quash the same.

For Petitioners : Mr.K.Venkataramani,
Senior counsel
for M/s.M.Muthappan

For Respondents : Mr.T.M.Pappiah,
Special Government Pleader

O R D E R

The petitioner was originally recruited as Grade II Police Constable on 14.07.2002. After initially serving in Tamil Nadu Special Police IV battalion, Kovaipudur, he was transferred to City Armed Reserve, Coimbatore. While serving in City Armed Reserve, the petitioner fell ill on 04.05.2008 and therefore, he was absent and did not attend duty for some time. According to the petitioner, he had informed one of his colleagues about the reason for his absence. According to him, when he was ill, at the same time, his mother also fell ill and was suffering from

paralytic stroke. Therefore, he had to rush to his native place to look after his mother. In view of his absence, the petitioner was declared a deserter by Deputy Commissioner of Police, based on the report of the duty Sub-Inspector, who made an endorsement with reference to the absence of the petitioner from 04.05.2008. The declaration of deserter was by proceedings dated 12.06.2008. Thereafter, the petitioner was issued with charge memo under Rule 3(b) of Tamil Nadu Police Subordinate Service (Discipline & Appeal) Rules on 06.09.2008, for the act of desertion and absence without leave or permission for a period of 21 days from 04.05.2008. On receipt of the charge memorandum, the writ petitioner submitted his explanation on 22.09.2008, explaining the reasons as set out above for his absence. Not satisfied with the explanation, an enquiry was ordered and in the enquiry also, the petitioner had explained about his illness and other family circumstances, which forced him to remain absent for some time. However, without appreciating the explanation given by the petitioner, the enquiry officer submitted his report holding the charge as proved on 07.11.2008. The petitioner filed the objection to the enquiry report on 29.01.2009. But the disciplinary authority accepted the findings of the enquiry officer's report and imposed punishment of removal from service by an order dated 18.02.2009, which was served upon the petitioner on 08.03.2009.

2. While the petitioner was contemplating of filing an appeal against the order of penalty dated 18.02.2009, the 2nd respondent took suo motu review and confirmed the punishment. However, the petitioner submitted an appeal to the Commissioner of Police, the 2nd respondent herein against the 1st respondent's punishment order. Since the 2nd respondent already reviewed the order, he forwarded the same to the 3rd respondent. The 3rd respondent confirmed the order of the 1st respondent and refused to interfere with the punishment by order dated 10.11.2009. The order of the disciplinary authority dated 18.02.2009 as confirmed by the 3rd respondent on 10.11.2009 is the subject matter of challenge in this Writ Petition.

3. Mr. K. Venkataramani, learned senior counsel appearing for the petitioner would inter alia contend that apart from various infirmities in the conduct of the enquiry against the petitioner and also the orders by the disciplinary authority as well as the other higher authorities, the punishment of removal from service as such is grossly disproportionate to the gravity of misconduct alleged against the petitioner. According to the learned senior counsel, this Court, in a number of cases, by Single judge as well as by Division Bench, have held that punishment of removal from service for the misconduct of desertion was disproportionate and interfered with such punishment and modified the same into one of minor penalty or in some cases the

matter was remanded back to the authority for imposition of minor penalty.

4.The learned senior counsel would draw the attention of this Court to the Division Bench's order in W.A.No.58 of 2011 dated 27.01.2011, wherein the Division Bench of this Court allowed the Writ Appeal under similar circumstances. The finding of the learned Division Bench as held in paragraphs 2 and 3 are usefully extracted hereunder:

"2. The appellant/writ petitioner, who was serving as Grade-II Police Constable in the Police Department at Kancheepuram, was proceeded against departmentally on the charge that he remained absent from duty for a period of 21 days. The Enquiry Officer held the charge against the appellant as proved. In view of the finding of the Enquiry Officer, as also the fact that the appellant had earlier deserted the force on three occasions and absented himself from duty on two occasions, the disciplinary authority, viz. the second respondent herein, passed an order of dismissal from service against the appellant. The appellant challenged the same by filing the writ petition, which was dismissed by the learned single Judge, who held that the appellant, being employed in the Armed Reserve, was expected to maintain strict discipline and in view of his past conduct, the punishment of dismissal cannot be termed as excessive or disproportionate.

3. 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 levelled 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.The learned senior counsel would also rely on two orders

passed by the learned Judge of this Court in W.P.No.6873 of 2013 dated 19.09.2017 and WP.No.24162 of 2012 dated 08.12.2017 in which, this Court, on the basis of various other decisions including the decision of the Division Bench, had interfered with the order of removal from service against those petitioners for desertion of duty.

6.The learned Judge of this Court has given detailed reasons about the quantum of penalty as found in paragraphs 4 to 7 of W.P.No.6873 of 2013, which reads as follows:

"4.The learned counsel would further submit that at the time when the punishment was imposed, the petitioner was only 32 years of age and his further employment in the Government has been snuffed out for a solitary act of misconduct. The learned counsel on the issue of proportionality of punishment would draw the attention of this Court to an order passed by a learned single Judge in WP.No.16415 of 2009 dated 15.06.2011, in which, the learned Judge after adverting to various judgments passed by this Court and the Hon'ble Supreme Court of India, has concluded that removal from service for desertion, was highly disproportionate. The operative portion of the order dated 15.06.2011 passed by the learned Judge in paragraph No.10 is extracted below:

"10.Considering the facts and circumstances of this case and the order passed by the Division Bench holding that the order of dismissal from service for desertion is highly disproportionate and a lesser punishment should be imposed and the said order having been implemented by imposing a lesser punishment of postponement of one increment for two years in the case of one R.Ramesh, who was the appellant in W.A.No.58 of 2011 dated 27.01.2011, I am of the view that the interest of justice would be met by setting aside the order of the respondents and remitting the matter to the second respondent to consider the said issue of proportionality of the punishment alone in the light of the additional affidavit filed by R3, dated 10.06.2011 and pass fresh orders, within a period of eight weeks from the date of receipt of a copy of this order."

The learned counsel would therefore plead before this Court that punishment imposed on the petitioner may be interfered with on the ground that the punishment being excessive, disproportionate to the gravity of the acts of misconduct alleged against the petitioner.

5. Upon notice, Mr.A.Zakkir Hussain, learned Additional Government Pleader entered appearance for the respondents and filed a detailed counter affidavit. In the counter affidavit, it is stated that the petitioner having found guilty of misconduct, has been dealt with rightly by the respondents and there was no scope for interference by this Court even in respect of the quantum of penalty imposed on the petitioner, since the absence of duty without proper permission is a serious misconduct defined in the Uniformed Services and therefore, no relief can be granted in the present writ petition.

6. This Court, after considering the rival submissions of the learned counsel for the parties and upon perusing the relevant materials and pleadings placed on record, is of the considered view that as rightly held by the learned single Judge of this Court, as he then was, in the aforesaid writ petition, a punishment imposed on the petitioner, namely, the removal from service, is grossly disproportionate to the gravity of misconduct (Desertion) alleged against the petitioner. There cannot be two opinions that for solitary act of misconduct, punishment of removal from service is too excessive, particularly, considering the age of the petitioner, who was only 32 years at that point of time. Having concluded so, this Court has to see as to what punishment should be imposed on the petitioner instead of removal from service. Considering the evidence in the enquiry proceedings and the order passed by the disciplinary authority, this Court is of the view in the fitness of things, that the petitioner having been removed from service as early as in 2007 and has been out of employment for over 10 years, the punishment of removal from service imposed on the petitioner is modified to the extent that the petitioner is directed to be reinstated in service without any backwages for the period from the date of his removal from service till the date of his reinstatement. Denial of backwages for a long period of 10 years is a sufficient punishment to be imposed on the petitioner in the facts and circumstances of the case.

7. In the light of the above, the respondents are directed to pass orders of reinstatement of the petitioner in service without backwages within a period of two months from the date of receipt of a copy of this order. On being reinstated, the petitioner is

entitled to all other attendant benefits."

7. Yet another decision passed by the learned Judge of this Court in WP.No.24162 of 2012 dated 08.12.2017 has also been relied on and paragraphs 12, 13, 16, 17 and 18 read as follows:

"12. The learned counsel for the petitioner would finally submit that apart from vitiating factors as pointed above in the matter of conducting enquiry and imposition of penalty, the punishment imposed on the petitioner who has rendered less than 10 years of service, is disproportionate. He would submit that the punishment of compulsory retirement is akin to removal from service for unauthorised absence for a few days and such punishment was found to be misappreciated by the learned Division Bench of this Court. In the similar circumstances, it has also been followed by the learned Single Judge of this Court recently in W.P.No.6873 of 2013 dated 09.09.2017. He would draw the attention of this Court to para-6 of the judgment of the learned Single Judge, which held the similar issue, is extracted below:

This Court, after considering the rival submissions of the learned counsel for the parties and upon perusing the relevant materials and pleadings placed on record is of the considered view that as rightly held by the learned Single Judge of this Court, as he then was, in the aforesaid writ petition, a punishment imposed on the petitioner, namely, the removal from service, is grossly disproportionate to the gravity of misconduct (Desertion) alleged against the petitioner. There cannot be two opinions that for solitary act of misconduct, punishment of removal from service is too excessive, particularly, considering the age of the petitioner, who was only 32 years at the point of time. Having concluded so, this Court has to see as to what punishment should be imposed on the petitioner instead of removal from service. Considering the evidence in the enquiry proceedings and the order passed by the disciplinary authority, this Court is of the view that the fitness of things, that the petitioner having been removed from service as early as in 2007 and has been out of employment for over 10 years, the punishment of removal from service imposed on the petitioner is modified to the extent that the petitioner is directed to be reinstated in service without any backwages for the period from the date of his removal from service till the date of his reinstatement. Denial of backwages for a long

period of 10 years is a sufficient punishment to be imposed on the petitioner in the facts and circumstances of the case.

13. In the above case, this Court has finally substituted the penalty as follows:

"7. In the light of above, the respondents are directed to pass orders of reinstatement of the petitioner in service without backwages within a period of two months from the date of receipt of a copy of this order. On being reinstated, the petitioner is entitled to all other attendant benefits."

" 16. Learned counsel for the respondents would submit that the petitioner was in the habit of frequently absenting without informing to the department. In any event, the following order is passed for giving a last opportunity to the petitioner to correct himself in future. In case, the petitioner is going to continue with this attitude of absentism without proper reasons and without getting permission from the department, it is always open to the respondents to proceed against him, as they may be advised in future.

17. For all the above reasons, the petitioner is entitled to succeed. However, in view of the fact that the petitioner was absent without giving proper reasons, continuously for several weeks and such conduct will not sufficiently satisfy the respondents to pay him the backwages, the petitioner has to be imposed with punishment of forfeiture of backwages as a method of corrective measure so that in future, he does not absent or commit any misconduct during his service.

18. In the above said circumstances, this Court is of the considered view that the writ petition is allowed and the impugned orders passed by respondents 1 and 2 in Na.Ka.No.G1/PR No.26/2010, dated 05.05.2011 and RC No.A2/3436/2011 dated 22.12.2011, are set aside and the respondents herein are directed to reinstate the petitioner in service with all other attendant benefits etc., However, the petitioner is not entitled to the backwages from the date of compulsory retirement till the date of reinstatement into service. The denial of backwages for the period of punishment is sufficient penalty to be imposed on the petitioner in the facts and circumstances of the case. The respondents are directed to pass the consequential order within a period of eight weeks from the date of receipt of a copy of this order.

No costs."

8. Therefore, the learned senior counsel would submit that similar consideration may be applied in the present case also and that the petitioner may be imposed with any other minor penalty for his absence during the relevant period.

9. Upon notice, Mr. T. M. Pappiah, learned Special Government Pleader, entered appearance and filed detailed counter affidavit.

10. The learned Special Government Pleader would refer paragraphs 8 and 10 of the counter affidavit, which reads as follows:

"8. With regard to averments made in paragraph 4 of the affidavit, it is submitted that the averments stated in para 4 of the petition are denied as not correct. The petitioner absented himself for duty from 04.05.2008 AN without any leave or permission continuously for 21 days. He was already being dealt with in punishment Roll No. 52/2007 for desertion. He reported back for duty on 04.05.2008 FN and again absented the same AN without any leave or permission and without informing his superiors and without obtaining sick passport. The petitioner failed to report sick and obtain sick passport as per the rules in force. For his failure, he was dealt with departmentally. Sub-Inspector of Police, Armed Reserve, Coimbatore City reported about his absence from 04.05.2008 AN vide reference No. GM.18/SI AR V Pln/2008-2009 dated 07.05.2008. He also reported in his report dated 25.05.2008 that the petitioner has absented himself for duty from 04.05.2008 AN and completed 21 days of absence. Hence the petitioner was declared as a deserter with effect from 04.05.2008 vide City Police order No. 1061/2008 dated 12.06.2008 in F4/23652/2008 and the desertion order was served on the delinquent on 22.6.2008.

10. With regard to averments made in paragraph 6 of the affidavit, it is submitted that the petitioner received the orders on 08.03.2009. But the petitioner did not prefer any appeal against the punishment of "Removal from service" within the stipulated appeal time i.e. 30 days. Hence the P.R. File was reviewed suo-motu by the Commissioner of Police, Coimbatore City (2nd respondent) on 09.04.2009. The petitioner submitted a petition dated 31.07.2009 to the Commissioner of Police,

Coimbatore City requesting to cancel the punishment awarded in Punishment Roll No.48/2008. As the suo-motu review was already done by the 2nd respondent, his petition along with connected records was forwarded to the Additional Director General of Police, Law and order, Chennai for considering the petition of the Ex.PC.2324 Tr.M.Baskar as review petition. In this case the Director General of Police, Chennai is the competent authority to pass orders on the petition. This petition was treated as mercy petition and orders were passed u/r 15A (1) (ii) of TNPSS (D & A) Rules 1955. The review petition was rejected by the Director General of Police, Chennai in Rc.No.160692/AP.1(1)/2009, dated 10.11.2009. The copy of order was served on the petitioner on 15.12.2009."

11.The learned Special Government pleader would further submit that on two occasions, the petitioner was already a deserter and therefore, the administration felt that further retention of the petitioner's service is against public interest. Therefore, the action of the disciplinary authority in removal of the petitioner from service cannot be faulted at all and therefore, the petitioner is not entitled to any relief as prayed for in the Writ Petition.

12.As rightly contended by the learned senior counsel for the petitioner, this Court has held that imposition of penalty of removal from service for the act of desertion is disproportionate to the gravity of the misconduct alleged against the police personnel and interfered in such matters with regard to the quantum of penalty imposed on such police personnel. In fact, even in one of the cases, in similar facts and circumstances, where repeated desertion was pointed out, inspite of the same, as a matter of grace such punishment was interfered by this Court by giving one more opportunity to the petitioner therein to correct himself.

13.In all the cases, referred by the learned senior counsel this Court has consistently interfered with the quantum of the penalty imposed by the disciplinary authority for the act of desertion. In such circumstances, this Court does not think it is right to take any different view since the petitioner herein is also alleged to have deserted the police force for more than 21 days. In fact, the petitioner has some kind of valid explanation for remaining absent during the relevant period. That being the case, this Court finds that the action of the disciplinary authority in imposing the severe penalty of removal from service is without any justification.

14. In fact, in two of such cases, the learned single Judge of this Court has imposed penalty of denial of backwages for the period of non employment and ordered reinstatement of the petitioner therein. In this case also, it is found that the petitioner was dismissed from service on 10.11.2009 and it is nearly 8 years, the petitioner is out of employment from the date of removal from service. Therefore, this Court is of the considered view that instead of remanding the matter back to the authority for consideration for imposition of lesser punishment, this Court on the facts and circumstances of the case, imposes penalty of denial of backwages, as done in respect of two other similarly placed Writ Petitioners, as aforesaid. The denial of back wages for the entire period of non employment would be sufficient punishment since, the punishment of removal from service was imposed as early as 18.02.2009.

15. In view of the above, this Court is of the considered view that the writ petition is allowed and impugned proceedings passed by the 1st respondent in PR No.48/F4/2008 dated 18.02.2009 and confirmed by the 3rd respondent in RC No.160692/API(1)/2009, dated 10.11.2009 are hereby set aside and the respondents are directed reinstate the petitioner in service with all other attendant benefits and the petitioner is not entitled to backwages from the date of removal from service (ie) 18.02.2009 until the date of his reinstatement. The denial of backwages for the period of non-employment is a sufficient penalty to be imposed on the petitioner in the facts and circumstances of the cases. The respondents are directed to pass consequential orders within a period of eight weeks from the date of receipt of copy of this order.

Sd/-
Assistant Registrar(CS V)

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Sub Assistant Registrar

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To

1.The Deputy Commissioner of Police,
Armed Reserve, Coimbatore City.

2.The Commissioner of Police,
Coimbatore City.

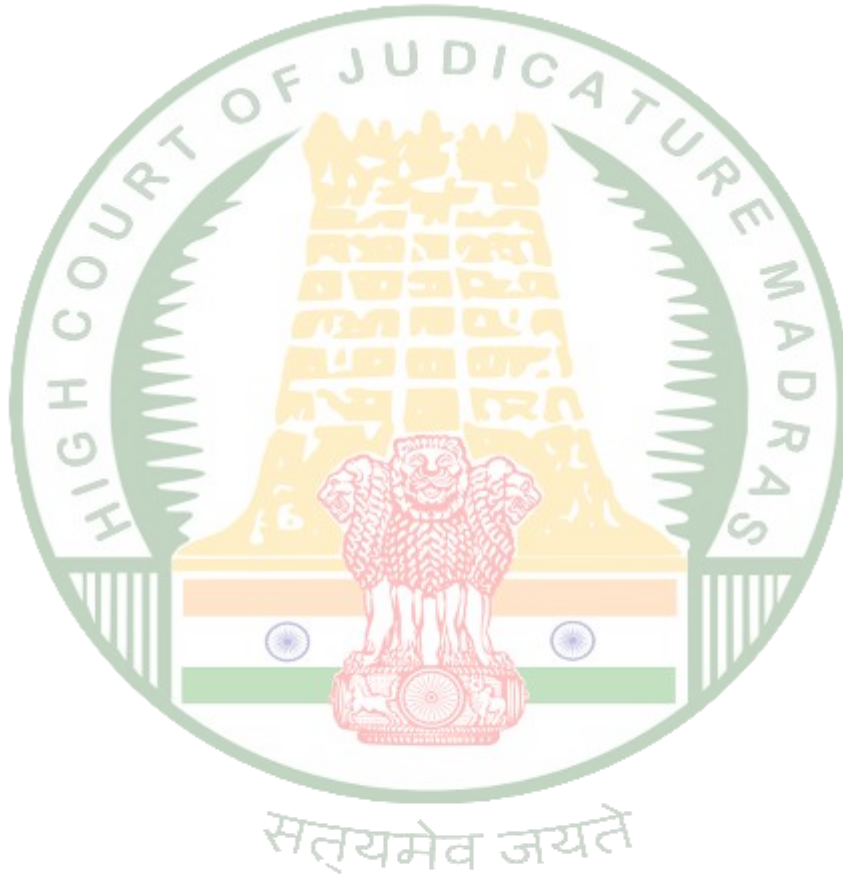
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3.The Director General of Police,
Tamil Nadu, Chennai 4.

+lcc to Mr.M.Muthappan, Advocate SR.No.22961
+lcc to Government Pleader SR.No.22873

W.P.No.22611 of 2011

KGK (CO)
GN (20/04/2018)



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