

IN THE HIGH COURT OF JUDICATURE AT MADRAS

DATED: 17.07.2018

CORAM

THE HONOURABLE MR. JUSTICE V.PARTHIBAN

W.P.No.28467 of 2014

M.Arokiyasamy

.. Petitioner

Vs.

1. The State of Tamilnadu,
Rep. By its Secretary to Government,
Home Department,
Secretariat,
Chennai-600 009.
2. The Director General of Police,
Mylapore,
Chennai-600 004.
- 3.The Commandant
TSP.Vth Bn, (Tamil Nadu Special Police)
S.M.Nagar, Avadi,
Chennai-600 109.
- 4.The Assistant Commandant
TSP Vth Bn (Tamil Nadu Special Police)
S.M.Nagar, Avadi,
Chennai-600 109.

.. Respondents

Prayer: Petition filed under Article 226 of The Constitution of India praying for the issuance of a writ of Certiorarified Mandamus to call for the entire records of the 2nd respondent's proceeding in R.C.No.177076/AP.3(1)2007 dated 28.04.2008 and 3rd Respondent's proceedings in Ta.Ba.07/03 rule 3(B) dated 05.06.2003, and his proceedings C.No.D4, 168898/10 dated 29.11.2010 which has been passed the order of rejection on mercy by the 3rd respondent on behalf of 2nd respondent and quash the same and consequently directing the respondents to reinstate the petitioner into service with backwages and other monetary benefits.

For Petitioner .. Mr.K.Venkatramani, Senor Counsel
for M/s.V.Thiyagu
For Respondents.. Mrs.P.Rosekalam,
Addl. Govt. Pleader

ORDER

The petitioner has approached this Court seeking the following reliefs:

'To issue a Writ writ of Certiorarified Mandamus to call for the entire records of the 2nd respondent's proceeding in R.C.No.177076/AP.3(1)2007 dated 28.04.2008 and 3rd Respondent's proceedings in Ta.Ba.07/03 rule 3(B) dated 05.03.2003, and his proceedings C.No.D4, 168898/10 dated 29.11.2010 which has been passed the order of rejection on mercy petition by the 3rd respondent on behalf of 2nd respondent and quash the same and consequently directing the respondents to reinstate the petitioner into service with backwages and other monetary benefits.'

2.The petitioner was appointed as Gr-II Police Constable on 31.10.1997. He had successfully completed his probationary period and was serving in the Tamil Nadu Special Police without any blemish or any fault. While serving in the Police Department, the petitioner was issued a charge memorandum dated 14.03.2003, alleging that he remained absent for considerable time and he was declared as 'Deserter'. On enquiry, it appears that the petitioner had given his explanation that he was suffering from severe ulcer, due to which, he had taken prolonged treatment. However, according to the petitioner, without considering the explanation, the report was submitted holding the charges proved and on the basis of the said report, the 3rd respondent, by proceedings, dated 05.06.2003, removed the petitioner from service on the ground that he deserted duty from 01.11.2002.

3. The order of removal was passed against the petitioner considering the fact that he was earlier remained absent without proper intimation to the Department at least on four occasions. Against the order of removal, a Mercy Petition was filed with the 2nd respondent on 20.06.2005. Since no action was taken on the mercy petition, the petitioner sent a legal notice on 13.09.2007 and the same was rejected by the 2nd respondent, on 28.04.2008. Thereafter, he sent yet another mercy petition to the 2nd respondent on 29.10.2010. However, by order dated 29.11.2010, the second mercy petition came to be rejected. These orders are put to challenge in the present writ petition.

4. Shri K.Venkatramani, learned Senior Counsel appearing for the petitioner would submit that the punishment of removal from service is extremely disproportionate and excessive, since the petitioner had remained absent in view of forced circumstances, as he was not well for some time. According to him, this Court had held that in the cases of desertion, the punishment of removal from service was harsh and excessive and this Court interfered with such quantum of penalty. Therefore, the learned Senior Counsel for the petitioner would submit that without going into the merits of the case of the petitioner, he would confine his arguments only with regard to the quantum of penalty imposed on the petitioner.

5. In support of his above contention, the learned Senior Counsel for the petitioner would rely on the order passed by the Division Bench of this Court in W.A.No.58 of 2011 dated 27.01.2011. The Division Bench of this Court held that the punishment of dismissal from service for desertion was highly disproportionate. The relevant portion of the findings of the Division Bench in paragraph-3, is extracted below:

"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 re-consider 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 his 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."

6.The learned Senior Counsel for the petitioner would further draw the attention of this Court to the order passed by the Honourable Mr. Justice N.Paul Vasanthakumar (as he then was) rendered in W.P.No.16415 of 2009 dated 15.06.2011. The learned Judge, after following the observations and directions of the

Division Bench of this Court, directed the authority to consider the issue of proportionality of punishment. The relevant portion of the findings of the order in paragraph-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."

7. The learned Senior Counsel would also draw the attention of this Court to yet another decision rendered by the learned Single Judge of this Court in W.P.No.6873 of 2013 dated 19.09.2017. This Court, after considering the submissions had set aside the punishment of removal from service and ordered reinstatement of the petitioner without backwages. The operative portion of the order passed by this Court in paragraphs 6 and 7 are extracted below:

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.

8. Lastly, the learned Senior Counsel for the petitioner would rely on another decision rendered by this Court in W.P.No.24162 of 2012 dated 08.12.2017. This Court, in similar circumstances, had interfered with the quantum of compulsory retirement and ordered reinstatement of the petitioner therein, without backwages. The operative portion of the order of this Court in paragraphs 16 to 18, are reproduced below:

"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 does advance the cause of discipline, 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, the writ petition is allowed and the impugned orders passed by the 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."

The learned Senior Counsel therefore would submit that the Courts have consistently interfered with the quantum of penalty imposed on the employees in regard to the act of misconduct viz., desertion /unauthorised absence.

9. Upon notice, Mrs.P.Rosekamalam, learned Additional Government Pleader entered appearance for the respondents and filed a detailed counter affidavit.

10. The learned Additional Government Pleader would submit that the petitioner does not deserve any indulgence from this Court, since he had deserted at least on four occasions prior to the passing of the order of removal. Therefore, retaining him in police force was not in public interest.

11. At this, the learned Senior Counsel for the petitioner would submit that even in respect of multiple acts of desertion, the Courts have interfered with the quantum of penalty and substituted the same with alternate penalty other than removal from service and compulsory retirement.

12. Considering the legal principle as evolved by the Division Bench of this Court and also the decision rendered by the learned Single Judges of this Court, the order of removal from service imposed on the petitioner prima facie appears to be harsh and excessive. More over, considering the age of the petitioner being only 42 years at the time of filing of the writ petition, the order of removal from service would have adverse implication not only to the petitioner but also to his family. Although the fact that the petitioner had remained absent unauthorisedly even on earlier occasions, nevertheless, in order to give one more opportunity to the petitioner for correcting his behaviour and conduct, this Court is of the view that the order of punishment removal from service is to be set aside. Therefore, the impugned order of the 2nd respondent in R.C.No.177076/AP.3(1) 2007, dated 28.04.2008, proceedings of the 3rd respondent in Ta.Ba.07/03 rule 3(B) dated 05.06.2003 and also his proceedings in C.No.D4 16898/10 dated 29.11.2010, are hereby set aside. The respondents are directed to reinstate the petitioner with continuity of service and all other benefits except backwages for the period of his non employment. This Court finds that the denial of backwages would be sufficient punishment commensurate with the act of misconduct committed by the petitioner for the nonemployment period from 2003 to till the date of reinstatement. The respondents are directed to comply with the above direction and pass consequential orders, within a period of eight weeks from the date of receipt of a copy of this order.

13. With the above direction, this writ petition stands allowed. No costs.

Sd/-

Assistant Registrar(CS-IX)

//True Copy//

Sub Assistant Registrar

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To

1. The State of Tamilnadu,
Rep. By its Secretary to Government,
Home Department,
Secretariat,
Chennai-600 009.

2. The Director General of Police,
Mylapore,
Chennai-600 004.

3. The Commandant
TSP.Vth Bn, (Tamil Nadu Special Police)
S.M.Nagar, Avadi,
Chennai-600 109.

4. The Assistant Commandant
TSP Vth Bn (Tamil Nadu Special Police)
S.M.Nagar, Avadi,
Chennai-600 109.

+ 1 cc to Mr.V. Thyagu, Advocate Sr.46732
+ 1 cc to Government Pleader Sr.47578

W.P.No.28467 of 2014

MR(CO)
EU(29/08/2018)

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