

IN THE HIGH COURT OF JUDICATURE AT MADRAS

DATED : 26.07.2018

CORAM

THE HONOURABLE Mr.JUSTICE V.PARTHIBAN

W.P.No.32317 of 2015

T.S.Prabhu

... Petitioner

Vs

1.The Director General of Police,
No.1, Kamarajar Salai,
Mylapore,
Chennai 600 004.

2.The Commandant,
Tamil Nadu Special Police,
15th Battalion,
Vellore @ Avadi,
Chennai 600 054.

... Respondents

PRAYER : Petition filed under Article 226 of the Constitution of India, praying to issue a Writ of Certiorarified Mandamus, to call for the concerned records relating to the order issued by the second respondent B.O.No.319/2013, C.No.D1/PR.12/2013 dated 23.07.2013 and Order No.Na.Ka.No.233084/Me.Mu.3(1)/2013 dated 23.06.2014 passed by the first respondent and quash the same and consequently direct the second respondent to reinstate the petitioner in service with all consequential, monetary and other service benefits.

For Petitioner : Mr.M.Gnanasekar
For Respondents : Mr.J.Pothiraj,
Special Government Pleader

सत्यमेव जयते

O R D E R

Heard Mr.M.Gnanasekar, learned counsel for the petitioner and Mr.J.Pothiraj, learned Special Government Pleader appearing for the respondents.

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

"To issue a Writ of Certiorarified Mandamus, to call for the concerned records relating to the order issued by the second respondent B.O.No.319/2013, C.No.D1/PR.12/2013 dated 23.07.2013 and Order

No.Na.Ka.No.233084/Me.Mu.3(1)/2013 dated 23.06.2014 passed by the first respondent and quash the same and consequently direct the second respondent to reinstate the petitioner in service with all consequential, monetary and other service benefits."

3. The case of the petitioner is as follows:-

The petitioner was appointed as Naik in the Tamil Nadu Special Police, 15th Battalion, Vellore, Avadi, Chennai 600 054. While working as Naik, he has applied for casual leave on 01.01.2013, for a period of six days upto 06.01.2013. However, on expiry of leave period, he did not report for duty due to his ill health. The second respondent taking note of the absence of the petitioner without sanction, by order dated 30.01.2013, declared the petitioner as deserter under the provisions of Police Standing Order. The order of desertion was also subsequently confirmed on 14.03.2013.

4. Thereafter, the second respondent issued a charge memo on 22.04.2014, for an act of remaining absent unauthorizedly for more than 21 days. Thereafter, a departmental enquiry was initiated. However, the petitioner could not participate in the enquiry due to ill health, the enquiry was conducted ex-parte and the report was submitted on 17.06.2013, holding the charges proved against the petitioner.

5. According to the petitioner, the copy of the enquiry report was not furnished to him nor was given any opportunity to submit any explanation on the findings of the Enquiry Officer. On acceptance of the Enquiry report, the disciplinary authority viz., the second respondent herein, passed an order on 23.07.2013, removing the petitioner from service. Against the order passed by the disciplinary authority, a mercy petition was submitted to the first respondent on 31.12.2013. However, the same came to be rejected on 23.06.2014, the petitioner thereafter, approached the Government, seeking review of the order of removal from service. However, it appears that no orders were passed by the Government on the review petition. In the said circumstances, the petitioner is before this Court, challenging the order of removal by the disciplinary authority which was confirmed by the first respondent.

6. The learned counsel for the petitioner would submit that it was a solitary act of absence on the part of the petitioner which evoked extreme penalty of removal from service. According to the learned counsel, the absence of the petitioner was necessitated due to ill health of the petitioner. However, unfortunately, before he could give his explanation for his absence, the enquiry was conducted ex-parte and the report of the enquiry was also not furnished to the petitioner. Therefore,

he would submit that the petitioner was not given proper and reasonable opportunity to put up his defence for his absence.

7. The learned counsel for the petitioner would contend that the Hon'ble Supreme Court of India and this Court had consistently held that even in the case of repeated acts of desertion, the punishment of removal or dismissal from service was excessive and disproportionate. In this case, admittedly, it is a solitary act of desertion and therefore, the extreme penalty of removal from service is absolutely not warranted and uncalled for. The learned counsel would rely on the following decisions of this Court in W.P.No.16415 of 2009, dated 15.06.2011, wherein, the learned Judge as he then was, after advertng to an order of the learned Division Bench of this Court, has held that the order of dismissal from service for desertion is rather disproportionate, as found in paragraph No.10, which is reproduced 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."

8. The learned counsel for the petitioner would also draw the attention of this Court to an order passed by this Court in W.P.No.6873 of 2013, dated 19.09.2017, this Court under similar circumstances, has allowed the writ petition by interfering with the quantum of penalty for an act of desertion on the part of the petitioner therein. The operative portion of the order as found in paragraph Nos.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 back wages 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."

9. The learned counsel for the petitioner would also draw the attention of this Court to W.P.No.24162 of 2012 dated 08.12.2017, yet again this Court has allowed the writ petition on similar circumstances. The findings of the learned Judge of this Court in paragraph Nos.16 to 18 are extracted 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 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."

The learned counsel for the petitioner would submit that even in the case of multiple acts of desertion, the Courts have intervened and moderated the penalty by ordering reinstatement of the police personnels.

10. Upon notice, learned Special Government Pleader appearing for the respondents, entered appearance and filed a detailed counter affidavit.

11. In the counter affidavit, it is admitted that it was a solitary act of desertion on the part of the petitioner. However, the learned Special Government Pleader would submit that the fact of the matter was, the petitioner remained absent without prior intimation or permission. Therefore, he was declared as deserter under the provisions of the Police Standing Order. Therefore, the act of desertion would only mean that the petitioner is not interested in serving the Police Force where the discipline has to be maintained at all time. Therefore, the second respondent's order of removal from service, was a proper punishment in the circumstances of the case. He would therefore submit that despite opportunity given to the petitioner, he did not choose to participate in the enquiry. Therefore, for the proved misconduct, the penalty of removal from service was imposed on the petitioner.

12. This Court has considered the rival submissions of the learned counsel on either side and perused the materials and pleadings placed on record. Admittedly, it is a solitary act of desertion on the part of the petitioner which invited the

disciplinary action against him. Unfortunately, in this case, the petitioner for whatever reasons has not chosen to participate in the departmental enquiry. It appears that the report of the enquiry was also not furnished to him. Therefore, there appears to be some force in the contention put forth on behalf of the petitioner that no reasonable opportunity was afforded to the petitioner.

13. Even otherwise, as rightly contended by the learned counsel for the petitioner that the Courts have consistently held that for an act of desertion, the punishment of removal or dismissal from service was harsh, excessive and disproportionate. In fact, on earlier occasion, this Court has intervened in respect of the same misconduct committed by the member of the Police personnel for more than one occasion and ordered reinstatement without back wages for the period of non-employment. That being the case, the petitioner herein has much better case calling for interference of this Court in regard to the penalty of removal from service. The citations relied on by the learned counsel for the petitioner would squarely apply to the factual matrix of the present case. Therefore, this Court has not hesitation in coming to a conclusion that the petitioner has made out a clear case for calling for interference of this Court in regard to the quantum of penalty imposed on him.

14. For the above said reasons, the impugned orders in B.O.No.319/2013, C.No.D1/PR.12/2013, dated 23.07.2013 and Order No.Na.Ka.No.233084/Me.Mu.3(1)/2013, dated 23.06.2014, are hereby set aside. The respondents are directed to reinstate the petitioner in service with all attendant benefits. However, it is made clear that the petitioner is not entitled to back wages for the period of his non-employment till the date of his reinstatement. This Court is of the considered view that the denial of back wages would be a sufficient punishment in the facts and circumstances of the case, since admittedly, it is a single act of misconduct. The respondents / competent authorities are directed to comply with the order of reinstatement, within a period of eight weeks from the date of receipt of a copy of this order.

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

Sd/-
Deputy Registrar

//True Copy//

Sub Assistant Registrar

gsk

To

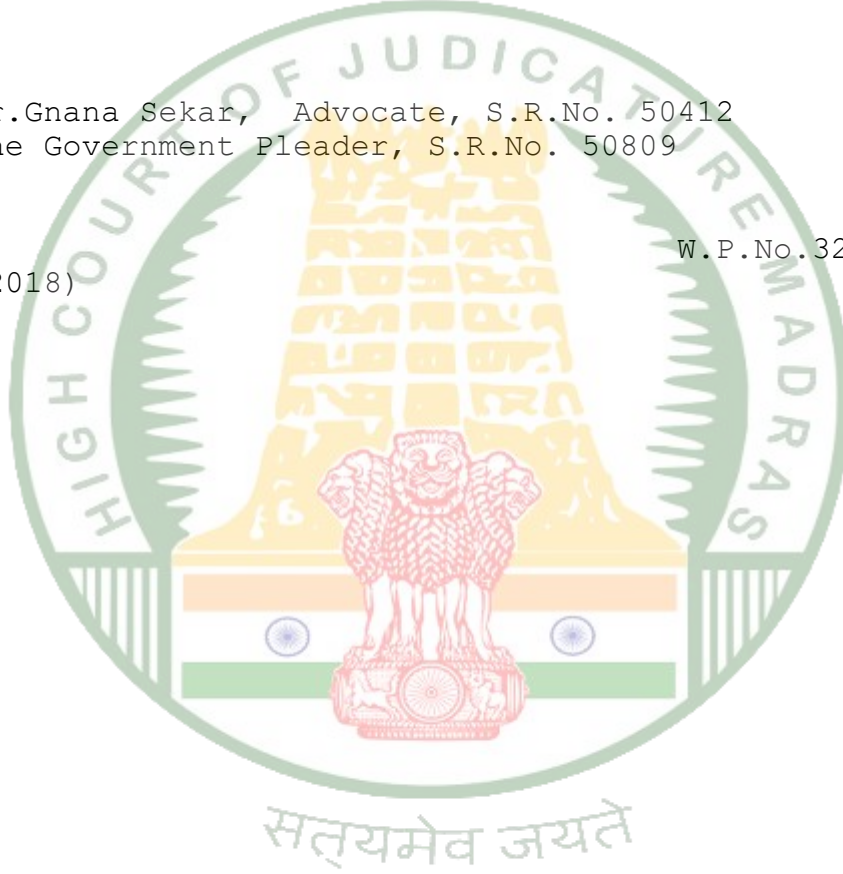
1.The Director General of Police,
No.1, Kamarajar Salai,
Mylapore,
Chennai 600 004.

2.The Commandant,
Tamil Nadu Special Police,
15th Battalion,
Vellore @ Avadi,
Chennai 600 054.

+1cc to Mr.Gnana Sekar, Advocate, S.R.No. 50412
+1cc to the Government Pleader, S.R.No. 50809

GN(11/09/2018)

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