

IN THE HIGH COURT OF JUDICATURE AT MADRAS

DATED : 09.07.2018

CORAM

THE HONOURABLE Mr.JUSTICE V.PARTHIBAN

W.P.No.33362 of 2015

Kolumbus

... Petitioner

Vs

1.The Director General of Police,
Mylapore, Chennai 600 004.

2.The Superintendent of Police (Railways),
Chennai 600 008. Respondents

PRAYER : Petition filed under Article 226 of the Constitution of India, praying to issue a writ of Certiorarified Mandamus, to call for the records relating to the second respondent's order made in C.No.G1/PR No.66/2006 dated 09.07.2008, as confirmed by the 1st respondent in his order in Rc.No.120497/AP IV (2)/2014 dated 20.06.2015, to quash the same and to consequently, direct the respondents to forthwith reinstate the petitioner with all benefits both service and monetary and to extend other applicable benefits.

For Petitioner : Mr.L.Chandrakumar
For Respondents : Mr.J.Pothiraj,
Special Government Pleader

O R D E R

Heard Mr.L.Chandrakumar, 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 records relating to the second respondent's order made in C.No.G1/PR No.66/2006 dated 09.07.2008, as confirmed by the 1st respondent in his order in Rc.No.120497/AP IV (2)/2014 dated 20.06.2015, to quash the same and to consequently, direct the respondents to forthwith reinstate the petitioner with all benefits both service and monetary and to extend other applicable benefits. "

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

The petitioner was appointed as Grade II Police Constable on 27.02.1986. Subsequently, he was promoted as Head Constable and according to him, he had rendered blemishless record of service without any adverse remark till the time when the charge memo was issued to him, which is a subject matter of the present litigation.

4. While he was working as Head Constable, he was issued with the charge memo on 07.12.2006 under Rule 3(b) of the Tamil Nadu Police Subordinate Services (Discipline and Appeal) Rules, charging the petitioner for remaining unauthorizedly absent continuously for 21 days. An enquiry was conducted into the charges. But, the petitioner did not choose to participate in the departmental enquiry. The enquiry was concluded exparte, holding the charge proved against the petitioner.

5. On the basis of the enquiry report, the second respondent passed an order on 09.07.2008, removing the petitioner from service. The leave period of the petitioner from 20.10.2006 to 28.11.2006 had been treated as eligible leave including extraordinary leave to the extent necessary. It appears that the petitioner was taken back to duty when he reported on 29.11.2006 as evidenced by the proceedings of the respondents dated 29.11.2006. After a lapse of several years, the petitioner appeared to have submitted a mercy petition on 23.07.2014 to the first respondent and the first respondent vide his proceedings dated 20.06.2015, rejected the same, stating that there was no merit in the mercy petition and also the same was preferred after six years. The petitioner has also not preferred a statutory appeal after the removal order was passed by the disciplinary authority, but, had chosen to submit mercy petition to the first respondent belatedly. The original order of removal from service dated 09.07.2008 and the order of mercy petition dated 20.06.2015 are put to challenge in the present writ petition.

6. Upon notice, learned Special Government Pleader appearing for the respondents entered appearance and filed a detailed counter affidavit, resisting the claim of the petitioner. In the counter affidavit, it has been clearly explained that the conduct of the petitioner and his unauthorized absence and his non participation in the departmental enquiry in paragraph Nos.5 to 7 are extracted below:-

"5. As regards the averments set out in paragraph 2 of the affidavit, it is submitted that the petitioner was appointed as Gr.II PC on 27.02.1986, promoted as Gr.I PC on 05.09.1997 and upgraded as Head Constable on 22.07.2002 and has completed 19 ½ years of service as on the date of desertion on 20.10.2006.

6. As regards the averments set out in paragraph 3 of the affidavit, it is submitted that the contentions of the petitioner was false, because the charge memo was initiated against the petitioner on 07.12.2006 for deserting the force on 20.10.2006. The petitioner was deputed to report before the Inspector, Special Branch on 18.10.2006 and absented himself on his own accord without leave or permission for more than 21 days from 20.10.2006. The petitioner had acknowledged the receipt of the charge memo on 20.12.2006 in his own hand writing.

7. As regards the averments set out in paragraph 3 of the affidavit, it is submitted that the charge memo was acknowledged by the petitioner on 20.12.2006. The petitioner was directed to appear for the oral enquiry at 10.00 A.M. On 06.02.2007 through memo dated 01.02.2007. Since the petitioner was not available in his residence it was pasted on the door of his residence on 06.02.2007. In spite of that he did not attend the oral enquiry. Again the oral enquiries was fixed on 17.02.2007, 28.02.2007, 05.03.2007, 12.03.2007 and 17.03.2007, he did not attend the oral enquiries, he was given all reasonable opportunities to defend himself. But he did not utilize the opportunity provided to him and failed to attend the oral enquiry. Hence, the prosecution witnesses were examined in his absence."

7. The learned counsel for the petitioner would submit that the petitioner had legitimate reasons for remaining absent unauthorizedly and unfortunately, the reasons given by the petitioner for remaining absent for the period in question was not considered in proper perspective. According to the learned counsel that the petitioner although remained absent for some time, had reported for work on 29.11.2006 and was taken back to duty. Once the petitioner had reported back to duty, the second respondent's action in imposing harsh penalty of removal from service did not commensurate with the gravity of misconduct committed by the petitioner. According to the learned counsel, the disciplinary authority as well as the first respondent who dealt with the mercy petition, passed a non-speaking order, notwithstanding the fact that the petitioner had remained absent during the departmental enquiry. In any event, according to the learned counsel, the Courts have consistently held that for the acts of desertion, the punishment of removal or dismissal from service was excessive and harsh and the Courts have interfered with such punishment imposed on the police personnels.

8. The learned counsel for the petitioner would therefore submit that in this case, it was a solitary act of desertion and such solitary act cannot entail extreme penalty of removal from service. Once the petitioner had reported for duty and he was taken back, the imposition of penalty of removal from service cannot be countenanced both in law and on facts as the punishment did not satisfy the "test of proportionality" as laid down by the Courts.

9. The learned counsel for the petitioner would rely upon the following decisions of this Court which held that the punishment of removal or dismissal from service was harsh and excessive and following the decisions, this Court has also passed a similar orders under similar circumstances. The learned counsel would draw the attention of this Court to the order passed by the learned Division Bench of this Court in W.A.No.58 of 2011 dated 27.01.2011, wherein, the learned Division Bench has passed orders in paragraph Nos.2 and 3 as follows:-

"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 this past conduct, the punishment of dismissal cannot be termed as excessive or disproportionate. सत्यमेव जयते

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 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."

10. Following the learned Division Bench order, the learned counsel would also draw the attention of this Court to an order passed by the learned Single Judge of this Court as he then was in W.P.No.16415 of 2009 dated 15.06.2011. The operative portion of the order passed by the learned Single Judge as he then was in paragraph No.10 as follows:-

"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."

11. Following these decisions, this Court vide its order rendered in W.P.No.6873 of 2013 dated 19.09.2017, has ruled in paragraph Nos.6 and 7 as follows:-

"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."

12. The learned counsel for the petitioner would draw the attention of this Court to the order on the same issue, this Court passed similar orders on 08.12.2017 in W.P.No.24162 of 2012 and the findings rendered in paragraph Nos.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 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."

13. Lastly, this Court passed yet another order in respect of similar issue in W.P.No.22611 of 2011 dated 23.03.2018, paragraph Nos.13 to 15, are reproduced below:-

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.

The learned counsel would therefore submit that these decisions are squarely applicable to the facts of the present case. Therefore, the petitioner may be granted similar relief as given in other cases.

14. This Court considered the factual and legal submissions of the learned counsel for the petitioner as well as the learned Special Government Pleader appearing for the respondents and perused the materials and authorities cited on behalf of the petitioner. In fact, this Court at least in three such similar cases, has interfered with the quantum of penalty and ordered reinstatement of the police personnels who were sent out of service for desertion by denying them the back wages for the period of non-employment holding that such denial would be a sufficient penalty.

15. In fact, the learned Division Bench of this Court as cited supra has clearly held that for an act of desertion, the punishment of removal or dismissal from service is very excessive and harsh and following that, this Court has consistently held that the act of desertion cannot entail extreme punishment of removal from service. This position was also held good even in the case where there were more than one instance of desertion.

16. In the said circumstances, this Court is bound by the ruling of the learned Division Bench and also bound by the orders passed by this Court in respect of similar writ petitions. Although the conduct of the petitioner for deserting the Police Force is not condonable, nevertheless, the fact of the matter is that the Courts have consistently held that the punishment of removal or dismissal from service was excessive and harsh for an act of desertion. Therefore, for the sake of rendering uniform justice, this Court cannot take a different view in the present matter alone.

17. For the above said reasons, the impugned orders in C.No.G1/PR No.66/2006 dated 09.07.2008 and Rc.No.120497/AP IV (2)/2014 dated 20.06.2015, are set aside and the respondents are directed to reinstate the petitioner with all other attendant benefits. However, the petitioner is not entitled to back wages from the date of his dismissal from service i.e., from 09.07.2008 until the date of reinstatement. The denial of the back wages for the period of non-employment is a sufficient penalty to be imposed on the petitioner in the facts and circumstances of the case. It is also made clear that the petitioner shall not repeat such an act of desertion in future and in case, such misconduct is repeated, it is always open to the respondents to take severe action against the petitioner. The respondents are directed to comply with the direction, within a period of eight weeks from the date of receipt of a copy of this order.

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

Sd/-
Assistant Registrar(CS-II)

//True Copy//

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Sub Assistant Registrar

gsk

To

1.The Director General of Police,
Mylapore, Chennai 600 004.

2.The Superintendent of Police (Railways),
Chennai 600 008.

+1cc to Mr.L.CHANDRAKUMAR, Advocate, S.R.No. 44446
+1cc to the Government Pleader, S.R.No. 44953

W.P.No.33362 of 2015

TR(30/07/2018)