

**IN THE HIGH COURT OF PUNJAB AND HARYANA AT
CHANDIGARH**

**CWP No. 3573 of 2003
Date of Decision: 14.12.2018**

Sanjeev Sharma

...Petitioner

versus

Union of India and others

...Respondents

CORAM : HON'BLE MR. JUSTICE ARUN MONGA

Present : Mr. Hemen Aggarwal, Advocate,
for the petitioner.

Ms. Anita Balyan, Advocate,
for the respondent.

ARUN MONGA, J. (ORAL)

1. The present writ petition has been filed for issuance of a writ in the nature of certiorari seeking quashing of impugned order dated 05.12.2001 (Annexure P-2) passed by the Punishing Authority i.e Commandant CISF, as also order dated 08.01.2003 (Annexure P-5) passed by the Appellate Authority upholding the order passed by the Punishing Authority, whereby the petitioner was dismissed from service.

2. Succinctly, the facts are that the petitioner had put in 09 years of service as Constable in CISF, when he was dismissed on the charge of remaining absent from duty without leave for a period of 42 days. The petitioner states that said delinquency attributed to him for remaining absent from duty without leave

was owing to the exceptional circumstances in view of his wife's serious illness which disabled him to report for duty.

3. Petitioner has further stated that the punishing authority, later on, vide a separate order dated 24.12.2001 (Annexure A-1) regularized even the said period of absence of 42 days i.e from 01.08.2001 to 11.09.2001. The punishing authority in the impugned order dated 05.12.2001 itself observed that the period of absence will be regularized separately. Yet, it proceeded to award punishment of dismissal on the ground of absence from duty without leave.

4. The petitioner was enrolled as Constable on 18.07.1992. He was posted at 9th Reserve Batallion, Main Civil Secretariat at Chandigarh. On 01.08.2001, at 7.00 AM, he received a telephonic message from his house regarding illness of his wife. Thereafter, petitioner left for his house. After getting his wife treated, he joined his duties after 42 days. He was charge sheeted for remaining absent from duty without leave for 42 days. On this charge, respondent No.4 awarded the petitioner exemplary punishment of removal from service.

5. In the written statement filed in response to the writ petition, emphasis is more on the past misconduct of the petitioner. Instances of past misconduct have been enumerated therein viz. i) assaulting a civilian for which he was awarded penalty of 7 days of pay; ii) for remaining absent without leave w.e.f 28.01.2000 to 29.03.2000 for which one increment for one

year was withheld with cumulative effect; iii) for remaining absent from duty without leave w.e.f 28.04.2000 to 04.07.2000, 01.09.2000 to 18.09.2000 and w.e.f 29.09.2000 to 14.11.2000 habitual of absent without leave/overstay on leave for which penalty of reduction to minimum stage from ₹3350/- to ₹3050/- for a period of one year; iv) for remaining overstay on leave w.e.f. 09.04.2001 to 08.05.2001 for which he was awarded 05 days pay as fine and last punishment is under challenge in this petition. Therefore, the punishment of dismissal was pleaded to be justified in view of the delinquencies committed by the petitioner in past.

6. I have gone through the pleadings and the appended record thereto and have heard the rival contentions of the learned counsels appearing for respective parties.

7. Learned counsel for petitioner contends that once the period of unauthorized absence was regularized then on the charge of being absent without leave, he could not have been dismissed. He submits that once the charge itself did not survive then the situation did not warrant any punishment, be it minor or major. He places reliance upon a judgment rendered by this Court reported as **2001 (3) SCT 492** titled as **Jarnail Singh vs.**

State of Punjab, the relevant whereof is extracted below :

“6. This appeal has to be allowed and the dismissal of the appellant from service has to be set aside and it is accordingly set aside, on a short ground, namely that while dismissing him from service the Senior

Superintendent of Police, Barnala had observed that the period during which he remained absent shall be treated as the leave of the kind due, the period of absence which is the basis of his dismissal from service, no longer survived and it was condoned. It was held in the State of Punjab v. Bakshish Singh, 1997 (3) SCT 401 (SC); 1998 (5) SLR 625, that once the period of absence was treated as leave of the kind due, the fact that the delinquent remained absent from duty could not be sustained. Since the period of unauthorized absence from duty was regularised, the charge of the absence did not survive."

8. Learned counsel for the petitioner contends that the punishing authority passed a very harsh order of dismissal on the basis of a charge i.e absent without leave for 42 days, which, admittedly, had been regularized vide separate order.

9. Learned counsel for the petitioner argued with strong vehemence that penalty of dismissal inflicted on the petitioner is ex facie disproportionate to the alleged misconduct on his part. He contends that it cannot be disputed that the petitioner was indeed absent without leave for a period of 42 days but the same did not warrant maximum penalty. He states that the petitioner had rendered nine years of service and in these circumstances, awarding such extreme penalty of dismissal was completely unjustified.

10. Learned counsel for petitioner further contends that, another employee who was similarly situated as the petitioner,

was re-instated in service by virtue of a Division Bench judgment of Delhi High Court dated 24.05.2012 in ***WP (Civil) No.7098 of 1999 titled as "Constable Ashok Kumar v. Union of India."***

The delinquency attributed to the employee therein was absence without leave for a period of 115 days. He states that Delhi High Court judgment has since attained finality, as respondent-CISF did not file any appeal against the same. The petitioner therein was re-instated in compliance of the said judgment. The relevant extract from the said judgment is reproduced hereunder :-

"42. Considering the nature of the charge, the punishment awarded and the circumstances of the case, the punishment of dismissal does not conform to the gravity of the alleged misconduct imputed against the petitioner. In *Braj Kishor Singh v. State of Jharkhand and ors.* 2005 (2) BLJR 1415 it was held that if after explanation, it appears that the charged officer had remained absent from duty due to any sufficient reason, he shall be granted leave admissible to him for that period and the punishment is to be inflicted only in the cases where it is proved that the delinquent has violated the rules at his own will. In the said case the petitioner, who was a constable and had over stayed leave for 38 days, had given sufficient cause for the same and had proved it on the record with proper medical documents, which however was not duly appreciated by the Disciplinary Authority, The Court had, therefore, held that the punishment of compulsory retirement was unconscionable, excessive and disproportionate to the charge imputed against the charged officer and consequently the Court had set aside the penalty of compulsory retirement and the

charged officer was reinstated with part of back wages.

11. Learned counsel for the petitioner seeks parity of the petitioner with the petitioner in Ashok Kumar's case, *ibid*. He argues that in the present case also, a writ of mandamus ought to be issued, directing the respondents to re-instate the petitioner.

12. Per contra, learned counsel for the respondent points out that ratio rendered in Delhi High Court judgment (*supra*) is not applicable in the present case, in view of the fact, that the petitioner is a habitual offender. He further justified the impugned order passed by the punishing authority and the appellate authority on the ground that there is no legal infirmity involved. He argues that petitioner being a member of Armed Forces, was duty bound, to apply for leave, after receipt of information about his wife's illness. Having failed to do so, he has been rightly inflicted with the punishment of dismissal from service.

13. The stand taken by learned counsel for the respondent qua the past conduct of the petitioner does not stand scrutiny of law or the principles of fair play and justice. Even the impugned orders passed by the punishing authority and the appellate authority, nowhere, mention past conduct of the petitioner being the ground of holding him a habitually delinquent. It is only for the first time in the written statement filed in this Court, that the stand has been taken that past conduct of the petitioner was not

satisfactory.

14. To be noted here, that the punishment of dismissal has been awarded to the petitioner apropos the charge of "over stay on leave by a period of 42 days without seeking appropriate sanction". The charge-sheet admittedly does not have any other charge qua the past conduct. Neither was the petitioner put to notice qua any past charge being the reason of dismissal. Further more, the nature of past conduct and the punishments awarded therein are not of such grave nature so as to warrant dismissal. In any case, once past conduct has been appropriately penalized by the employer, it cannot then be reopened later, while granting punishment for an other stand alone charge, which is later in time.

15. What is further noteworthy is that orders passed by punishing authority and Appellate Authority show that even the act of the petitioner having remained absent without leave was found to be believable. It was also observed by the punishing authority that wife of the petitioner was indeed in critical condition. Notwithstanding, the punishing authority observed that wife being in critical condition does not mean that the petitioner could absent himself from duty and abscond from the office without any leave or permission. No doubt petitioner ought to have sought permission but the reasoning adopted by the punishing authority as also the appellate authority shows lack of application of mind on their part to understand the medical

emergency explained by petitioner.

16. The punishing authority further fell in grave error by observing that the delinquent employee/petitioner has himself accepted his offence and, therefore, deserved the maximum punishment i.e. dismissal from service. While doing so, the punishing authority completely overlooked the mitigating circumstances explained by the petitioner.

17. The reasoning of the punishing authority found favour with the Appellate authority. The appellate authority, did not apply his independent mind as is reflected from the perusal of his order. The Appellate authority observed that the petitioner being a member of Armed Forces was duty bound to apply for leave after receipt of information about his wife's illness, which he failed to do so. The appellate authority also did not go into the mitigating circumstances of the petitioner. Appellate authority, in fact, noticed the justification but preferred to disregard the same. I am of the view that the Appellate authority erred, both, in law and facts, in as much as not applying its independent mind while upholding the orders passed by the punishing authority.

18. I am in agreement with the reliance placed by learned counsel for the petitioner on the judgment rendered in ***Constable Ashok Kumar's case (supra)***, wherein it has been held that past conduct of an employee which is not subject matter before the punishing authority cannot be reopened for granting the punishment qua a charge over which the delinquent

employee has been put to notice.

19. In view of my discussion above and the reasoning contained therein and the judgments relied upon by learned counsel for petitioner, the impugned orders dated 05.12.2001 and 08.01.2003 are set-aside. The respondents are directed to re-instate the petitioner with continuity of service and consequential benefits with effect from the date when he was dismissed from service, within two months from the date of receipt of certified copy of this order. However, it is made clear that the petitioner shall not be entitled to any pay for the period he was out of service

20. With the above said observations, the present writ petition is allowed, in terms of preceding para, above.

(ARUN MONGA)
JUDGE

DECEMBER 14, 2018
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1. Whether speaking/reasoned : Yes/No
2. Whether reportable : Yes/No