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* **IN THE HIGH COURT OF DELHI AT NEW DELHI**

Date of Decision : 28.02.2018

+ W.P(C) 6149/2017

SURINDER SINGH

..... Petitioner

Through Mr.Rajat Aneja with
Ms.Chandrika Gupta, Advs.

versus

DELHI HIGH COURT & ORS. Respondents

Through Mr.Siddharth Aggarwal with
Ms.Rupali Samuel, Advs for
R-1/DHC.

Mr.Ankur Chhibber with
Mr.A.S.Aggarwal, Advs for
R-2 & 3.

Mr.Surya Kumar, Judicial
Assistant, O/o.District Judge
(NE).

CORAM:

HON'BLE MR. JUSTICE S. RAVINDRA BHAT

HON'BLE MR. JUSTICE A. K. CHAWLA

A.K. CHAWLA, J. (ORAL)

1. By the petition filed under Article 226 of the Constitution of India, the petitioner seeks judicial review of the order dated

03.08.2013 passed by the Ld. District & Sessions Judge (NE) imposing penalty of removal from service upheld by the Appellate Authority vide order dated 16.01.2017 (in short 'the impugned orders').

2. Concisely, the facts emerging from the record are that the petitioner was initially appointed on ad-hoc basis as Peon/Orderly by the District & Sessions Judge, Delhi on 29.01.1997 and later, regularized in the year 1998. In the year 2009, he came to be transferred to and posted at Karkardooma Courts. While posted at Karkardooma Courts, he started absents unauthorisedly and departmental enquiries ensued. At the time of passing of the impugned order dated 13.08.2013, the petitioner stood penalised for his unauthorised absence for the period from 15.02.2010 to 24.02.2010 having been awarded punishment of withholding of two increments with cumulative effect while two departmental enquiries for his absence for the period from 30.6.2010 to 30.9.2010 and 5.9.2012 to 2.8.2013 were still pending. Departmental enquiry for his unauthorised absence with effect from 03.01.2011 to 09.03.2011; 14.03.2011 to 02.04.2011 and from 12.05.2011 onwards, culminated into the passing of the impugned orders.

3. According to the petitioner, on account of sickness, he was unable to attend to his duties for the periods he absented. On his joining duties on 10.03.2011, he had furnished a medical certificate (which is not disputed by the department and is found to be

genuine). The petitioner initially joined the subject departmental enquiry but later, absented. In order to prove the charges, the department examined three of its witnesses viz. SW-1 Ms. Asha Rani, Asstt., Leave Section (NE); SW-2 Ms. Rajni Chattwal, Supdt.Admin.(NE); and, SW-3 Dr.Rashmi Aggarwal, BAMS, Raj Bala Hospital, Trauma and Surgery Centre. None of these three witnesses were cross-examined as neither the petitioner appeared for the purpose nor had any representation before the Enquiry Officer. Enquiry Officer returned the finding for the charges of unauthorised absence proved. Notice thereof was issued to the petitioner and thereon, the petitioner made a representation and was also given a hearing by the Ld. District & Sessions Judge, KKD. Vide the impugned order dated 03.08.2013 the Ld. District & Sessions Judge (NE) imposed penalty of removal from service and that was upheld by the Appellate Authority. Hence, this petition.

4. The petitioner challenging the authority of the Ld. District & Sessions Judge (NE) to pass the impugned orders asserts that the order of removal from service is bad in law in the given facts and circumstances besides being disproportionate to the alleged misconduct. According to the petitioner, his absence from duty was on account of the circumstances beyond his control inasmuch as he was sick and medically unfit to work. In support thereof, he places reliance upon the medical certificate dated 09.03.2011 Exhibit SW-3/1 that came to be proved on record by the department itself. It is

also averred that the petitioner belonged to lower echelons of Class IV service and without having educational attainment of a high order was to face an enquiry and expected to defend himself without any assistance and without knowing the intricacies of the departmental enquiry. The enquiry conducted by the Enquiry Officer and the impugned penalty awarded to the petitioner are therefore said to be in violation of the principles of natural justice and not sustainable in law. Award of the penalty of removal from service is also asserted to be too harsh as it forfeited his entire previous service and denied him pension and other terminal benefits and the penalty so imposed was disproportionate to the alleged misconduct and therefore, liable to be set aside.

5. During the course of hearing, Ld. counsel for the petitioner did not dispute the fact that the petitioner was unauthorisedly absenting his duties off and on and even failed to inform the department the reason(s) of his absence. It was not disputed that out of the four departmental enquiries initiated against the petitioner, the petitioner stood already punished for his unauthorised absence from 15.2.2010 and 24.2.2010 and the impugned orders had come to be passed for his unauthorised absence w.e.f 03.01.2011 to 09.03.2011; 14.03.2011 to 02.04.2011 and since 12.05.2011 onwards and that, it was only for the period from 03.01.2011 to 09.03.2011, he had produced one medical certificate Exh.SW-3/1, when he joined his duties on 10.03.2011.

6. Undisputedly, the petitioner has been absenting his duties repeatedly and unauthorisedly. Except the medical certificate dated 9.3.2011 Exhibit SW-3/1 certifying that the patient was suffering from fever with viral hepatitis and was under the close observation of the hospital for about two months and advised bed rest from 3.1.2011 to 9.3.2011, no other medical prescription or any report of diagnosis has come to be produced on record by the petitioner nor has been pointed out during the course of hearing.

7. Leave is not a matter of right to be exercised at the sole discretion of an employee. An employee also cannot take excuse of the fact that he belongs to a lower echelon of a service like Class IV and thereby, ignore the compliance of the applicable Conduct Rules. Intermittent absenteeism and that too, without any intimation, of course, seriously affects the smooth functioning of an office. An employee is deployed to any office for a purpose and when an employee absents without any permission and intimation, it results in serious disruption in the functioning of the office. Any such absenteeism, therefore, cannot be ignored lightly and deserves to be dealt with sternly.

8. Recurring absenteeism of the petitioner inspite of the fact that he stood even penalised for such misconduct compounds the issue and leads to the necessary inference that he was incorrigible. The mere plea of sickness, in the given facts and circumstances, does not

aid the petitioner. The other plea of being not well educated to understand the intricacies of the departmental enquiries is equally of no avail to the petitioner inasmuch as any ignorance thereof cannot be accepted as an excuse, as such. It is a matter of record that the petitioner initially joined the enquiry proceedings and did not choose to engage any defence assistance and after few appearances, of his own volition, did not join the enquiry proceedings either when the departmental witnesses came to be examined or thereafter. There is therefore no gainsaying in the submission that he was not afforded a fair opportunity to defend himself of the charges of misconduct and the departmental enquiry suffered from any illegality or procedural irregularity of material nature. Conscious thereof, it appears, the Ld. counsel for the petitioner restricted challenge to the quantum of punishment. Having considered the diverse aspects of the matter, we find that the findings of misconduct of the petitioner, which have been well gone into by the Appellate Authority as well, do not invite interference by this Court.

9. Coming to the question of the proportionality of the punishment imposed, which is agitated by the Ld. counsel for the petitioner, though the scope for interference by this Court is narrow, it is difficult to ignore that the punishment of removal from service has the effect of forfeiting the entire previous service and denying even pension and the terminal benefits which has serious

consequences especially for a person, who is a Class IV employee and has a wife and three minor children to support.

10. Petitioner is penalised for his unauthorised absence for the period from 03.01.2011 to 09.03.2011; 14.03.2011 to 12.05.2011 and from 12.05.2011 onwards. For the period of his absence from 03.01.2011 to 09.03.2011, he produced medical certificate Exhibit SW-3/1, when he joined the duties on 10.03.2011. This medical certificate was found to be genuine inasmuch as the department has examined the doctor, who issued it. In the absence of anything on record to belie the genuineness of such certificate, it necessarily implies that the petitioner was sick during the said period. In her deposition, Doctor SW-3 has also deposed for having remembered that when the patient visited for taking the certificate, he was very weak and she had advised him to bed rest for about two months. This deposition of department witness SW-3, the department has not disputed or challenged. It does lead to the conclusion that the petitioner was sick during the said period and possibly, thereafter as well. It appears that the little education coupled with negligence solely attributable to him, apparently unintentional, has carried the petitioner to the situation in hand. Otherwise, no malafides for his misconduct in question have come to be pointed out. Equally, one cannot loose sight of the fact that till June, 2010, when the petitioner started absenting, no allegation of any misconduct attributable to him has come to be pointed out at any stage of the

proceedings. Dealing with the aspect of the penalty imposed being proportionate or commensurate with the charge of misconduct, the Appellate Authority has observed as under:

"17. Since the appellant has repeatedly remained absent from duty without any justified reason, whatsoever, penalty imposed by the Disciplinary Authority cannot be considered as unreasonable, excessive or harsh or disproportionate to the gravity of charge imputed to him. Repeated intentional misconduct can't be condoned every time."

11. No doubt, unauthorised absenteeism from duty has serious connotations. In this case, the absence appears to be on account of some chronic health issue of the petitioner. We are also unable to find from the record any of the misconduct of the petitioner having been condoned nor anything to that effect has come to be pointed on behalf of the respondents. In the given factual conspectus, to us, the penalty of removal from service, when for more than 13 years of the initial service of the petitioner not even an iota of misconduct was pointed out, operates excessively harsh, which invites judicial review by this Court. Having formed an opinion to that effect, the question arises as to whether in the given facts and circumstances, the matter be remanded back to the competent Authority to decide on the question of penalty afresh, keeping in view the observations made hereto-above. In the said context, it would be relevant to note that in *Bhagat Ram vs. State of Himachal Pradesh & Ors, (1983) 2*

SCC 442 relied upon by the petitioner, the Supreme Court observed as follows:-

"15. The question is once we quash the order, it is open to us to give any direction which would not permit a fresh enquiry to be held? After all what is the purpose of holding a fresh enquiry? Obviously, it must be to impose some penalty. It is equally true that the penalty imposed must be commensurate with the gravity of the misconduct, and that any penalty disproportionate to the gravity of the misconduct would be violative of Article 14 of the Constitution. Having been influenced by all these relevant considerations, we are of the opinion that no useful purpose would be served by a fresh enquiry. What option is open to us in exercise of our jurisdiction under Article 136 to make an appropriate order. We believe that justice and fairplay demand that we make an order of minor penalty here and now without being unduly technical apart jurisdiction, we are fortified in this view by the decision of this Court in Hindustan Steels Ltd., Rourkela vs. A.K.Roy where this Court after quashing the order of reinstatement proceeded to examine whether the party should be left to pursue further remedy. Other alternative was to remand the matter that being a case of an industrial dispute to the Tribunal. It is possible that on such a remand, this Court further observed, that the Tribunal may pass an appropriate order but that would mean prolonging the dispute which would hardly be fair to or conducive to the interest of the parties. This Court in such circumstances proceeded to make an appropriate

order by awarding compensation. We may adopt the same approach....."

12. Keeping in view the totality of the facts and circumstances and the ratio of the judgment in *Bhagat Ram's* case (Supra), we do not consider it necessary to remand the matter for reconsideration by the competent Authority and proceed to make an appropriate order.

13. As observed earlier, for the initial period of about 13 years in service, no misconduct of the petitioner surfaces on record nor was it pointed out during the course of hearing. He was removed from service vide impugned order dated 03.08.2013 of the Ld. District & Sessions Judge (NE) within whose jurisdiction, the petitioner was posted. His unauthorised absenteeism, as emerges from the record, started somewhere in February, 2010. It appears to be on account of some health issue, which he developed during the course of his service. These mitigating facts and circumstances, convince us to take a lenient view.

14. In view of the foregoing, the penalty of removal from service is hereby modified to one of compulsory retirement. It is also directed that the compulsory retirement order would be effective from 31.01.2017 in the circumstances of the case and the past period (i.e. periods when the petitioner was not in service and absence was the subject matter of enquiry) shall be reckoned and

duly considered for the purpose of terminal benefits and pension only. The petitioner shall however be not entitled to any arrears of pay and allowance for the entire duration he was out of employment. The pension and terminal benefits shall however, be calculated and disbursed for the period 01.02.2017 onwards. The arrears on that score shall be disbursed within eight weeks from today.

The petition is partly allowed in the above terms.

A. K. CHAWLA, J

S.RAVINDRA BHAT, J

FEBRUARY 28, 2018

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