

IN THE HIGH COURT OF JUDICATURE AT PATNA
Civil Writ Jurisdiction Case No.1518 of 2017

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Shankar Ghosh, S/o Late Badal Ghosh, R/o Old Police Lines, North of
Gandhi Maidan, P.O. Bankipore, P.S. Gandhi Maidan, District – Patna.

... .. Petitioner/s

Versus

1. The State of Bihar through the Home Secretary, Govt. of Bihar, Patna.
2. Director General Cum Inspector General of Police, Bihar, Patna.
3. Deputy Inspector General, B.M.P. Phulwari Sharif, Patna
4. Commandant, B.M.P. 14, Phulwari Sharif, Patna

... .. Respondent/s

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Appearance :

For the Petitioner/s : Mr. Ram Yash Singh, Advocate.
For the Respondent/s : Mr. Shailesh Kumar, A.C. to G.P.-5

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CORAM: HONOURABLE MR. JUSTICE CHAKRADHARI SHARAN SINGH

ORAL JUDGMENT

Date : 18-11-2019

Heard learned counsel for the parties.

2. The petitioner was working as a cook in the Company Headquarters of Bihar Military Police-14 (BMP-14). He has filed the present writ application challenging the order of the disciplinary authority namely, Commandant, BMP-14 dated 24.05.2014 (Annexure-1) in the Departmental Proceeding No. 27/2013 whereby punishment of dismissal from service has been imposed on him. The petitioner's appeal against the order of the disciplinary authority has been dismissed by the DIG, BMP, vide order dated 23.07.2014 (Annexure-2). He had approached the Director General-cum-Inspector General of Police, Bihar, by filing a memorial against the aforesaid two orders, which too, has been dismissed by an order dated 27.10.2016. The



aforesaid orders passed by the D.I.G., B.M.P., Patna, dated 23.07.2014 and Director General-cum-Inspector General of Police, Bihar, dated 27.10.2016 have also been put to challenge in the present writ application.

3. I have heard Mr. Ram Yash Singh, learned counsel appearing on behalf of the petitioner and Mr. Shailesh Kumar, learned A.C. to G.P-5, representing the State of Bihar. At the very outset, it must be noted that no procedural irregularity, having the potential of vitiating the finding of guilt of the misconduct of the petitioner as alleged in the charge sheet, has been pointed out. Mr. Ram Yash Singh, learned counsel appearing on behalf of the petitioner has, however, submitted that the extreme punishment of dismissal of service for the petitioner's absence from duty for the periods of 12 days and 08 days, is so disproportionate as to shock, this Court's conscience and, therefore, the impugned action deserves interference by this Court in exercise of power under Article 226 of the Constitution of India. He has argued that the petitioner's past conducts, for which he had already been punished, have also been made part of the misconduct against him and the basis for imposition of the extreme punishment of dismissal from service. According to him, though, the petitioner is working under Bihar Military Police, which is a para military force of the State of Bihar, the post, which, the petitioner held, is a civil post and the standard of discipline expected from a member of para military



force, cannot be a bench mark for determining misconduct of a person holding a civil post.

4. Learned counsel for the petitioner has relied on following two Supreme Court's decisions in support of his plea that the extreme punishment of dismissal from service is not only unduly harsh but grossly unjust, being in-excess to the allegations:

(i) (2009) 15 SCC 620 (Chairman cum Managing Director, Coal India Limited & Anr. Vrs. Mukul Kumar Choudhury & Anr.

(ii) 2010 (3) PLJR 197 (Indu Bhushan Dwivedi V. State of Jharkhand & Anr.)

5. He has relied on a decision of this Court in case of ***Md. Hanif Khan V. State of Bihar***, reported in ***2011(2) PLJR 599*** to contend that past punishment cannot be made a basis for inflicting punishment, for fresh set of charges.

6. A counter affidavit has been filed on behalf of the Respondent-State of Bihar wherein a plea has been taken that the petitioner being a habitual deserter, the disciplinary authority, considering the acts of the petitioner to be a case of gross misconduct, decided to impose major punishment of dismissal from service. Mr. Shailesh Kumar, learned A.C. to G.P.-5, referring to Rule 826 of Bihar Police Manual, has submitted that it is permissible for the disciplinary authority to consider past acts of the personnel governed by the said Manual, while determining the quantum of punishment. It has been



contended that the petitioner was made aware, from very beginning, about his past misconducts as the basis of charge and, therefore, it cannot be said that the petitioner had no knowledge about the fact that his past misconduct may be the basis for imposition of punishment. According to him, since no case of prejudice or bias is made out nor there is any violation of principles of natural justice, this Court may not interfere with the impugned order, for the reason that the nature of punishment to be imposed on an employee is within the exclusive domain of the Disciplinary Authority. He has argued that, in the background of proven track record of repeated misconduct, against the petitioner, punishment cannot be said to be grossly excessive.

7. In the light of the submissions made on behalf of the parties as noted above, I must recount the charge framed against the petitioner in the charge sheet, which has been brought on record by way of Annexure-4 to the writ application. It is alleged that the petitioner deserted his post on 02.01.2013 and returned back on 14.01.2013. On the allegation against him of having deserted the post, his salary was withheld by the Force Order No.6/2013. He again deserted the post on 28.01.2013 and returned eight days thereafter, i.e. on 05.02.2013. The charge takes note of the petitioner's past acts of desertion as recorded in his service book, from which, it transpires that the petitioner had deserted from duty 23 times and joined his duties overstaying leave for 24 times in past. He was placed under suspension



15 times and had already been awarded 8 major punishments and 14 minor punishments.

8. An explanation was sought from him and his response was not found satisfactory, whereafter, the Disciplinary Proceeding was initiated against him with the aforesaid charge leading to impugned action, which is under challenge in the present writ application.

9. Be it noted that there is no denial of the facts relating to imposition of major and minor punishments in the past, as was recorded in the charge memo. It is the true that the immediate cause of action for initiation of Departmental Proceeding against the petitioner was, his unauthorized absence for the period 02.01.2013 to 14.01.2013 (12 days) and 28.01.2013 to 04.02.2013 (08 days). It is in this context that submissions have been made on behalf of the petitioner as noted above, that unauthorized absence for the period of 12 days and 08 days, is not such misconduct as to warrant extreme punishment of dismissal from service. It has very vehemently been argued on behalf of the petitioner that such misconduct, for which, the petitioner has already been punished, could not be made basis for imposition of extreme punishment for the present charge.

10. The only question, thus, requires to be answered is, as to whether, in the facts and circumstances noted above, the punishment of dismissal from service can be said to be disproportionately excessive



and so grossly unjust that it would require this Court's interference exercising power of judicial review.

11. Before I examine this aspect, I must take note of Rule 826 of the Bihar Police Manual which reads thus and empowers the disciplinary authority to impose punishment after taking into account previous records of the service of the Officer concerned:-

“826. Discrimination necessary in awarding punishments. - The punishment awarded should be in conformity with the gravity of offence with which the officer is charged and offences involving moral turpitude shall be carefully discriminated from smaller wrong doings. It should also be borne in mind that the previous record of service of the officer concerned, if it is not already included in the charge of the proceeding shall not be taken into account for determining the quantum of punishment.

The objective of awarding punishment is firstly to keep a record of the wrong doings of the officer and secondly as a measure of correction to alert him to improve his work and conduct. Several punishments awarded in one lot such as during inspections which do not provide an opportunity to the delinquent officer to improve himself are not likely to be helpful. In any case, the punishment cannot be awarded without carefully considering the defence of the delinquent officer.



Before issuing orders of minor punishment, it is necessary to apprise the delinquent of the substance of the charges against him and he should be given adequate opportunity for defence. After this has been ensured, the punishment can be awarded. However in the case of major punishments (see Rule 828) formal proceedings in P. M. Form no. 178 will have to be drawn up.”

12. There is no denial of the fact that the petitioner's service was governed by the Police Manual. I am conscious of the fact that the said provision under Rule 826 of Bihar Police Manual may not be termed statutory, *stricto sensu* but it certainly lays down reasonable guidelines for a disciplinary authority to decide quantum of punishment and enables him to take into account past service record of the Police Personnel facing departmental action.

13. It is trite to say that imposition of punishment is within the exclusive domain and discretion of the disciplinary authority and, unless the quantum is found to be outrageous, defiance of logic or one which no sensible persons of ordinary prudence could have thought of proper, scope of the High Court while exercising power of judicial review under writ jurisdiction is minimal and almost absent. The doctrine of proportionality for testing the correctness of the decision of the disciplinary authority to determine the quantum of punishment has been considered by Supreme Court in numerous cases including in



case of *Ranjeet Thakur Vrs. Union of India*, reported in (1987) 4 SCC 611 in which the Supreme Court found the order of punishment as perverse and irrational after coming to the conclusion that the punishment was an outrageous defiance of logic and was shocking, in the background of this case, the delinquent was charged of having refused to eat food despite orders of his superiors. In case of *Oil Corporation Limited Vrs. Ashok Kumar Arora*, reported in (1997) 3 SCC 72, the Supreme Court held that the Court would not intervene unless the punishment was wholly disproportionate. In case of *B.C. Chaturvedi Vrs. Union of India & Ors.* reported in (1995) 6 SCC 749, the Supreme Court laid down that while exercising power of judicial review under Article 226 of the Constitution of India, if the High Court is satisfied that the punishment imposed by the disciplinary authority or the appellate authority is shocking to conscience of the Court, it may direct the disciplinary/appellate authority to reconsider the penalty imposed and in exceptional and rare cases, impose appropriate punishment, with cogent reasons thereof.

14. In case of **Mukul Kumar Choudhury** (Supra), on which reliance has been placed by learned counsel for the petitioner, the Supreme Court held an award of punishment of dismissal from service on the charge of absence of 6 months of the delinquent employee, to be unduly harsh and grossly in excess to the allegations, in the background of the facts noted therein. In that case, the employee upon being charged of misconduct while admitting his guilt, had explained the



reasons for his absence which were purely personal and beyond his control and as a matter of fact, he had already sent his resignation which was not accepted. It was in that background that the Supreme Court had held imposition of punishment of dismissal from service to be excessive and shocking to the Court's conscience. On reading of paragraph-20, 21 and 22 of the Supreme Court decision in case of ***Mukul Kumar Choudhury*** (supra) it can be easily seen that the case of the petitioner is clearly distinguishable.

“20. One of the tests to be applied while dealing with the question of quantum of punishment would be: would any reasonable employer have imposed such punishment in like circumstances? Obviously, a reasonable employer is expected to take into consideration measure, magnitude and degree of misconduct and all other relevant circumstances and exclude irrelevant matters before imposing punishment.

21. In a case like the present one where the misconduct of the delinquent was unauthorised absence from duty for six months but upon being charged of such misconduct, he fairly admitted his guilt and explained the reasons for his absence by stating that he did not have any intention nor desired to disobey the order of higher authority or violate any of the Company's rules and regulations but the reason was purely personal and beyond his control and, as a matter of fact, he sent his resignation which



was not accepted, the order of removal cannot be held to be justified, since in our judgment, no reasonable employer would have imposed extreme punishment of removal in like circumstances. The punishment is not only unduly harsh but grossly in excess to the allegations.

22. Ordinarily, we would have sent the matter back to the appropriate authority for reconsideration on the question of punishment but in the facts and circumstances of the present case, this exercise may not be proper. In our view, the demand of justice would be met if Respondent 1 is denied back wages for the entire period by way of punishment for the proved misconduct of unauthorised absence for six months”.

15. It is true that in the present case, the petitioner had also explained reasons for his absence in his written statement of defence, as personal in nature. However, it can be seen from the Memo of charge and the findings recorded by the disciplinary authority which are not in dispute that the petitioner, after having left his post without any information on 02.01.2013, had returned on 14.01.2013. Merely two weeks thereafter, he again left the place of posting on 28.01.2013 without any permission and returned on 05.02.2013. His unauthorized absence/desertion from the post was treated to be gross by the disciplinary authority in the wake of his past service records. It is for



this reason that his past misconduct formed part of the memo of charge, leading to initiation of Departmental Proceeding.

16. In case of *Indu Bhushan Dwivedi Vrs. State of Jharkhand and Anr.* reported in *2010 (3) PLJC 197 (SC)*, the question had arisen as to whether a disciplinary authority can consider past adverse record of punishment while imposing a punishment. Paragraphs-20 and 25 of the said decision precisely answered the question, which read thus:

“20. An analysis of the two judgments shows that while recommending or imposing punishment on an employee, who is found guilty of misconduct, the disciplinary/competent authority cannot consider his past adverse record or punishment without giving him an opportunity to explain his position and considering his explanation. However, such an opportunity is not required to be given if the final punishment is lesser than the proposed punishment.

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25. Since the uncommunicated adverse remarks contained in the Annual Confidential Reports of the appellant became foundation of the decision taken by the High Court to recommend his dismissal from service and he was not noticed about the proposed consideration of those remarks, it must be held that the appellant was seriously prejudiced. We have mentioned all this only to reinforce



*the ratio of the judgment in **Manche Gowda's case** that consideration of the past adverse record without giving an opportunity to the delinquent to explain the same can cause serious prejudice to him."*

17. It can be easily culled out on close reading of the law laid down in paragraphs-20 and 25 of the Supreme Court decision in case of **Indu Bhushan Dwivedi** (Supra) that consideration of past adverse records without giving an opportunity to the delinquent to explain the same, will cause serious prejudice to him. The Supreme Court, for the aforesaid proposition relied on an earlier decision of this Court, in case of **State of Mysore Vrs. K. Manche Gowda (AIR 1964 SC 506)**.

18. The question as to whether consideration of the past adverse record of the delinquent had the effect of vitiating the ultimate order passed by the disciplinary authority had arisen in case of **State of Mysore Vrs. K. Manche Gowda** (Supra) which was considered and answered in affirmative by the Constitution Bench of Supreme Court. The Constitution Bench in case of **K. Manche Gowda** (Supra) held that it would be incumbent upon the authority to give the Government servant reasonable opportunity to show cause against proposed punishment. The judgment in case of **State of Mysore Vrs. K. Manche Godwa** (Supra) was rendered before 42nd Amendment of the Constitution, when there was requirement of issuance of second show



cause notice before imposition of punishment of 'dismissal or removal from service' or 'reduction in rank'. In that background, dealing with Article 311 (2), as existed prior to Constitutional Amendment, the Supreme Court in case of ***Indu Bhushan Dwivedi Vrs. State of Jharkhand***, held as follows:

“Under Art. 311(2) of the Constitution, as interpreted by this Court, a Government servant must have a reasonable opportunity not only to prove that he is not guilty of the charges leveled against him, but also to establish that the punishment proposed to be imposed is either not called for or excessive. The said opportunity is to be a reasonable opportunity and, therefore, it is necessary that the Government servant must be told of the grounds on which it is proposed to take such action: see the decision of this Court in State of Assam vs. Bimal Kumar Pandit, Civil Appeal No. 832 of 1962 Dt. 12.2.1963: (AIR 1963 SC 1612). If the grounds are not given in the notice, it would be well nigh impossible for him to predicate what is operating on the mind of the authority concerned in proposing a particular punishment: he would not be in a position to explain why he does not deserve any punishment at all or that the punishment proposed is excessive. If the proposed punishment was mainly based upon the previous record of a Government servant and that was not disclosed in the notice, it would mean that the main reason for the proposed punishment was withheld from the knowledge of



the Government servant. It would be no answer to suggest that every Government servant must have had knowledge of the fact that his past record would necessarily be taken into consideration by the Government in inflicting punishment on him; nor would it be an adequate answer to say that he knew as a matter of fact that the earlier punishments were imposed on him or that he knew of his past record. This contention misses the real point, namely, that what the Government servant is entitled to is not the knowledge of certain facts but the fact that those facts will be taken into consideration by the Government in inflicting punishment on him. It is not possible for him to know what period of his past record or what acts or omissions of his in a particular period would be considered. If that fact was brought to his notice, he might explain that he had no knowledge of the remarks of his superior officers, that he had adequate explanation to offer for the alleged remarks or that his conduct subsequent to the remarks had been exemplary or at any rate approved by the superior officers. Even if the authority concerned took into consideration only the facts for which he was punished, it would be open to him to put forward before the said authority many mitigating circumstances or some other explanation why those punishments were given to him or that subsequent to the punishments he had served to the satisfaction of the authorities concerned till the time of the present enquiry. He may have many other



explanations. The point is not whether his explanation would be acceptable, but whether he has been given an opportunity to give his explanation. We cannot accept the doctrine of “presumptive knowledge” or that of “purposeless enquiry”, as their acceptance will be subversive of the principle of “reasonable opportunity”. We, therefore, hold that it is incumbent upon the authority to give the Government servant at the second stage reasonable opportunity to showcause against the proposed punishment and if the proposed punishment is also based on his previous punishments or his previous bad record, this should be included in the second notice so that he may be able to an explanation”.

19. It is evident on reading of the Constitution Bench decision in case of ***State of Mysore Vrs. K. Manche Gowda*** (Supra) and ***Indu Bhushan Dwivedi*** (Supra) that past service records can be a relevant factor for the disciplinary authority to determine quantum of punishment. It is however, essential that the delinquent employee is made known about the fact that his past conduct being considered as one of the grounds for taking disciplinary action and award of punishment on him. The Single Bench decision of this Court in case of ***Md. Haneef Khan (Supra)*** has also no application in the facts and circumstances of the present case where the Inquiry Officer had not found the delinquent guilty of the charge after unauthorized absence having been regularized. The allegation of misbehaviour against the



delinquent of the said case was not proved, in the absence of any evidence. This Court did not find merit with the finding of the disciplinary authority, disagreeing with the report of the Inquiry Officer and opined that a charge cannot be proved on the basis of inference. The Court finally held that there was no finding of guilt by the Inquiry Officer and the so called materials of disagreement and reasons given by the disciplinary authority were erroneous.

20. In the aforesaid background, this Court was of the opinion in case of **Md. Haneef Khan** (Supra) that since the charge in hand could not be proved, the delinquent could not be punished on the basis of his past records.

21. As has been noted at the very outset, the main issue which is being raised in the present proceeding, is of quantum of punishment. As has been noticed, the petitioner's past misconduct was also taken as basis for the disciplinary action against him, along with his latest misconduct.

22. At this stage, I must take note of Supreme Court decision in case of **Government of A.P. and Anr. Vrs. Mohd. Taher Ali**, reported in **(2007) 8 SCC 656**, paragraphs 5 of which reads thus:

“5. Learned counsel appearing on behalf of the respondent submitted that in fact, the disciplinary authority while passing the order has taken into consideration the earlier absence of the respondent from the duty. He submitted that this could not have been taken into consideration as the respondent was not aware about these incidents



and those were not the part of the charges levelled against him. In support of his submission learned counsel for the respondent has invited our attention to the judgment of this Court titled State of Mysore v. K. Manche Gowda [AIR 1964 SC 506 : (1964) 4 SCR 540] but in the present case we are satisfied that in fact the respondent deliberately absented himself from duty and did not offer any explanation for his absence from election duty. It is not the respondent's first absence. He also absented himself from duty on earlier occasions also. In our opinion there can be no hard-and-fast rule that merely because the earlier misconduct has not been mentioned in the charge-sheet it cannot be taken into consideration by the punishing authority. Consideration of the earlier misconduct is often only to reinforce the opinion of the said authority. The police force is a disciplined force and if the respondent is a habitual absentee then there is no reason to ignore this fact at the time of imposing penalty. Moreover, even ignoring the earlier absence, in our opinion, the absence of 21 days by a member of a disciplined force is sufficient to justify his compulsory retirement”.

23. It is settled legal position that the scope of judicial review has its own limitations while testing correctness of the quantum of punishment by a disciplinary authority.

24. The submission made by Mr. Singh that because the petitioner holds a civil post and not an employee in uniform, his



unauthorized absence, for the said reason, should not be treated to be gross misconduct for imposition of extreme punishment of dismissal from service, is not acceptable to me. The disciplinary authority has taken into account the past service records of the petitioner which are undisputed and speak for themselves. In my view, the petitioner has not been able to make out a case that the punishment of dismissal from service in the facts and circumstances as noted above, is so disproportionate, unjust and grossly excessive to the proved misconduct as to warrant this Court’s interference in exercise of power of judicial review under Article 226 of the Constitution of India, I find no merit in this writ application, which is accordingly **dismissed**.

25. There shall be no orders as to costs.

(Chakradhari Sharan Singh, J)

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