

**IN THE HIGH COURT OF JUDICATURE AT BOMBAY
BENCH AT AURANGABAD**

WRIT PETITION NO. 1337 OF 2018

Vikas Sureshrao Waghmare
Age : 44 years, Ex-Peon,
R/o: Maqbul Manzil, near Ikraj
English Medium School, Jamatkhana,
Govindpura, Ahmednagar ...Petitioner

VERSUS

1. The Principal District & Sessions Judge,
And Disciplinary Authority, Ahmednagar,
District Ahmednagar
2. The Registrar General (Appellate Authority)
The High Court of Judicature at Mumbai
3. The Civil Judge (S.D.) and Enquiry Officer,
Sangamner, Tq. Sangamner,
Dist. Ahmednagar
4. The Registrar, District Court,
Ahmednagar, Dist. Ahmednagar ...Respondents

Mr. H.D. Deshmukh, Advocate for the Petitioner
Mr. Ajit B. Kadethankar, Advocate for Respondent Nos.
1 to 4

**CORAM : S.V. GANGAPURWALA AND
A.M. DHAVALA, JJ.**

RESERVED ON : 18.02.2019
PRONOUNCED ON : 20.02.2019

JUDGMENT : (Per : A.M. Dhavale, J.)

1. Rule. Rule Made returnable forthwith. With the consent of the parties, the matter is taken up for final disposal at admission stage.

2. The petitioner-Peon in District Court, Ahmednagar assails the order of Disciplinary Authority (Respondent No.1 - District Judge, Ahmednagar) dated 14.10.2016 of removing him from service on account of his habitual absence. He also assails order in Administrative Appeal dated 29.07.2017 confirming the same in his appeal.

3. Mr. H.D. Deshmukh, learned Advocate for the petitioner argued that the petitioner was appointed as a Peon on 11.10.2001 and was made permanent from 18.04.2006. He worked at different stations honestly and without any blemish for number of years. In the year 2015, his mother became serious and he was required to avail excessive leave. He could not take permission on some occasions and sometimes, he had no leave at balance, but there was no *mala fide* intention on the part of the petitioner in remaining absent from duties. Unfortunately,

the petitioner's mother died on 24.04.2015. The petitioner was served with show cause notice for his unauthorized absence. On 02.03.2015, he could resume duties only with the leave of District Judge (R-1). Departmental enquiry was held and he was held guilty for his misconduct. The Principal District Judge imposed penalty of removal from service. The petitioner preferred appeal No. A09/2016, but it was rejected without due application of mind. Mr. Deshmukh argued that except unauthorized absence, there was no complaint against the petitioner. He had served for a long period. His absence was not intentional and his removal was totally disproportionate. Mr. Deshmukh argued that considering the grounds raised, the petitioner should be exonerated. In the alternative, he claimed that the punishment of the petitioner may be reduced to a minor punishment.

4. Per contra, learned Advocate Mr. A.B. Kadethankar for the Department argued that the petitioner was in habit of going on leave without obtaining permission. He repeatedly enjoyed leave and as per the chart at page No. 56, his leave of 160.5 days was made without pay as

there was no leave at his balance. Mr. Kadethankar also referred to the ACR. He submits that the petitioner was also arrogant and disobedient. He gave false reasons for his absence. Departmental enquiry was held after following due procedure of law. He was given full opportunity and he was held guilty by the Enquiry Officer. The Petitioner had not produced medical certificate of his mother. He was absent for 63 days without obtaining permission. His absence caused a lot of inconvenience in administration. It is also noted by the Principal District Judge that the petitioner was held guilty under section 138 of Negotiable Instruments Act and was sentenced. Considering the facts, the order passed by the respondent No. 1 is reasonable and proportionate. No interference is called for.

5. Mr. Deshmukh submitted that the conviction under criminal case was not part of the charge, and the petitioner's appeal against the same is pending.

6. We have gone through the record and carefully considered the submissions made before us. In the writ jurisdiction, we cannot appreciate the facts like the Appellate Court. We find that the petitioner was admittedly

absent for long durations. He was many a times absent without seeking prior permission. The chart at page 56 shows that from the year 2003 to 2016, the petitioner had enjoyed 418 days of Earned Leave, 147 days commuted Leave and 160.5 days leave without pay. The chart shows that the petitioner was repeatedly enjoying leave during the year 2014 to 2016. Considering the facts, when the departmental enquiry was held after following due procedure, we find no fault on the part of the Principal District Judge (the Disciplinary Authority) in coming to the conclusion that the petitioner was guilty of dereliction of duties. The Tribunal committed no error in confirming the said finding.

7. However, we find substance in the argument of learned Advocate Mr. Deshmukh that the quantum of punishment is disproportionate. Here, we would like to make it clear that the charge against the petitioner was only in respect of his unauthorized and habitual absentee. No charge for prosecution U/s. 138 of Negotiable Instruments Act and the conviction has been framed. The appeal against the said conviction is pending. In the appeal if the sentence

is confirmed, the Principal District Judge may consider whether any departmental enquiry should be held or any action should be taken against the petitioner or not. We are restricting our consideration only to the ground of unauthorized and habitual absentee.

8. Mr. Kadethankar, the learned Counsel for the respondents relied on ***Om Kumar Vs. Union of India AIR 2000 SC 3689***. The facts in this case are quite different. The adequacy of minor punishments imposed were under challenge. However, the following passages on the point of proportionality of sentence and the scope of this Court to invoke writ jurisdiction are eloquent guidelines.

Wednesbury principles : Lord Greene said in 1948 in the Wednesbury case that when a statute gave discretion to an Administrator to take a decision, the scope of judicial review would remain limited. He said that interference was not permissible unless one or other of the following conditions were satisfied namely the order was contrary to law, or relevant factors were not considered, or irrelevant factors were considered; or the decision was one which no reasonable person could have taken. These principles were consistently followed in UK and in India to judge the validity of administrative action. It is equally well known that in 1983, Lord Diplock I Council/or civil Services Union v. Minister of Civil Service (1983 I AC 768 (called the GCHQ case) summarised the principles of judicial review of administrative action as based upon one or other of the following

viz. Illegality, procedural irregularity and irrationality. He, however, opined that proportionality was a “future possibility.” (Para 26)

By proportionality, we mean the question whether, while regulating exercise of fundamental rights, the appropriate or least restrictive choice of measures has been made by the Legislature or the Administrator so as to achieve the object of the legislation or the purpose of the administrative order, as the case may be. Under the principle, the Court will see that the Legislature and the administrative authority maintain a proper balance between the adverse effects which the legislation or the administrative order may have on the rights, liberties or interests of persons keeping in mind the purpose which they were intended to serve. The Legislature and the administrative authority are, however, given an area of discretion or a range of choices but as to whether the choice made infringes the rights excessively or not; is for the Court. That is what is meant by proportionality. (Para 28)

The burden of proof to show that the restriction was reasonable lay on the State. Reasonable restrictions under Art. 19(2) to (6) could be imposed on these freedoms only by legislation and Courts had occasion throughout to consider the proportionality of the restrictions. In numerous judgments of this Court, the extent to which reasonable restrictions could be imposed was considered. In Chintaman Rao v. State of M.P., 1950 SCR 759 : (AIR 1951 SC 118), Mahajan, J. (as he then was) observed that reasonable restrictions which the State could impose on the fundamental rights should not be arbitrary or of an excessive nature, beyond what is required for achieving the objects of the legislation. Reasonable implied intelligent care and delibera” tions, that is, the choice of a course which reason dictated. Legislation which arbitrarily or excessively invaded the right could not be said to contain the quality of

reasonableness unless it struck a proper balance between the rights guaranteed and the control permissible under Art. 19(2) to (6). Otherwise, it must be held to be wanting in that quality. Patanjali Sastri, C.J. In State of Madras v. V.G. Row, 1952 SCR 597: (AIR 1952 SC 196: 1952 Cri LJ 966), observed that the Court must keep in mind the nature of the right alleged to have been infringed, the underlying purpose of the restrictions imposed, the extent and urgency of the evil sought to be remedied thereby, the disproportion of the imposition, the prevailing conditions of the time. This principle of proportionality vis-a-vis legislation was referred to by Jeevan Reddy, J. in State of A.P. v. Me Dowell & Co. (1996) 3 SCC 709: (1996 AIR SCW 1679 : AIR 1996 SC 1627) recently. This level of scrutiny has been a common feature in the High Court and the Supreme Court in the last fifty years. Decided cases run into thousands. (Para 30)

ADMINISTRATIVE action in India affecting fundamental freedoms has been tested on the anvil of proportionality in the last fifty years even though it has not been expressly stated that the principle that is applied is the proportionality principle.

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In all these matters, the proportionality of administrative action affecting the freedoms under Art. 19(1) or Art. 21 has been tested by the Courts as a primary reviewing authority and not on the basis of Wednesbury principles. It may be that the Courts did not call this proportionality but it really was.

In that case, it was held that there was no fact omitted or irrelevant fact taken into account and there was no illegality nor punishment was shockingly disproportionate. Hence, the Apex Court declined to interfere.

9. Since the learned Principal District Judge has passed the order of removal from service, we have called and seen the ACR of the petitioner from 2001 to 2015. His ACRs are good for the year 2001-2002 to 2010 to 2011 except in 2004-2005. He was shown as disobedient and having average integrity and character. It is recorded that he was in habit to proceed on leave frequently causing inconvenience. In the year 2005-2006, though his assessment on all points are good, the learned Civil Judge and the Principal District Judge have given him general remark B - average. Again, there are good remarks in the year 2012-2013 to 2014-2015. In the year 2011-2012, he was shown adamant and non-punctual.

10. The petitioner was charged on account of his absence of 63 days in the year 2014-2015. His overall record has been considered which shows that he had exhausted his Earned Leave and and medical leave and besides, he enjoyed leave without pay of 160.5 days.

11. Though the petitioner is entitled to get Earned Leave and Commuted Leave in cases of his personal difficulties, leave is not a right. The petitioner was bound to

apply for leave and get it sanctioned. Enjoying the leave only after getting the same sanctioned is the rule. The Principal Officer of the Department may face administrative inconvenience in case the staff members go on leave without prior permission. In the present case, the petitioner was in habit of enjoying leave many a times without prior permission and has not only exhausted his available leave but has remained absent for 160.5 days without pay.

12. In the present case, it is not disputed that the petitioner's mother was ill and she died on 24.04.2015. It appears that the petitioner did not produce proper medical evidence to justify his repeated unauthorized absentee for such a long period, but it is obvious that the absentee of 63 days in the month of December, 2014 to March, 2015 which was cause for holding departmental enquiry must be on account of illness of his mother.

13. The petitioner has served from 2001 to 2015 without any serious complaints against him. Taking conspectus of the circumstances, particularly, the ground taken by the petitioner for his absence namely, serious illness of his mother which resulted into her death. We find

that the punishment is shockingly disproportionate. The petitioner, no doubt committed dereliction of his duties by remaining absent without prior permission and taking huge amount of leave without pay. The exact nature of illness of mother and requirement of personal assistance of the petitioner to her mother during her illness is not brought on record. Still in the light of the facts, the petitioner deserves to get one more opportunity to improve himself.

14. With respect to the quantum of sentence, Mr. Deshmukh relied on the Judgment of this Court in ***Shri Madhu S. Sadlapurkar Vs. Union of India reported in 2019 (I) ALL MR 235***. In this case, the petitioner was illiterate watchman. He was absent unauthorizedly for 81 days. Tribunal had remitted the case to the Disciplinary Authority to consider the case on merits and on quantum of penalty. However, the Disciplinary Authority confirmed the penalty holding that he was habitual defaulter without giving details. This Court held that the punishment of removal was shockingly disproportionate and the same was modified to compulsory retirement and he was given no pensionary benefits till the date of filing of Original

Application.

15. Today, the petitioner has given undertaking that he would not repeat such misconduct in future and he would have no excuse if he commits such misconduct. He has shown willingness to forgo monetary benefits in the intermediate period. In the light of these facts, we rely on the Judgment of ***Dnyaneshwar Vithuji Ghude Vs. State of Maharashtra reported in 2015 (1) Mh.L.J. 761.*** In this Judgment, it is held that the petitioner deserves to be reinstated, but without back wages. We hold that Stoppage of two annual increments permanently would be the proportionate sentence and the petitioner should be reinstated with continuity of service without back wages. It will give opportunity to the petitioner to reform and rectify mistake he has committed. With these observations, we pass the following order :-

ORDER

- (i) The Writ Petition is partly allowed.
- (ii) The impugned order of Principal District Judge, Ahmednagar dated 14.10.2016 of removal of the petitioner and the order in Administrative Appeal dated 29.07.2017 of

dismissing the appeal are hereby set aside and modified.

(iii) The findings of holding the petitioner guilty for dereliction of duty is not disturbed, but the quantum of punishment of removal is set aside and substituted by penalty of withholding of two annual increments permanently.

(iv) The petitioner shall stand reinstated from 14.10.2016 with continuity of service, but without any annual increments for the intermediate period of his absence and without monetary benefits till the date he joins.

(v) He shall join his duties on or before 1st March, 2019. The petitioner shall abide by his undertaking given in this Court.

(vi) The Rule is made partly absolute in above terms.
No costs.

(A.M. DHAVALÉ)
JUDGE

(S.V. GANGAPURWALA)
JUDGE

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