

IN THE HIGH COURT OF JUDICATURE AT MADRAS

RESERVED ON : 15/03/2019

DATED : 20.03.2019

CORAM

THE HONOURABLE MR.JUSTICE C.V.KARTHIKEYAN

W.P.No.11223 of 2012

D.Nagalingam

.. Petitioner

Versus

1. The Secretary to Government
Home (Police-VI) Department
Chennai - 9.

2. The Director General of Police
Chennai - 4.

.. Respondents

PRAYER:

Petition under Article 226 of the Constitution of India, praying for the issue of a Writ of Certiorarified Mandamus, calling for the records pertaining to the order passed by the Government G.O.(D).No. 827 Home (Police - VI) Department dated 19.08.2011 on the file of the first respondent and quash the same and direct the respondents to award all consequential benefits.

For Petitioner :: Mr.M.S.Soundara Rajan

For Respondents :: Mr.P.S.Sivashanmuga Sundaram
Special Government Pleader

ORDER

The petitioner, D.Nagalingam was enlisted as Grade - II Police Constable in 1974 at Kanyakumari District. He was posted at Armed Reserve VI Platoon. A memo under Rule 3(b) of the Tamil Nadu Police Subordinate Service Rules was issued by him by the Deputy Superintendent of Police. It was stated that he had absented from duty without leave or permission for more than 21 days from 01.09.1983 to 21.09.1983 and that he committed the offence of desertion. It was stated that he had also not availed sick passport for taking medical treatment. He had also not informed his superiors regarding availing of sick leave. The

petitioner was issued with an order of desertion in D.O.No. 858/83 dated 23.09.1983. It was served on him on 03.10.1983. Enquiry was conducted. The petitioner examined Thangiah, a Siddha Medical Officer. However, the Enquiry Officer held that the charges were proved. The disciplinary authority imposed a punishment of dismissal from service on 17.03.1984 in P.R.NBo. 267/88. this was issued by the Superintendent of Police. The petitioner filed an appeal before the Deputy Inspector General of Police, Tirunelveli Range. It was rejected on 10.07.1984. He then filed a Review Petition before the Inspector General of Police. This was dismissed on 19.06.1985. Hethen made a representation before the Government on 26.09.1986. This was rejected on 05.05.1994 in G.O.(3d)No.52. He then filed O.A.No. 1626 of 1995 before the Tamilnadu Administrative Tribunal. This was dismissed by order dated 22.06.2001. He then filed W.P.No. 21103 of 2001 before this Court. The order dated 22.06.2001 passed by the Tamilnadu Administrative Tribunal was set aside by this Court and the Home Secretary was directed to consider the representation dated 17.08.2009 with reference to the conditions prescribed in G.O.(MS).No. 1382, Home Department dated 22.06.1981 and it was further directed that a fresh order should be passed within a period of three months. The Government then passed G.O.(2d) No. 422 dated 30.09.2005 stating that reinstatement of the petitioner into service is not feasible and therefore, the representation was rejected. The petitioner then filed W.P.No. 3984 of 2006 before this Court. This Court passed an order on 16.07.2010 directing the second respondent, Director General of Police, Chennai, to consider the petitioner's representation in the light of decisions of this Court and the Hon'ble Supreme Court and D.O. Letter No. AP.I.(i)/223597/2005 dated 2.11.2005. The Director General of Police forwarded a report stating that the petitioner was absent for more than 21 days and was also absent on two earlier occasions for 11 days and one day respectively. He further stated that desertion is normally viewed sympathetically and also suggested that the case of the petitioner may also be viewed sympathetically and that the punishment may be modified. However, by this time on 31.08.2009, the petitioner had crossed the age of superannuation. The first respondent, namely, Secretary to Government, Home (Police- VI) Department, Chennai, passed the impugned order in G.O.(D)No. 827 Home (Police-VI), Department on 19.08.2011 rejecting the representation of the petitioner to set aside the punishment of dismissal from service. This order of the Government is called in question in this Writ Petition.

2. It had been sated in the Writ Petition that the first respondent had failed to properly consider the recommendation of the second respondent that desertions for the first time are generally viewed sympathetically. It was also stated that the

petitioner had only been on leave for 11 days and 1 day earlier and they cannot be a ground to reject his representation in the present instance. It was also stated that the punishment of removal from service is excessive.

3. The Inspector of General of Police (Establishment) in the office of the second respondent filed a counter affidavit on behalf of both the respondents.

4. It was stated that the petitioner had been issued with a memo under Rule 3(b) of the Tamil Nadu Police Subordinate Services (Discipline and Appeal) Rules 1955 for being absent from duty for more than 21 days from 01.09.1983 to 21.09.1983 without leave or permission and without obtaining sick passport and without informing his superiors. It was stated that the Deputy Superintendent of Police Armed Reserve, Nagercoil, conducted an oral enquiry and found the charge proved. The disciplinary authority, the Superintendent of Police, Kanyakumari District had concurred with the findings of the Enquiry Officer and awarded punishment of dismissal from service by order dated 01.09.1983. The appeal filed before the Deputy Inspector of Police, Tirunelveli was also dismissed vide proceedings in C.No. 45/Appeal/84 dated 10.07.1984. The Review before the Inspector General of Police (Law and Order), Chennai, was also rejected in proceedings in D.Dis.No. 39898/AP.1/85 dated 11.06.1985. The Government rejected the further representation by letter No. 2147/POL.6/19-50 Home dated 05.05.1994. The petitioner then filed O.A.No. 1626 of 1995 before the Tamil Nadu Administrative Tribunal, Chennai and by order dated 22.06.2001, this was also dismissed. He then filed W.P.No. 21103 of 2011 before this Court and by order dated 15.02.2005 the order of the Tamil Nadu Administrative Tribunal was set aside and it was directed to consider the representation of the petitioner dated 17.08.1989 with reference to the conditions prescribed in G.O.Ms.No. 1382, Home Department, dated 22.06.1981 and pass a fresh order. The Government rejected the representation vide G.O.(2d).No. 422, Home (Pol.VI) Department dated 13.09.2015. The petitioner then filed W.P.No. 3984 of 2006 and by order dated 16.07.2010 the petitioner was given a liberty to submit a representation regarding the punishment. It was stated in the counter affidavit that the Government examined the representation dated 13.08.2010 and had rejected the same in G.O.(d).No. 827, Home (Pol.VI) Department dated 19.08.2011. It was finally stated that the present Writ Petition has to be dismissed. It was stated that the petitioner cannot claim equal rights with that of others, who had been permitted to join duty even though they had committed the offence of desertion on more than one occasion. It was stated that since the petitioner had crossed the age of superannuation, the recommendations of the Director General of Police to view his case sympathetically

had been rejected. It was stated that the Police Standing Order No. 95 stipulates that punishment for desertion is dismissal. It was therefore stated that the order does not warrant interference.

5. Heard arguments advanced by Mr.M.S.Soundara Rajan, learned counsel for the petitioner and Mr.Sivashanmuga Sundaram, learned Special Government Pleader appearing for the respondents.

6. The facts in this case are not disputed. It is a fact that the petitioner was a Grade - II Police Constable appointed in the year 1974 at Kanyakumari District and was working in Armed Reserve VI Platoon. It is a fact that he absented himself from duty for more than 21 days between 01.09.1983 and 21.09.1983. It is a fact that a memo was issued under Rule 3(b) of the Tamil Nadu Police Subordinate Service Rules. It is a further fact that an enquiry was conducted and the charge was held to be proved. The further facts are that the appeal of the petitioner was dismissed, his review was rejected, his further representation was rejected by the Government and his Petition before the Tamil Nadu Administrative Tribunal was dismissed. He then filed W.P.No. 21103 of 2001 before this Court and an order was passed directing the Home Secretary to consider the representation dated 17.08.2009 with specific reference to the conditions in G.O.Ms.No. 1382, Home Department dated 22.06.1981.

7. The said Government Order related to cases where the individuals had taken unauthorised leave or absented themselves from duty within the period 01.01.1975 to 22.06.1981 and instructions were given regarding the manner in which they should be considered. However, the petitioner was on leave from 01.09.1983 to 21.09.1983 and consequently, the stand of the respondents is that G.O.Ms.No. 1382, Home Department, dated 22.06.1981 cannot not be applied to the facts asserted by the petitioner. The petitioner then filed W.P.No. 3984 of 2006 and once again the respondents were directed to consider his representation in the light of earlier decisions of the High Court and the Hon'ble Supreme Court.

8. In W.P.No. 26072 of 2004 (R.Jayakumar Vs. The Deputy Commissioner of Police and others) by order dated 08.08.2008, a learned Single Judge of this Court considered the case of a Grade-I Constable in B-2 Coimbatore City Police Station, who absented from duty from 21.11.2001 without leave or permission and reported for duty only on 11.12.2001, he had also been issued a charge memo under Rule 3(b) of the Tamil Nadu Police Subordinate Services (Discipline and Appeal) Rules 1955. Charges were also framed. The charges were held to be proved by the Enquiry Officer. Further representation was also dismissed.

The Appeal was also dismissed. Even in that case, the petitioner therein had suffered two earlier punishment and subsequent absentions from service. In that case, the impugned order of dismissal from service was set aside and the Writ Petition was allowed and the petitioner was directed to be reinstated into service.

9. In W.P.No. 16415 of 2009 (M.Gunasekaran Vs. The Superintendent of Police and Others) by order dated 15.06.2011, a learned Single Judge of this Court examined the case of a writ petitioner, who was terminated from service on the ground of desertion for more than 21 days. The petitioner was appointed as Grade-II Police Constable and was posted in Chennai City Police. He was sent on deputation to the Special Wing CCIW-CID and promoted as Head Constable. He was then repatriated to Chennai City Police. He took medical leave from 24.08.2006 to 17.10.2006. It was sought to be extended to 06.12.2006. He was directed to appear before the medical board on 22.12.2006.

10. The claim of the writ petitioner was that the medical board sent an adverse representation on 27.12.2006 without even examining him. He was then dismissed from service and his appeal was also rejected. In the said case, the order of dismissal from service was set aside and the matter was remitted back to the respondents to decide on the proportionality of punishment.

11. In the earlier case, in W.P.No. 3984 of 2006 filed by the present petitioner in the nature of Writ of Certiorarified Mandamus pertaining to the order passed in G.O.(2d)No.422 dated 30.09.2005 to quash the same, this Court had ordered as follows:-

"8. In the light of the above decisions of this Court, as well as the decisions of the Supreme Court and the D.O.Letter above referred, this Writ Petition is disposed of by granting liberty to the petitioner to submit a representation regarding the punishment, before the second respondent, within a period of two weeks from the date of the receipt of copy of this order and if such representation is made, the second respondent is directed to consider the same taking note of the D.O.Letter dated 02.11.2005 and pass necessary orders within a period of two weeks from the date of receipt of the representation from the petitioner. The petitioner is directed to enclose copies of Judgments relied on in this Writ Petition as well as D.O. Letter dated 02.11.2005 along

with the said representation. No costs."

12. A perusal of the said order shows that the matter had been remitted back to the respondents to decide on the quantum of punishment to be imposed. This implied that the order of dismissal from service had been set aside and the respondents were directed to re-examine the quantum of punishment imposed on the petitioner.

13. The memo under Rule 3(b) of the Tamil Nadu Police Subordinate Services (Discipline and Appeal) Rules 1955 which had been issued to the petitioner was for the following delinquencies:-

"i) Gross neglect of duty in having absented from duty without any leave or permission for more than 21 days from 01.09.1983 to 21.09.1983 and thereby constituted the offence of desertion.

ii) In having failed to obtain sick passport and taking medical treatment on his own accord.

iii) In having failed to inform his superiors regarding availing of sick leave."

14. It is pertinent to point out that in the said memo, his earlier alleged absence from service were not mentioned. It is also not the case of the respondents that the earlier absence for 11 days and 1 day were without permission. As a matter of fact, records have not been produced relating to the same.

15. In AIR 1964 SC 506 (The State of Mysore v. K.Manche Gowda), the Hon'ble Supreme Court has held as under:-

"Under Art. 311(2), a Government servant must have a reasonable opportunity not only to prove that he is not guilty of the charges levelled 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. If the grounds are not given in the notice, it would be well high 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 is mainly based upon the previous record of a Government servant and that is not disclosed in the notice, it would mean that the main reason for the proposed punishment is 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. 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.

16. In the present case, there is nothing to indicate that the respondents intended to take the previous absences of the petitioner for consideration while proposing to award punishment of dismissal from service. Charge was framed only for absence without information from 01.09.1983 to 21.09.1983. But while awarding punishment of dismissal from service the authority concerned had taken into account the past records without giving an opportunity to the petitioner.

17. In AIR 1996 SC 484 : 1995 (6) SCC 634 (B.C. Chaturvedi v. Union of India and others), the Hon'ble Supreme Court has decided the question as to whether Tribunal was justified in interfering with the punishment imposed by the disciplinary

authority by referring to various Judgements to the effect that it is for the disciplinary authority who has to impose penalty and normally a Tribunal or a High Court should not interfere. The Hon'ble Supreme Court has further held that in cases where the punishment shocks the conscience of the High Court or Tribunal, the High Court or Tribunal can either direct the disciplinary authority to reconsider the penalty or to shorten the litigation in exceptional cases and in rare cases imposed an appropriate punishment.

18. In this aspect, Hon'ble Supreme Court has laid down the law as follows:-

"-----A review of the above legal position would establish that the disciplinary authority, and on appeal the appellate authority, being fact-finding authorities have exclusive power to consider the evidence with a view to maintain discipline. They are invested with the discretion to impose appropriate punishment keeping in view the magnitude or gravity of the misconduct. The High Court/Tribunal, while exercising the power of judicial review, cannot normally substitute its own conclusion on penalty and impose some other penalty. If the punishment imposed by the disciplinary authority or the appellate authority shocks the conscience of the High Court/Tribunal, it would appropriately mould the relief, either directing the disciplinary/appellate authority to reconsider the penalty imposed, or to shorten the litigation, it may itself, in exceptional and rare cases, impose appropriate punishment with cogent reasons in support thereof."

19. In AIR 1994 SC 215 (Union of India and Others V. Giriraj Sharma), a Government servant over-stayed the leave period subsequent to the order of rejection of application for explanation of leave. Observing that there was no wilful intention to flout the order and that the punishment of dismissal merely on the ground of over-staying leave period was held to be harsh and disproportionate, the Hon'ble Supreme Court had ordered reinstatement with all monetary and service benefits granted with liberty to visit minor punishment.

20. In (1999) 9 SCC 86 (Syed Zaheer Hussain v. Union of India and Others) the delinquent Government servant was

dismissed from service on the ground of unauthorised absence for 7 days. Observing that the order of dismissal was too harsh, Hon'ble Supreme Court directed the appellant to be reinstated with continuity in service with all other benefits but limiting the back wages to 50% only for the period between dismissal to the date of passing of the order by the Court. In the present case, petitioner was absent for 21 days. It is a clear instance where the punishment of dismissal from service is disproportionate to the charge.

21. The grounds on which charges of unauthorised absence on medical ground is to be considered and punishment shall be imposed was considered by the Hon'ble Supreme Court in the decision reported in (2004) 4 SCC 560: AIR 2004 SC 2131 (Bhagwan Lal Arya v. Commissioner of Police, Delhi). In paragraphs 11 and 14 it was held thus,

"11..... It is not the case of the respondents that the appellant is a habitual absentee. He had to proceed on leave under compulsion because of his grave condition of health and, therefore, the punishment of removal from service is excessive and disproportionate. We are of the view that the punishment of dismissal/removal from service can be awarded only for the acts of grave nature or as cumulative effect of continued misconduct proving incorrigibility of complete unfitness for police service. Merely one incident of absence and that too because of bad health and valid and justified grounds/reasons cannot become basis for awarding such a punishment. We are, therefore, of the opinion that the decision of the disciplinary authority inflicting a penalty of removal from service is ultra vires of Rule 8 (a) and 10 of the Delhi Police (Punishment & Appeals Rules, 1980) and is liable to be set aside. The appellant also does not have any other source of income and will not get any other job at this age and the stigma attached to him on account of the impugned punishment. As a result of not only he but his entire family totally dependant on him will be forced to starve. These are the mitigating circumstances which warrant that the punishment/order of the disciplinary authority is to be set aside.

14. Thus, the present one is a case wherein we are satisfied that the punishment of removal from service imposed on the appellant is not only highly excessive and disproportionate but is also one which was not permissible to be imposed as per the Service Rules. Ordinarily we would have set aside the punishment and sent the matter back to the disciplinary authority for passing the order of punishment afresh in accordance with law and consistently with the principles laid down in the judgement. However, that would further lengthen the life of litigation. In view of the time already lost, we deem it proper to set aside the punishment of removal from service and instead direct the appellant to be reinstated in service subject to the condition that the period during which the appellant remained absent from duty and the period calculated upto the date on which the appellant reports back to duty pursuant to this judgement shall not be counted as a period spend on duty. The appellant shall not be entitled to any service benefits for this period. Looking at the nature of partial relief allowed hereby to the appellant, it is now not necessary to pass any order of punishment in the departmental proceedings in lieu of the punishment of removal from service which has been set aside. The appellant must report on duty within a period of six weeks from today to take benefit of this judgement."

22. In the said judgement, the Supreme Court instead of remanding the matter to the Department, following the earlier decision reported in (1995) 6 SCC 749: AIR 1996 SC 484 (B.C. Chaturvedi v. Union of India) imposed punishment by itself. In AIR 1996 SC 484, in para 18 it was held thus,

"18. "A review of the above legal position would establish that the disciplinary authority, and on appeal the appellate authority, being fact-finding authorities have exclusive power to consider the evidence with a view to maintain discipline. They are invested with the discretion to impose appropriate punishment

keeping in view the magnitude or gravity of the misconduct. The High Court/Tribunal, while exercising the power of judicial review, cannot normally substitute its own conclusion on penalty and impose some other penalty. If the punishment imposed by the disciplinary authority or the appellate authority shocks the conscience of the High Court/Tribunal, it would appropriately mould the relief, either directing the disciplinary/appellate authority to reconsider the penalty imposed, or to shorten the litigation, it may itself, in exceptional and rare cases, impose appropriate punishment with cogent reasons in support thereof."

23. In the present case, the petitioner had been imposed with the order of removal of service only on the ground that he had earlier absented himself for a period of 11 days and for a period of 1 day. However, those aspects were not put before the petitioner during the course of enquiry as is seen from the memo issued to him under Rule 3(b) of the Tamil Nadu Police Subordinate Service Rules. It is also seen that the respondents have continuously not appreciated in proper perspective the orders of this Court passed in the case of the petitioner himself wherein in W.P.No. 21103 of 2001 by order dated 15.12.2005, the respondents were directed to consider the representation of the petitioner in line with the conditions in G.O.Ms.No. 1382, Home Department dated 22.06.1981. Again in W.P.No. 3984 of 2006, by order dated 16.07.2010, the respondents were again directed to consider the quantum of punishment which had been imposed on the petitioner. The respondents have not given any convincing reason for treating the petitioner differently from other similarly placed individuals, who were also reinstated into service. The punishment imposed on the petitioner is shocking to the conscience of the Court. He had been absent from 01.09.1983 to 21.09.1983. The period of leave come to 22 days if both the days are taking into account. He had participated in the enquiry. There are no other charges of misconduct against the petitioner. He had let in some evidence which though not accepted by the authorities, had at least projected that he took Siddha treatment during the relevant period. The respondents simply restated their earlier stand without considering the ratio and spirit the orders passed by this Court in the case of the petitioner himself in the earlier writ petitions.

24. Following the precedents stated above, I hold that the petitioner is entitled for the relief sought and I hold that the

petitioner can be reinstated with continuity of service with all benefits but without back wages and the service from the date of dismissal till the date of superannuation may be considered as continuity in service for his pensionary and other benefits. The petitioner is not entitled for any back wages since he had not discharged any work during the said period. The absence period and the period after dismissal are directed to taken as leave on loss of pay. The said period shall be taken in to account only for continuity of service and other benefits.

25. With these observations, the Writ Petition is allowed.
No costs.

Sd/-

Assistant Registrar(CCC)

//True Copy//

Sub Assistant Registrar

vsg

To

1. The Secretary to Government
Home (Police-VI) Department
Chennai - 9.
2. The Director General of Police
Chennai - 4.

+lcc to Mr.M.S.Soundara Rajan, Advocate, S.R.No.26476

+lcc to the Government Pleader, S.R.No.26863

W.P.No.11223 of 2012

GJII(CO)
CS/25/04/2019

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