

IN THE HIGH COURT OF JUDICATURE AT MADRAS

ORDER RESERVED ON : 01.02.2019

ORDER PRONOUNCED ON : 08.02.2019

CORAM:

THE HON'BLE MR. JUSTICE SUBRAMONIUM PRASAD

W.P.No.21602 of 2013

Basha Shaik

... Petitioner

Vs.

1. The Railway Board,
Rep. by its President, Union of India,
Ministry of Railways,
New Delhi - 110 001.
2. The Director of General,
Railway Protection Force,
Railway Board, New Delhi.
3. The Chief Security Commissioner,
Railway Protection Force, Moore Market Complex,
Chennai - 600 003.
4. The Senior Divisional Security Commissioner,
Railway Protection Force, Moore Market Complex,
Chennai - 600 003.

... Respondents

PRAYER: Writ Petition has been filed under Article 226 of the Constitution of India, praying in the nature of Writ of Certiorarified Mandamus, to call for the entire records relating to the impugned order of dismissal from service passed by the 4th respondent vide Penalty Advice No.M/XP/227/ 3/2004, dated 12.10.2004, confirmed by the 3rd respondent by his proceedings dated 28.02.2005, further confirmed in No.2005/SEC(E)/DAR-2/9, dated 07.06.2005 by the 2nd respondent and in No.2005/Sec.(E)/DAR-2/09 dated 30.03.2009 by the 1st respondent and quash the same and consequently direct the respondents to reinstate the petitioner into service with continuity of service, back wages and attendant benefits from the date of dismissal from service till the date of reinstatement.

For Petitioner : Mr.K.V.Ramesh

For Respondents : Mr.P.T.Ramkumar

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O R D E R

Challenging the order of dismissal from service passed by the Senior Divisional Security Commissioner, Railway Protection Force, Chennai/4th respondent, vide Penalty Advice No.M/XP/227/ 3/2004, dated 12.10.2004, confirmed by the Chief Security Commissioner, Railway Protection Force, Chennai/3rd respondent by his proceedings dated 28.02.2005, and further confirmed by the Director of General, Railway Protection Force, Railway Board, New Delhi/2nd respondent in his No.2005/SEC(E)/DAR-2/9, dated 07.06.2005, the petitioner has filed this instant Writ Petition.

Brief facts leading in the instant petition are as follows:-

2. The petitioner was appointed as Constable in the Railway Protection Force, with effect from December, 1999. He applied for Casual Leave on 20.04.2004 and 21.04.2004, which was sanctioned. He was entitled the weekly rest on 22.04.2004. When he was to join duty on 23.04.2004, his mother was seriously ill and he sent a telegram on the same day to the Assistant Sub-Inspector, Railway Protection Force, Salt Contours, Chennai, seeking for leave. It is stated by him that his mother was continuously ill for about 60 days. The petitioner states that a charge sheet was issued to him under Rule 153 of Railway Protection Force Rules, 1987, vide No.M/XP227/9/04, dated 03.06.2004 framing the following charge:-

"While working as such at SO RPF Post he was permitted to avail 2 days CL on 20.04.2004 & 21.04.2004 with a days rest on 22.04.2004, but, he did not turn up and absented himself unauthorisedly for duty from 23.04.2004 onwards on his own accord without obtaining prior permission from his superior officer which amounts to dereliction of duty".

3. Explanation was given by the petitioner and the petitioner permitted to join duty on 25.06.2004. The Inspector, Railway Protection Force, Gummidipoondi, conducted a domestic enquiry based on the charge sheet dated 03.06.2004. The Enquiry Officer submitted his report held that charge of unauthorised absence from service was proved. Based on the said report, the disciplinary authority viz., the Senior Divisional Security Commissioner, Railway Protection Force, Chennai, has passed an order dated 12.10.2004 vide Penalty Advice No.M/XP227/9/04 removing the petitioner from service.

4. The appeal to the appellate authority viz., the Chief Security Commissioner, Railway Protection Force, Chennai, has been rejected on 28.02.2005. The revision to the Director of General, Railway Protection Force, Railway Board, New Delhi, has also been rejected by an order dated 07.06.2005. The instant Writ Petition has been filed in the year 2013 challenging the

order dated 12.10.2004.

5. The reason given by the petitioner for approaching the Court late is his health condition. Paragraph No.14 of the Writ Petition reads as under:-

"14. In the meantime, I fell to serious illness of Viral Hepatitis from 05.01.2005 to 31.12.2010 and was taking treatment at Rajiv Gandhi Medical Science General Hospital, Kadapa, Andra Pradesh. I state that due to Viral Hepatitis Renal Syndrome, gross Aneia, and mental depression, and Acute Bronco Pneumonua and Peptic ulcer till November, 2012, I could not move anywhere and virtually in bed. I state that my health condition prevented me from approaching this Hon'ble Court in time challenging the validity of the Impugned Orders of Dismissal from service passed by the respondents herein on the ground of my unauthorised absence from duty for 60 days."

This Court issued notice on the Writ Petition. On notice, the respondents have entered an appearance. No counter has been filed.

6. The learned counsel appearing for the petitioner would state that the petitioner admits that he was on unauthorised leave for a period of 60 days. He would submit that a telegram was sent seeking for extension of leave on account of illness of his mother and that he did not get any letter confirming or rejecting his application. He would submit that the punishment is completely disproportionate to the charges. The petitioner would place very heavy reliance on the judgment of the Hon'ble Supreme Court in the case of Chairman-cum-Managing Director, Coal India Limited and Another Vs. Mukul Kumar Choudhuri and Others reported in (2009) 8 MLJ 460 (SC). The Hon'ble Supreme Court, in identical circumstances, has held that the punishment of removal from service for unauthorised absence of six months is disproportionate.

7. On the other hand, the learned counsel appearing for the respondents would strenuously contend that the petitioner has habitually absented from duty. In the five years of service, he has been given five minor punishments and one major punishment. The learned counsel would also contend that no document has been produced to substantiate the illness of his mother. He would contend that in fact, Officers were sent to his residence to inform him about the hearings and copies were served on him, but, the petitioner did not appear for duty.

8. Further, the learned counsel appearing for the respondents placed reliance on the judgment of the Hon'ble Supreme Court in the case of U.P.SRTC Vs. Ram Kishan Arora

reported in (2007) 4 SCC 627, and contended that the conduct of the petitioner does not require any leniency and that the punishment imposed on him is not disproportionate to the gravity of the misconduct.

9. Heard the learned counsel appearing on both sides and perused the materials placed before this Court.

10. The facts are admitted. The petitioner is guilty of unauthorised absence for 60 days. It is also true that he has not produced any document to substantiate his mother's illness. The question is as to whether the punishment is commensurate to the misconduct. As rightly pointed out by the learned counsel for the petitioner, the judgment of the Hon'ble Apex Court in the case of Chairman-cum-Managing Director, Coal India Limited and Another Vs. Mukul Kumar Choudhuri and Others reported in (2009) 8 MLJ 460 (SC) would apply to the facts of the case in hand. The Hon'ble Apex Court in great detail examined the question of proportionality.

22. The question, however, remains : is the punishment of removal grossly disproportionate to the proved charge of unauthorized absence for more than six months?

23. In order to answer the aforesaid question, it would be appropriate to refer to a few of decisions of this Court wherein doctrine of proportionality has been considered. In Union of India and Another v. G. Ganayutham², this Court elaborately considered the proportionality in the administrative law in England as well as in our own country. The court considered some important English decisions, viz., Associated Provincial Picture Houses Ltd. v. Wednesbury Corporation³, Council of Civil Service Unions v. Minister for Civil Service⁴, R.v. Goldstein⁵ and R. v. Secretary for Home Dept. ex. p. Brind⁶ and few decisions of this Court, viz., Ranjit Thakur v. Union of India⁷, State of Maharashtra v. M.H. Mazumdar⁸, Ex-Naik Sardar Singh v. Union of India⁹, Tata Cellular v. Union of (1997) 7SCC463 (1947) 2All ER 680 (1984) 3 All ER 935 (1983) 1 All ER 434 (1991) 1 All ER 720 (1987) 4 SCC 611 (1988) 2 SCC 52 (1991) 3 SCC 213 India¹⁰, State of A.P. v. McDowell & Co.¹¹ and summed up position of proportionality in administrative law in England and India thus :

"(1) To judge the validity of any administrative order or statutory discretion, normally the Wednesbury test is to be applied to find out if the

decision was illegal or suffered from procedural improprieties or was one which no sensible decision-maker could, on the material before him and within the framework of the law, have arrived at. The court would consider whether relevant matters had not been taken into account or whether irrelevant matters had been taken into account or whether the action was not bona fide. The court would also consider whether the decision was absurd or perverse. The court would not however go into the correctness of the choice made by the administrator amongst the various alternatives open to him. Nor could the court substitute its decision to that of the administrator. This is the Wednesbury test.

(2) The court would not interfere with the administrator's decision unless it was illegal or suffered from procedural impropriety or was irrational -- in the sense that it was in outrageous defiance of logic or moral standards. The possibility of other tests, including proportionality being brought into English administrative law in future is not ruled out. These are the CCSU principles.

(3)(a) As per Bugdaycay (1987 AC 514), Brind and Smith as long as the Convention is not incorporated into English law, the English courts merely exercise a secondary judgment to find out if the decision-maker could have, on the material before him, arrived at the primary judgment in the manner he has done.

(3)(b) If the Convention is incorporated in England making available the principle of proportionality, then the English courts will render primary judgment on the validity of the administrative action and find out if the restriction is disproportionate or excessive or is not based upon a fair (1994) 6 SCC 651(1996) 3 SCC 709.

balancing of the fundamental freedom and the need for the restriction thereupon.

(4)(a) The position in our country, in administrative law, where no fundamental freedoms as aforesaid are involved, is that the courts/tribunals will only play a secondary role while the primary judgment as to reasonableness will remain with the executive or administrative authority. The secondary judgment of the court is to be based on Wednesbury and CCSU principles as stated by Lord Greene and Lord Diplock respectively to find if the executive or administrative authority has reasonably arrived at his decision as the primary authority.

(4)(b) Whether in the case of administrative or executive action affecting fundamental freedoms, the courts in our country will apply the principle of "proportionality" and assume a primary role, is left open, to be decided in an appropriate case where such action is alleged to offend fundamental freedoms. It will be then necessary to decide whether the courts will have a primary role only if the freedoms under Articles 19, 21 etc. are involved and not for Article 14."

11. The past conduct of the petitioner cannot be looked into, because that has been put not to the petitioner while imposing the order of dismissal. If the respondents were taking into account his past conduct, then, in the show cause notice, it is necessary to give an opportunity to the petitioner to explain the past conduct. There is no material on record that the petitioner was put on notice regarding the fact that his past conduct would be taken into account while granting punishment.

12. The judgment relied on by the learned counsel appearing for the respondents in the case of U.P.SRTC Vs. Ram Kishan Arora reported in (2007) 4 SCC 627 is not applicable to the facts of this case. That was a case, where the petitioner therein was guilty of criminal breach of trust and the misconduct was of very serious nature. The present case is not one of such type.

13. The learned counsel appearing for the respondents has also relied on another judgment of the Hon'ble Supreme Court

in the case of Union of India and Others Vs. Datta Linga Toshatwad reported in (2005) 13 SCC 709. In that case, the person did not report for duty from 16.09.1997 till the inquiry was conducted. The present case is one of unauthorised absence of 60 days.

14. It is well settled that the High Court, ordinarily, should not interfere with the quantum of punishment and it is for the disciplinary authority to decide the appropriate punishment. However, it is also well settled that a High Court can definitely come to a conclusion that the punishment awarded is disproportionate and if it comes to a conclusion that the punishment is disproportionate, then leave it to the authorities to impose any other lesser punishment.

15. In view of the fact that the order of dismissal from service of unauthorised leave for 60 days disproportionate to the punishment awarded to him and the order of dismissal is set aside. Accordingly, this Writ Petition is allowed and the matter is remitted back to the Senior Divisional Security Commissioner, Railway Protection Force, Chennai/4th respondent to decide as to whether the petitioner can be given any lighter punishment other than dismissal. However, it is made clear that the petitioner will not be entitled any back wages from the date of termination till today. The 4th respondent/Senior Divisional Security Commissioner, Railway Protection Force, Chennai, is directed to complete the exercise of deciding of the punishment, which is appropriate to the nature of misconduct within a period of four (4) weeks from the date of receipt of a copy of this order. There shall be no order as to costs.

Sd/-

Assistant Registrar

//True Copy//

Sub Assistant Registrar

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To

1.The President, Railway Board,
Union of India,
Ministry of Railways,
New Delhi - 110 001.

2.The Director of General,
Railway Protection Force,
Railway Board, New Delhi.

3.The Chief Security Commissioner,
Railway Protection Force, Moore Market Complex,
Chennai - 600 003.

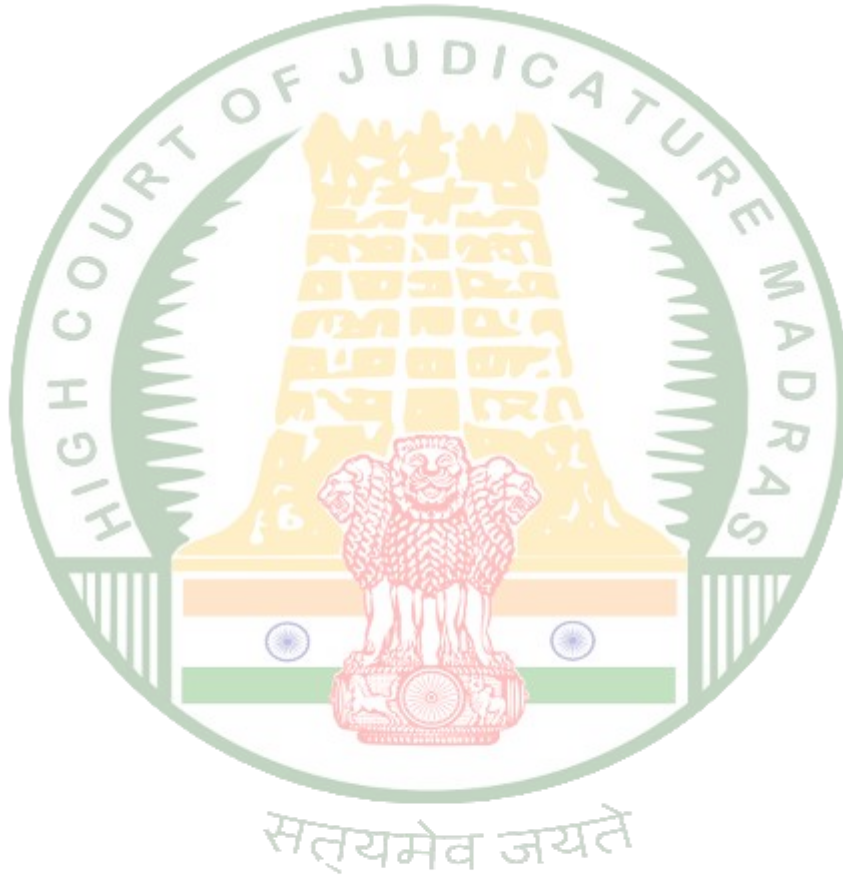
4.The Senior Divisional Security Commissioner,
Railway Protection Force, Moore Market Complex,
Chennai - 600 003.

+1cc to Mr.P.T.Ramkumar, Advocate, S.R.No.11597
+2ccs to Mr.K.V.Ramesh, Advocate, S.R.No.11534

W.P.No.21602 of 2013

SJ(CO)

rrs 08/03/2019



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