

IN THE HIGH COURT OF JUDICATURE AT MADRAS

RESERVED ON: 01.08.2019

DELIVERED ON: 08.08.2019

CORAM

THE HON'BLE MR. JUSTICE V.PARTHIBAN

W.P.No.6406 of 2019

Mr.P.Ganesh @ Ganesan

...Petitioner

-Vs-

1.The Principal Secretary to Government,
Home, Prohibition and Excise Department,
State of Tamilnadu,
Fort St.George,
Chennai-600 009

2.The Director General of Police,
State of Tamil nadu,
Chennai-600 009

3.The Deputy Commissioner of Police,
St.Thomas Mount District,
Chennai-600 016

...Respondents

Petition filed under Article 226 of the Constitution of India for issuance of writ of certiorari to quash the impugned order of compulsory retirement from service passed by the third respondent herein in his proceedings in PR No.41/PR.S(2)/13, dated 12.12.2014 and confirmed by the second respondent in his proceedings in Rc.No.66108/AP.3(2)/2015, dated 09.06.2016 and further confirmed by the first respondent in his Government Order in G.O.(D) No.1479 dated 21.12.2016 and direct the respondents to reinstate the petitioner into service with all consequential monetary, service and attendant benefits and back wages.

For Petitioner : Mrs.A.Yamuna for
Mr.G.Madavakarkidasan

For Respondents: Mr.J.Pothiraj, Spl.G.P.

ORDER

The petitioner was working as a Police Constable Grade-II in the Police Department. He was placed under suspension, under the provisions of the Tamil Nadu Police Subordinate Services (Discipline and Appeal) Rules 1955, pending enquiry into charges to be framed against him. Thereafter, a charge-memorandum was issued to the petitioner on 13.08.2013, charging the petitioner along with another Police Constable Grade-I, that during the duty hours, he entered the TASMAL outlet at about 10.30 p.m., on 24.06.2013 and attempted to consume alcohol from the TASMAL outlet, which was in fact closed after working hours.

2. Thereafter, an enquiry was held and the charges were found established. An enquiry report was also submitted on 10.03.2014. After obtaining explanation from the petitioner, final order was passed by the Disciplinary Authority, imposing the penalty of 'compulsory retirement', on 12.12.2014. Thereafter, the petitioner filed mercy petition-cum-Review Petition on 23.04.2015. The same was rejected by the Director General of Police, on 09.06.2016. Thereafter, the petitioner appealed to the Government, vide his representation dated 09.06.2016, followed by reminders. However, no order was passed. Therefore, the petitioner approached this Court in W.P.No.16777 of 2018. This Court disposed of the writ petition on 05.07.2018, directing the Government to dispose of the appeal within a particular time. Thereafter, the petitioner was constrained to file Contempt Petition in Contempt Petition No.2712 of 2018, on 01.11.2018. However, no order was passed by the Government in compliance with the earlier order passed by this Court in the aforementioned writ petition. Finally the Government passed order in G.O.(D) No.1479, Home (Police V) Department, dated 21.12.2018, rejecting the appeal as being devoid of merits. The order passed by the Disciplinary Authority, the third respondent herein, dated 12.12.2014 and the orders passed by the second and first respondents, dated 09.06.2016 and 21.12.2018 are put to challenge in the present writ petition.

3. When the matter is taken up for hearing, the learned counsel appearing for the petitioner would submit that he would confine his argument only in regard to the quantum of punishment imposed on the petitioner, viz., 'compulsory retirement'. According to the learned counsel, the co-delinquent, who was also identically charge-sheeted, who was a Grade-I Police Constable, was given a minor penalty of 'postponement of increment for one year with cumulative effect, vide order dated 10.11.2014, whereas, the petitioner herein was imposed with the penalty of 'compulsory retirement'. According to the learned counsel, both the petitioner as well as the other person, viz.,

A.Prabakaran, Grade-I Police Constable, were supposed to have visited the TASMACH outlet on the date and time mentioned in the charge-memorandum and attempted to consume alcohol illegally. While so, while imposing the penalty, the Government has adopted a different yardstick by letting of the other co-delinquent with the minor penalty of 'postponement of increment for one year with cumulative effect', whereas, the petitioner was compulsorily retired.

4.The learned counsel would submit that this Court and the Hon'ble Supreme Court of India have held consistently that there has to be parity in the matter of imposition of penalty when two delinquents were identically charge-sheeted. The learned counsel would also submit that though several grounds have been raised in assailing the issuance of charge-memorandum, conduct of enquiry and the punishment, he would not traverse in regard to those grounds and issues, as he would submit that the petitioner would be satisfied if the Court takes a call on the quantum of punishment imposed on the petitioner alone viz-a-vis punishment imposed on the co-delinquent.

5.The learned counsel would straight away draw the attention of this Court to the order passed in W.P.No.20953/2018, dated 02.07.2019, wherein, this Court, in the latest decision, has held that there has to be parity of treatment in the matter of imposition of penalty, after following the order passed by the Hon'ble Supreme Court of India and also the order passed by this Court in the earlier decisions. He would therefore submit that the petitioner is also entitled to be treated with minor penalty as imposed on the other co-delinquent A.Prabhakaran, Grade-I Police Constable.

6.At this, the learned Special Government Pleader appearing for the respondents submits that the petitioner cannot seek parity of treatment for the reason that the said Prabhakaran, Grade-I Police Constable, was not on duty at that time, whereas, the petitioner was on duty. Therefore, there is a palpable difference between the other Constable and the petitioner herein and therefore, the respondents felt that the punishment should be different for both the delinquents. Therefore, a different criteria was adopted in the matter of punishment, which cannot be faulted with by this Court.

7.This Court is unable to appreciate the arguments advanced on behalf of the learned Special Government Pleader for the reason that whether the person was on duty or not, their involvement or the extent of their involvement in the charge cannot be varied. The charge against both the delinquents was the same and such charge does not get diluted only because of the fact that the other delinquent was off duty. Therefore, this Court is of the view that the charge as it is, is the same for both the delinquents, no matter whether the Constable was on

or off duty during the particular hour. The charge against the delinquents was that they have gone to a TASMAL outlet in order to consume alcohol illegally. Therefore, the charge memorandum against both the delinquents was one and the same.

8. Even otherwise this Court is of the view that the imposition of major penalty of 'compulsory retirement' may not be a proportionate penalty for the proved charge against the petitioner. After all the charge was not pertaining to any corruption or mis-appropriation or any act of misconduct, which act suffers from moral turpitude. Therefore, this Court is of the view that as rightly contended by the learned counsel for the petitioner, the administration ought to have maintained parity in the matter of imposition of penalty and the penalty imposed on the other delinquent and the petitioner herein are completely different and the same suffers from discrimination and cannot be countenanced both on facts and in law.

9. In this connection, this Court would like to extract the order passed in the aforementioned writ petition in extenso (W.P.No.20953 of 2018, dated 02.07.2019 - R.Haribabu vs. 1.State of Tamil Nadu and two others), in support of the plea that there has to be a parity of treatment in the imposition of penalty.

"5. In regard to the Assistant Executive Engineer, namely, R.Palani, he was exonerated from the charges and in regard to other officer, R.Subash, Assistant Executive Engineer, he was imposed with minor penalty of Censure. Therefore, she would submit that the punishment imposed on the petitioner appears to be blatantly discriminatory and cannot stand to test of scrutiny. In support of her contention, the learned counsel would submit that there must be equality in imposition of penalty on the delinquent officers and in case, such punishment is discriminatory, the Courts have intervened in such punishment. The recent decision rendered by the Hon'ble Supreme Court of India in Naresh Chandra Bhardwaj V. Bank of India and others reported in (2019) 4 MLJ 637 (SC) has been referred to by the learned counsel. In the aforesaid decision, the Hon'ble Supreme Court of India, in paragraph No.7, has culled out the principles in regard to the proposition on hand and the same is reproduced hereunder:

"7. There is really no difference in the proposition, which is sought to be propounded except that in the latter judgment the principles have been succinctly summarised in the last paragraph of the judgment, which read as under:

"19. The principles discussed above can be summed up and summarized as follows:

19.1. When charge(s) of misconduct is proved in an enquiry the quantum of punishment to be imposed in a particular case is essentially the domain of the departmental authorities.

19.2. The Courts cannot assume the function of disciplinary/departmental authorities and to decide the quantum of punishment and nature of penalty to be awarded, as this function is exclusively within the jurisdiction of the competent authority.

19.3. Limited judicial review is available to interfere with the punishment imposed by the disciplinary authority, only in cases where such penalty is found to be shocking to the conscience of 1 (2013) 3 SCC 73 2 (2013) 12 SCC 372 the Court.

19.4. Even in such a case when the punishment is set aside as shockingly disproportionate to the nature of charges framed against the delinquent employee, the appropriate course of action is to remit the matter back to the disciplinary authority or the appellate authority with direction to pass appropriate order of penalty. The Court by itself cannot mandate as to what should be the penalty in such a case.

19.5. The only exception to the principle stated in para (d) above, would be in those cases where the co-delinquent is awarded lesser punishment by the disciplinary authority even when the charges of misconduct was identical or the co-delinquent was foisted with more serious charges. This would be on the Doctrine of Equality when it is found that the concerned employee and the co-delinquent are equally placed. However, there has to be a complete parity between the two, not only in respect of nature of charge but subsequent conduct as well after the service of charge sheet in the two cases. If co-delinquent accepts the charges, indicating remorse with unqualified apology lesser punishment to him would be justifiable." (emphasis supplied)"

6. In the above decision, the Hon'ble Supreme Court has stated that the above ruling is self explanatory that the doctrine of equality has to be applied uniformly to all similarly placed

employees. The learned counsel would further draw the attention of this Court to a detailed order passed by this Court in W.P.No.9004 of 2018 dated 02.08.2018. In the said writ petition, a similar issue came up for consideration along with other issues and after adverting to various decisions, this Court agreed with the submission made on behalf of the petitioner therein that there has to be equality in imposition of penalty on the delinquent officers.

7.The learned counsel would also draw the attention of this Court to the extensive reference to various other case laws on the issue and the order passed by this Court in W.P.No.9004 of 2016 wherein at paragraphs 13 & 14, it is held as under:

"13. Besides, the learned counsel for the petitioner would also rely on the decision in the case of R.Pitchandi Vs. The Principal Chief Conservator of Forest and others, reported in 2011 SCC Online Mad 1586 and she would draw the attention of this Court to paragraph Nos.6 to 7, which are reproduced below:-

"6. The fact remains that the Disciplinary Authority has held that the charges were not proved against the petitioner and other delinquents.

However, the Disciplinary Authority awarded the punishment to the petitioner and the second co-delinquent as stated above and insofar as the first co-delinquent is concerned, he has been totally exonerated from the charges. Therefore, it is crystal clear that different yardstick was adopted in respect of the petitioner and the second co-delinquent than that of the first co-delinquent and it would certainly amount to discrimination in awarding punishment to the petitioner and other co-delinquents. The learned counsel for the petitioner has rightly placed reliance on the decision of the Hon'ble Apex Court in M.Raghavelu v. Govt. of A.P. and Another reported in (1997) 10 SCC 779. The Hon'ble Apex Court in the said decision has held as hereunder:

"5.The argument of the learned counsel for the appellant is that if the persons directly in charge of the construction work were found not guilty of the charge framed, the appellant, who was indirectly in charge of the work, cannot be

punished for similar charge levelled against him. We find force in the argument of the learned counsel for the appellant and we do not think that the argument of the learned counsel for the respondent that the enquiry officer in this particular case has gone into the merits and has given different finding should be accepted. As pointed out earlier, on the basis of the same set of evidence the officers who were directly in charge of the construction work were exonerated of the charge and we see no reason to pick out the appellant along for finding him guilty of the charge."

The learned counsel for the petitioner has also rightly placed reliance on the decision of this Court in *N.Nandagopalan v. The Secretary to Government* reported in 2007 Writ L.R.52, wherein a learned Single Judge of this Court has held as hereunder:

"9. It is well settled in law that if employees are involved in the same incident, the Department should proceed against all or should not proceed against none. There is no discretion to proceed against some of employees and no action against the other employees, since they are identically placed and their involvement being identical. In the instruction submitted by the Government Advocate, it is not stated as to how the petitioner's involvement is not similar to other 28 persons. In the absence of such distinct feature, the proceedings conducted by the respondent against the petitioner and imposing punishment on the basis of the charge is illegal and hence the impugned order is set aside."

The principles laid down by the Hon'ble Apex Court and this Court in the decisions cited supra are squarely applicable to the facts of the instant case as in this case also, as already pointed out earlier, there is a discrimination in respect of awarding punishment between the petitioner and other co-delinquents.

7. In view of the aforesaid reasons, this Court is of the considered view that as the first co-delinquent has been totally exonerated from the charges, the same benefit should be given to the petitioner also. Accordingly, this Court is constrained to set aside the impugned order passed by the first respondent dated 27.06.2010

in proceedings Se.Mu.Aanai.No.A.A2/29499/ 2009. Consequently, the first respondent herein is hereby directed to give promotion to the petitioner as Forester, if the petitioner is otherwise eligible and entitled for such promotion."

14. The learned counsel would further rely on the decision rendered by the learned single Judge of this Court in W.P.(MD).No.8192 of 2014 dated 01.10.2015, with reference to paragraph Nos.5 to 7 of the said order passed by the learned Single Judge which are reproduced below:-

"5. The aforesaid portion of the counter affidavit infers that the co-delinquents of the petitioner, against whom similar charges were framed, have been imposed with a lighter of punishment of Censure. However, in the case of the petitioner, the respondent imposed a harsher punishment as stated above, without taking note of the fact that they are all involved in the same incident. Such approach adopted by the respondent is against the doctrine of equality.

6. In such circumstances, the Hon'ble Apex Court in the case of Rajendra Yadav v. State of Madhya Pradesh and others ((2013) 3 SCC 73), while dealing with the doctrine of equality, held thus:

12. The Doctrine of Equality applies to all who are equally placed; even among persons who are found guilty. The persons who have been found guilty can also claim equality of treatment, if they can establish discrimination while imposing punishment when all of them are involved in the same incident. Parity among co-delinquents has also to be maintained when punishment is being imposed. Punishment should not be disproportionate while comparing the involvement of co-delinquents who are parties to the same transaction or incident. The Disciplinary Authority cannot impose punishment which is disproportionate, i.e., lesser punishment for serious offences and stringent punishment for lesser offences.

13. The principle stated above is seen applied in few judgments of this Court. The earliest one is Director General of Police and Others v. G. Dasayan(1998) 2 SCC 407, wherein one Dasayan, a Police Constable, along with two other constables and one Head Constable were charged

for the same acts of misconduct. The Disciplinary Authority exonerated two other constables, but imposed the punishment of dismissal from service on Dasayan and that of compulsory retirement on Head Constable. This Court, in order to meet the ends of justice, substituted the order of compulsory retirement in place of the order of dismissal from service on Dasayan, applying the principle of parity in punishment among co-delinquents. This Court held that it may, otherwise, violate Article 14 of the Constitution of India. In Shaileshkumar Harshadbhai Shah case (supra), the workman was dismissed from service for proved misconduct. However, few other workmen, against whom there were identical allegations, were allowed to avail of the benefit of voluntary retirement scheme. In such circumstances, this Court directed that the workman also be treated on the same footing and be given the benefit of voluntary retirement from service from the month on which the others were given the benefit.

7. In the light of the above said ratio of the Hon'ble Apex Court, the impugned punishment passed only against the petitioner cannot be sustained, especially when the co-delinquent of the incidents, namely, Mr.Veerarajan and Mr.Ponswamynathan, who have faced similar charges, were imposed with a lighter punishment of Censure as observed above. Besides, from the date of punishment imposed against the petitioner i.e. on 13.03.2014, now more than twenty months have gone by and on account of a passage of time, he has lost his promotional avenues, that itself, in my view, would be much more than the punishment. Hence, this Court is inclined to allow the writ petition by setting aside the impugned order. Accordingly, the impugned order passed by the respondent is set aside. Consequently, the writ petition stands allowed. No Costs. M.P.No.1 of 2014 is closed."

8.The learned counsel would therefore submit that the matter is squarely covered by the orders passed by the Hon'ble Supreme Court and this Court and therefore, the petitioner is either entitled to full exoneration or atleast is liable to be imposed only with penalty of Censure since two officers who faced identical set of charges and given identical explanation to the charges, with one left off completely, the other with

Censure.

12.As rightly contended by the learned counsel for the petitioner that the Hon'ble Supreme Court of India as well as this Court have consistently held that even in the matter of imposition of penalty, equality must be maintained and in this case, there appears to be a blatant discrimination in the treatment of the petitioner at the hands of the Corporation and therefore, this Court is of the considered view that the impugned penalty is liable to be quashed. Although several other grounds have been raised, but the same were not pressed, as the learned counsel for the petitioner confined her argument only in regard to the discriminatory treatment meted out to the petitioner in regard to the imposition of penalty. Therefore, this Court is of the view that on the ground of partisan treatment meted out to the petitioner in the matter of imposing of penalty, the writ petition is liable to be disposed of as under:

(i) The impugned order of the 1st respondent in G.O.Ms.(P)-160 dated 12.03.2015 is hereby set aside and the disciplinary authority is directed to impose a penalty of Censure on the petitioner which shall take into effect from the date of stoppage of increment for a period of three years with cumulative effect.

(ii) The authority shall pass orders of penalty of Censure within a period of four weeks from the date of receipt of a copy of this order."

10.From the above it is clear that the imposition of penalty of 'compulsory retirement' on the petitioner, in the face of minor penalty imposed on co-delinquent, cannot be sustained in law. The order of 'compulsory retirement' means termination of service and such termination could be befall on an employee of the Government only in cases of serious charges and not for the charge, for which the petitioner is charged with.

11.Although this Court is conscious of the fact that being a member of the Police Force, where discipline has to be maintained with strictest standard, yet a solitary act of misconduct like this cannot entail a major penalty of 'compulsory retirement'. The imposition of 'compulsory retirement' appears to be unreasonable and excessive.

12.For the above said reasons, the writ petition is allowed and the impugned orders of the third respondent in his

proceedings in PR No.41/PR.S(2)/13, dated 12.12.2014, the second respondent in his proceedings in Rc.No.66108/AP.3(2)/2015, dated 09.06.2016 and the first respondent in G.O.(D) No.1479, dated 21.12.2018 are hereby set aside. The respondents are directed to pass orders, by substituting the penalty of 'compulsory retirement' imposed on the petitioner into one of 'postponement of increment for a period of one year with cumulative effect', as imposed on the co-delinquent, on 10.11.2014. The respondents are directed to pass orders as indicated above within a period of four weeks. It is made clear that the punishment shall run from the date the punishment of 'compulsory retirement' was imposed on the petitioner. No costs.

msk

Sd/-
Assistant Registrar(CS VIII)

//True Copy//

Sub Assistant Registrar

To

- 1.The Principal Secretary to Government,
Home, Prohibition and Excise Department,
State of Tamilnadu,
Fort St.George,
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- 2.The Director General of Police,
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- 3.The Deputy Commissioner of Police,
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+1cc to Mr.G.Madavakarkidasan, Advocate, SR.No.67781

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