

IN THE HIGH COURT OF JHARKHAND AT RANCHI
L.P.A. No.520 of 2019

1. The Union of India, through the Secretary Ministry of Railways Board, Rail Bhawan, P.O. & P.S. – New Delhi, District-New Delhi.
2. The Director General, Railway Protection Force, Railway Board, Rail Bhawan, P.O., P.S. & District-New Delhi.
3. The Chief Security Commissioner, R.P.S.F. Railway Board, P.O., P.S. & District-New Delhi.
4. The Deputy Inspector General, R.P.S.F. Railway Board, Rail Bhawan, P.O., P.S. & District-New Delhi.
5. The Commandant-cum-disciplinary R.P.S.F., 10th Battalion, Dhanbad, District Dhanbad, E.C. Railway, P.O., P.S. & Dist. – Dhanbad.
6. The Assistant Commandant R.P.S.F., 10th Battalion, Dhanbad, District Dhanbad, E.C. Railway, P.O., P.S. & Dist. – Dhanbad.
7. The Company Commander R.P.S.F., 10th Battalion, Dhanbad, District Dhanbad, E.C. Railway, P.O., P.S. & Dist. – Dhanbad through Ajay Kumar son of Late Brij Nandan Prasad aged about 50 years Adjutant 10 BN RPSF Dhanbad.

... .. **Appellants**

Versus

Md. Asif Ansari, S/O Zia Uddin Ansari, R/O – P.O. Sidula, P.S. Andal, District – Burdwan (W.B.).

... .. **Respondent**

CORAM : HON'BLE THE CHIEF JUSTICE
HON'BLE MR. JUSTICE SUJIT NARAYAN PRASAD

For the Appellants : Mr. Mokhtar Khan, Advocate
: Mr. Gautam Rakesh, Advocate

ORAL JUDGMENT

Order No. 06 : Dated 23rd March, 2021

With the consent of the parties, hearing of the matter has been done through video conferencing and there is no complaint whatsoever regarding audio and visual quality.

I.A. No. 1633 of 2021

This interlocutory application has been preferred under Section 5 of the Limitation Act for condoning the delay of 56 days in preferring this Letters Patent Appeal.

2. Heard parties.

3. Having regard to the averments made in the application and submissions made on behalf of the appellants, we are of the view that the appellants were prevented from sufficient cause in filing the appeal within the period of limitation. As such, the delay of 56 days in preferring the appeal is hereby condoned.

4. I.A. No. 1633 of 2021 stands allowed.

L.P.A. No.520 of 2019

5. The instant intra-Court appeal is under Clause 10 of the Letters Patent directed against the order/judgment dated 30.04.2019 passed by learned Single Judge of this Court in W.P.(S) No. 2305 of 2017 whereby and whereunder the order of punishment dated 01.04.2014 for removal of the writ petitioner from service as also the order dated 30.07.2015 passed by the appellate authority on the appeal filed by the petitioner and the order dated 26.10.2015 passed by the revisional authority, have been set aside by remanding the matter before the disciplinary authority to take a decision on the quantum of punishment by passing an appropriate order within stipulated period of eight weeks from the date of

receipt of copy of the order.

6. The brief facts of the case which need to be enumerated herein, read as under :-

The writ petitioner was appointed as a constable and was posted at 10th Battalion, R.P.S.F., Dhanbad. Since he was suffering from some orthopaedic problem since 2008, as such, he was referred to the Railway Hospital, E.C. Railway at Dhanbad. As per the medical report, the writ petitioner was found suffering from instability of right knee for the last five years and, therefore, recommendation was made by the doctors to take light work from the petitioner, if possible. Thereafter, on 10.06.2009, the writ petitioner was declared unfit for the job of constable in medical category B-1 and was found fit for sedentary job only. The appellant created a special supernumerary post temporarily for the said medical 'D' categorisation. The petitioner was absorbed in the special supernumerary post and was allowed to draw the same pay which he was drawing as constable. The writ petitioner, thereafter, was directed to report for re-examination to Jagjeevan Ram Hospital, Mumbai Central where he was found fit for duty as a constable. It is the case of the writ petitioner that he resumed the duty but again fell ill for which he was treated by one Dr. D.P. Bhusan, Assistant Professor, Department of Orthopaedic, P.M.C.H., Dhanbad from 03.10.2012 till January 2016. It is the further case of the writ

petitioner that he submitted all the medical documents to his department but ignoring the same the department proceeded against the petitioner on the charge of unauthorized absence and to that effect a charge-sheet was issued and served to the petitioner. The writ petitioner responded to the said allegation but the reply having been found unsatisfactory, he was proceeded against departmentally. A regular departmental enquiry was conducted against him. The writ petitioner participated in the said enquiry and produced some medical documents in support of his contention but the enquiry officer found the charge of unauthorized absence to be proved.

Second show cause notice was issued to the writ petitioner which had duly been responded but the disciplinary authority vide order dated 01.04.2014 finding the reply furnished by way of second show cause unsatisfactory, has imposed the punishment of removal from service.

The writ petitioner being aggrieved by the same, filed a writ petition before this Court being W.P.(S) No. 5095 of 2013 but that writ petition was disposed of on the ground that the petitioner is already pursuing the statutory appellate remedy against the order of removal.

Thereafter, the appeal filed by the writ petitioner was dismissed vide order dated 30.07.2015 against which revision

was preferred which was also dismissed vide order dated 26.10.2015.

The writ petitioner, against the order of dismissal, appellate as well as revisional order, has preferred writ petition before this Court being W.P.(S) No. 2305 of 2017 on the ground that the punishment imposed upon him is excessive and does not commensurate with the charge.

According to the writ petitioner, he was charged for the misconduct as enumerated under Rule 146.2 (iii) and 147 (vi) of the Railway Protection Force Rules, 1987. It has been submitted by the writ petitioner that the first charge is in respect of absence without leave and the second one relates to withdrawing from duty of the service without permission.

According to the writ petitioner, the said absence was not willful as he was under medical treatment and he was not in a position to attend the duty. He has further agitated the point that the enquiry report also suggests that he had submitted the medical documents before the enquiry officer, but merely on the ground that he was not an indoor patient and he did not get himself treated at any railway hospital, his misconduct was proved.

His further case before the writ court was that as per the Railway Protection Force Rules there are several other punishments which could have been inflicted upon the petitioner but having imposed the punishment of removal

from service is too harsh and does not commensurate with the charge.

The respondents appeared and defended the order passed by the disciplinary authority by taking the plea that all the procedures of departmental proceeding have been followed by observing the principle of natural justice.

It has been contended that since the writ petitioner was a member of disciplined force as such the absence without permission is a gross misconduct and taking into consideration the aforesaid aspect of the matter, the charge has been framed which has been found to be proved by the enquiry officer in course of enquiry and hence, the order of removal from service is having no illegality.

The writ court, after taking into consideration the rival submission advanced on behalf of the parties and considering the fact that the misconduct under Rule 147 (vi) of the Railway Protection Force Rules, 1987 is wholly not proved as the party regularly kept informed his hereabouts/self-sickness to the authority through postal department which has subsequently been observed by the enquiry officer which finding, according to the learned Single Judge, shows that the intention of the writ petitioner was not mala fide as because he regularly kept on informing the authorities about his physical position and his inability.

According to the learned Single Judge, the only charge which stands proved is 146.2(iii) which is of unauthorized absence. The learned Single Judge was of the view that although the writ petitioner has proceeded on leave without permission but for that the writ petitioner has furnished the plausible explanation for remaining absent which is his health ground and as such the absence cannot be said to be willful.

The learned Single Judge is of the view that the punishment of removal from service is excessive and harsh and, therefore, the order of punishment as also the appellate and the revisional orders have been quashed and set aside on the ground of quantum of punishment which, according to learned Single Judge, has been found to be excessive and not in commensurate with the charge levelled with a direction upon the disciplinary authority to take decision within the stipulated period of eight weeks from the date of receipt of copy of the order which is the subject matter of the present intra-court appeal.

7. Mr. Mokhtar Khan, learned counsel appearing for the appellant-Railway, has submitted that the learned Single Judge has committed gross error in remitting the matter before the authority without taking into consideration the fact that the charge has been proved by the enquiry officer after providing due opportunity of defending his case. He further

submits that the writ petitioner has not tried to defend himself with respect to his ailment and he did not produce any valid prescriptions of the hospital to suggest that he was an indoor patient rather he has shown the prescription of outdoor treatment and taking into consideration the aforesaid aspect of the matter, the enquiry officer has found the charge of unauthorized absence proved which has been accepted by the disciplinary authority by taking into consideration the fact that the writ petitioner was a member of the disciplined force and, therefore, the punishment of removal from service has been inflicted which has been affirmed by the appellate as well as revisional authorities.

According to the learned counsel, since there is concurrent finding, therefore, the writ court ought not to have interfered with the impugned orders on the ground of quantum of punishment which has been held by the learned Single Judge as harsh, excessive and not commensurate with the charge levelled.

8. This Court has heard the learned counsel for the appellants and gone across the documents available on record as also the finding recorded by the learned Single Judge.

9. The undisputed fact in this case is that the writ petitioner was appointed as constable but while discharging his duty, he suffered from orthopaedic problem in the year

2008. He was referred to the Railway Hospital, E.C. Railway at Dhanbad where he was thoroughly checked up and was declared suffering from instability of right knee vide decision dated 29.05.2009. The Chief Medical Superintendent, E.C. Railway, Dhanbad declared the writ petitioner unfit for the job of constable by declaring the writ petitioner medically unfit under medical category B-1 and found him fit for sedentary job only in present medical category i.e., B-1. The respondent authorities thereafter placed the writ petitioner to perform the sedentary job by creating supernumerary post temporarily. The appellant-Railway referred the writ petitioner to Jagjivan Ram Hospital, Mumbai Central, Mumbai for his re-examination vide letter dated 17.05.2012 where he was declared to be fit to perform the normal duty of constable vide report of the Medical Board of Jagjivan Ram Hospital. Pursuant thereto, the writ petitioner resumed his duty of constable. The writ petitioner again fell ill and, therefore, remained absent from duty. A memorandum of charge along with articles of charge was served upon the writ petitioner on 23.05.2013. The article of charge reads as hereunder:-

“ANNEXURE-I

CHARGE SHEET UNDER RULE 153 OF RPF RULES
1987 ISSUED AGAINST MOHD ASIF ANSARI,
CONSTABLE/10SF0445512 “C” COY NO.
10Bn/RPSF/DHN.

CHARGE

Serious misconduct & breach of discipline in that, Mohd. Asif Ansari, Constable/10SF0445512 of C.Coy No.10BN/RPSF/Dhanbad.

Unauthorized absented himself from Battalion Campus, 10BN/RPSF/Dhanbad wef. 20.09.2012 to till date without any authority.

This act of Mohd. Asif Ansari, Constable/10SF0445512 'C Coy No.10BN/RPSF/DHN tantamount to gross misconduct, serious breach of discipline, & disobedience of lawful orders being an enrolled member of the Armed Force of the Union. Thus he has violated the provisions contained in Rule 146.2(iii) & 147(vi) of RPF Rules, 1987 which is punishable as per section 9 of the RPF Act 1957 and modified Act of 1985.

Hence, charged.

Sd/-
(Kiran H. Joshi)
Asstt. Commandant
No.10BN/RPSF/DHN"

It is evident from the memorandum of charge that the writ petitioner has been found to be unauthorisedly absent from duty and as such, the same has been treated to be misconduct under the provision of Rule 147 (vi) of the Railway Protection Force Rules, 1987 and he was directed to put his defence and in pursuance thereto, the defence reply was submitted but the same having been found unsatisfactory, a regular departmental proceeding was initiated in which he participated and defended himself by producing medical certificates in order to show the reason for absence.

The enquiry officer found the explanation furnished by

the writ petitioner unsatisfactory and, therefore, the charge has been found to be proved which has been accepted by the disciplinary authority vide order dated 01.04.2014 and in consequence thereof, the punishment of removal from service has been imposed. The order of removal from service has been affirmed by the appellate as also by the revisional authority.

10. We have gone across the enquiry report more particularly reason for finding based upon the discussion made by the enquiry officer. For better appreciation, the same is being quoted as hereunder :-

“Reason for Finding :-

All possible PW's and DW have examined during the Enquiry in presence of Party Charged in different dates and party charged were turned up for all fixed D.E's except one sitting. Wherein Party Charged has not pleaded himself Guilty of the charges leveled against him in his Defence Statement. As such DAR proceeding is closed and have come to conclusion.

Discussion.

I the undersigned E.O. have come to the conclusion after discussion documents adduced during the proceeding and article charges leveled against the party charge that CT/10SF-0445512, Md. Asif Ansari of 'C' coy who is unauthorized absenting himself from battalion campus w.e.f. 20/09/2012 to till date without any authority or permission, for which he has been charge sheeted for serious misconduct and breach of discipline due to violation the provisions contained in Rule 146.2(iii) and 147(vi) of RPF Rule 1987. Carefully study of all documents and examined the PW's and DW, I being, Enquiry Officer concluded that, the First charge leveled against CT/Md. Asif Ansari i.e. 146.02(iii) of RPF Rule 1987 vide L/No.10BN/C/DAR/153-05/2013-1973 Dated - 23/05/2013 is proved beyond the shadow of doubt as

he was remained absent w.e.f. – 20/09/2012 to till date from BN/Campus without any proper authority or permission.

The second charge leveled against CT/Md. Asif Ansari i.e. 147(vi) of RPF Rule 1987 vide L/No.10BN/C/DAR/153-05/2013-1973 Dated – 23/05/2013 is in whole not proved as the Party Charged was time to time informed about his whereabouts/self-sickness to his authority through postal.

He submitted in his defense that he was undergoing treatment with Dr. D. P. Bhushan, Assistant Professor, Department of Orthopedic and Dr. B.P. Mahanty, M.S. ortho (Delhi), Orthopedic Surgeon where Dr. D.P. Bhushan who advised him taking rest for only two week from 03/01/2012 and Dr. B.P. Mahanty who also advised to him (PC) to take rest for only 06 week from 18/10/2012 due to his knee pain and further he was continuously taking treatment on 29/11/2012, 06/12/12, 20/11/12, 10/01/12 and 31/01/13 under said Doctor (Dr. B.P. Mohanty) as per only documents produced by party charge with Defence Statement. After about six month, he reported at B.N.Agarwal Memorial Hospital, Raniganj, Bardwan West Bengal and was taking treatment where the concerned doctor advised him for only 15 day's rest. In which it is disclosed that, he was took a very long gap between 31/01/2013 to 14/06/13 and in the meanwhile whether he was taking any treatment if any has not been stated anywhere which is established that he was remained absent in that period at his own will. After 14/06/2013, he was only reported at Jyoti Digital X-ray centre, Raniganj for X-ray of RT. Knee JT. A.P./LAT. The said doctors wherever he was undertaking treatment did not mention or disclosed in anywhere that the character of his (PC) illness/disease is very serious which might be took a very long period to recover & become for good health and no any doctors did not declare him in their medical prescription for taking rest such a long period. He also failed to submit/produce any current documents of Medical Treatment his self-sickness which may prove that whether he is still under any medical treatment, as so.

Findings.

On the basis of documents adduced during enquiry & statements of PW's and DW's recorded during enquiry, I hold Ct/Asif Ansari is "GUILTY" of the charges leveled against him."

It is evident from the discussion made by the enquiry officer with respect to the material furnished by the writ petitioner in his defence that the enquiry officer has come to a finding that the writ petitioner was undergoing treatment with Dr. D.P.Bhusan who has advised him to take rest for two weeks from 03.01.2012 and Dr. B.P.Mahanty also advised him to take rest for only six weeks from 18.10.2012 due to his knee pain and further, he was continuously taking treatment under said Dr. B.P.Mahanty. It has been opined that after about six months he reported at B.N.Agarwal Memorial Hospital, Raniganj, Bardwan, West Bengal and shown to have taken treatment where the concerned doctor advised him for only 15 days' rest. The writ petitioner took very long gap between 31.01.2013 to 14.06.2013 and in the meanwhile whether he was taking any treatment has not been stated anywhere which establishes that he remained absent during that period at his own will.

11. It is settled position of law as has been held by the Hon'ble Apex Court in ***Krushnakant B. Parmar v. Union of India and Another [(2012) 3 SCC 178]*** laying down the ratio as under paragraphs 17 and 18 which read as hereunder :-

“17. If the absence is the result of compelling circumstances under which it was not possible to report or perform duty, such absence cannot be held to be wilful. Absence from duty without any application or prior permission may amount to unauthorised absence, but it does not always mean wilful. There may be different eventualities due to which an employee may abstain from duty, including compelling circumstances beyond his control like illness, accident, hospitalisation, etc., but in such case the employee cannot be held guilty of failure of devotion to duty or behaviour unbecoming of a government servant.

18. In a departmental proceeding, if allegation of unauthorised absence from duty is made, the disciplinary authority is required to prove that the absence is wilful, in the absence of such finding, the absence will not amount to misconduct.”

It is evident from the fact involved in the said case that the delinquent employee therein was also proceeded against departmentally which was questioned by the delinquent employee on the ground that the enquiry officer has not come out with specific finding that the absence which has been shown to be unauthorized is willful.

The Hon'ble Apex Court, after taking into consideration the aforesaid aspect of the matter has been please to hold at paragraph 17 that if the absence is the result of compelling circumstances under which it was not possible to report or perform duty, such absence cannot be held to be wilful. Absence from duty without any application or prior permission may amount to unauthorised absence, but it does not always mean wilful. There may be different eventualities due to which an employee may abstain from duty, including

compelling circumstances beyond his control like illness, accident, hospitalisation, etc., but in such case the employee cannot be held guilty of failure of devotion to duty or behaviour unbecoming of a government servant.

Further, at paragraph 18 thereof, it has been laid down that in a departmental proceeding, if allegation of unauthorised absence from duty is made, the disciplinary authority is required to prove that the absence is wilful, in the absence of such finding, the absence will not amount to misconduct.

Further it has been held by taking into consideration the factual aspect involved therein that the enquiry officer on appreciation of evidence though held that the appellant was unauthorisedly absent from duty but failed to hold that the absence was wilful. The disciplinary authority as also the appellate authority failed to appreciate the same and wrongly held the appellant guilty.

12. We have considered the aforesaid judgment by applying it in the present facts and circumstances. Herein also it is evident from the enquiry report, as referred and quoted hereinabove, that there is no finding to the effect that the said unauthorized absence is willful.

Therefore, as per the judgment rendered by the Hon'ble Apex Court, we are of the view that in absence of any finding to the effect that the unauthorized absence was willful, the

same will not construe to the misconduct.

Further, the learned Single Judge has considered this aspect of the matter by taking into consideration the fact that the writ petitioner had produced the medical certificate although this Court is coming to such conclusion about not reaching to the specific finding by the enquiry officer with respect to the absence found to be willful, however, since we are sitting in the intra-court appeal and no cross appeal has been filed by the delinquent employee, therefore, we are proceeding in order to appreciate the finding recorded by the learned Single Judge whereby the learned Single Judge has found the charge pertaining to misconduct under rule 147(vi) of the RPF Rules of 1987 has not been wholly proved as the delinquent employee regularly kept informed about his whereabouts/self-sickness to the authority. The learned Single Judge has found it to be bonafide approach of the delinquent employee/writ petitioner. However, the fact about the finding recorded by the enquiry officer with respect to charge pertains to Rule 146.2(iii) which is of unauthorized absence, the writ petitioner has got plausible explanation for remaining absent which is his health ground which led the learned Single Judge to reach to the conclusion that the order of punishment of removal from service is excessive and needs to be considered by the authorities. This finding, according to our considered view, does not require any

interference in view of the fact that even it is the admitted case of the appellants that at the initial stage the writ petitioner was found to have suffered from orthopaedic problem for which he was declared to be medically unfit temporarily and in consequence thereof, he has been provided with the sedentary job by creating supernumerary post, however, he was subsequently found to be medically fit and was assigned the active Battalion duty. The writ petitioner again fell ill for which he took treatment and furnished the medical prescriptions which has not been doubted by the enquiry officer save and except the fact that the doctor had advised him to take rest for a certain period but ignoring the same he has absented from duty for a larger period and therefore, according to our considered view, if the reason shown for absence is writ petitioner's health issues, which is also supported by the decision of the Medical Board constituted by the appellant-Railway, the explanation furnished by the writ petitioner cannot be said to be unjustified and concocted. Therefore, if the learned Single Judge has come to a finding with respect to punishment of quantum, it cannot be said to suffer from illegality.

13. It is settled position of law that in the order passed by the administrative authority in the departmental proceeding, there should not be interference by the writ court sitting under Article 226 of the Constitution of India but certainly

the writ court can interfere with the order of punishment if the punishment inflicted shocks the conscience of the court as has been held by Hon'ble Apex Court in ***Union of India and Others v. P. Gunasekaran, [AIR 2015 SC 545]***, at paragraph 13, laying down following guidelines which are self explanatory:

“13. Despite the well-settled position, it is painfully disturbing to note that the High Court has acted as an appellate authority in the disciplinary proceedings, re-appreciating even the evidence before the enquiry officer. The finding on Charge No. 1 was accepted by the disciplinary authority and was also endorsed by the Central Administrative Tribunal. In disciplinary proceedings, the High Court is not and cannot act as a second court of first appeal. The High Court, in exercise of its powers under Article 226/227 of the Constitution of India, shall not venture into reappreciation of the evidence. The High Court can only see whether:

- a.** the enquiry is held by a competent authority;
- b.** the enquiry is held according to the procedure prescribed in that behalf;
- c.** there is violation of the principles of natural justice in conducting the proceedings;
- d.** the authorities have disabled themselves from reaching a fair conclusion by some considerations extraneous to the evidence and merits of the case;
- e.** the authorities have allowed themselves to be influenced by irrelevant or extraneous considerations;
- f.** the conclusion, on the very face of it, is so wholly arbitrary and capricious that no reasonable person could ever have arrived at such conclusion;
- g.** the disciplinary authority had erroneously failed to admit the admissible and material evidence;

- h.** the disciplinary authority had erroneously admitted inadmissible evidence which influenced the finding;
- i.** the finding of fact is based on no evidence.

Under Article 226/227 of the Constitution of India, the High Court shall not:

- (i)** re-appreciate the evidence;
- (ii)** interfere with the conclusions in the enquiry, in case the same has been conducted in accordance with law;
- (iii)** go into the adequacy of the evidence;
- (iv)** go into the reliability of the evidence;
- (v)** interfere, if there be some legal evidence on which findings can be based.
- (vi)** correct the error of fact however grave it may appear to be;
- (vii) go into the proportionality of punishment unless it shocks its conscience.”**

The Hon’ble Apex Court in ***Management of State Bank of India v. Smita Sharad Deshmukh and Anr., [(2017) 4 SCC 75]***, has laid down that it is equally settled position of law that the High Court sitting under Article 226 of the Constitution of India can certainly interfere with the quantum of punishment, if it is found disproportionate to the gravity of offence

14. So far as the issue of concurrent finding recorded by the appellate and revisional authorities is concerned, we are of the considered view that the issue of quantum of punishment ought to have been taken into consideration by the appellate or the revisional authority but failed to take into consideration this aspect of the matter and, therefore, in such circumstances, if the learned Single Judge has

interfered with the impugned decisions of the administrative authorities, the same cannot be said to be unjustified.

15. This Court, after going across the factual aspects as discussed hereinabove and taking into consideration the plausible explanation furnished by the writ petitioner as also the declaration of medical unfitness on the earlier occasion and again falling ill for which plausible explanation has been furnished, is of the view that the order of removal from service will be said to be excessive.

16. This Court, therefore, is also of the view that if the learned Single Judge has reached to the conclusion about the punishment of inflicting removal from service to be excessive and remanded the matter for taking fresh decision, the same cannot be faulted with.

17. According to our considered opinion, no interference is required in the order passed by the learned Single Judge.

18. Accordingly, the instant appeal fails and is dismissed. Consequent thereto, pending interlocutory applications also stand disposed of.

(Dr. Ravi Ranjan, C.J.)

(Sujit Narayan Prasad, J.)