



BEFORE THE MADURAI BENCH OF MADRAS HIGH COURT

DATED : 23.07.2021

CORAM

THE HONOURABLE MS.JUSTICE V.M.VELUMANI

WEB COPY

W.P. (MD)No.5405 of 2020

and

W.M.P. (MD)No.4701 of 2020

K.Karthikeyan

... Petitioner

Vs.

1.The Government of Tamil Nadu,
Rep. by its Principal Secretary to Government,
Home (Police) Department,
Secretariat,
Chennai - 600 004.

2.The Director General of Police,
Tamil Nadu, Chennai - 600 004.

3.The Additional Director General of Police,
Law and Order, Chennai - 600 004.

4.The Deputy Inspector General of Police,
Thanjavur Range,
Thanjavur.

5.The Superintendent of Police,
Thanjavur District,
Thanjavur.

... Respondents

Prayer : Writ Petition filed under Article 226 of the Constitution of India, seeking a Writ of Certiorarified Mandamus, calling for entire records relating to the impugned proceedings in Pro.Rc.No.24964/AP.1(1)/2015, dated 14.04.2015, passed by the second respondent, confirming the impugned proceedings passed by the fourth respondent in Pro.C.No.B2/Appeal 48/2011, dated 02.12.2011, in the appeal and impugned proceedings, passed by the fifth respondent in PR.No.259/2011, dated 20.09.2011, in the disciplinary proceedings, quash the same and consequently, direct the respondents herein to reinstate the writ petitioner in service and regularize his service with all monetary benefits.

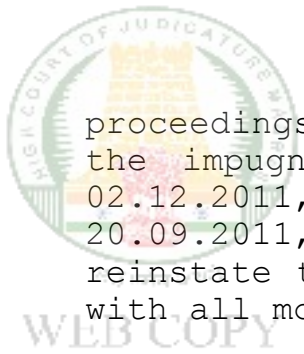
For Petitioner : Mr.S.Manikandan

For Respondents : Mr.P.Subbaraj
Government Advocate

* * * * *

ORDER

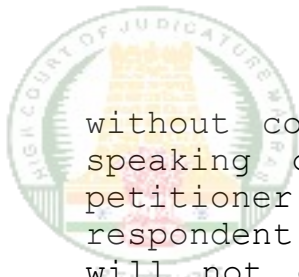
This Writ Petition has been filed seeking to quash the
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proceedings of the second respondent, dated 14.04.2015, confirming the impugned proceedings passed by the fourth respondent, dated 02.12.2011, and proceedings passed by the fifth respondent, dated 20.09.2011, and consequently, direct the respondents herein to reinstate the writ petitioner in service and regularize his service with all monetary benefits.

2. According to the petitioner, he joined as Grade - II Police Constable on 09.06.1993. He was discharging his duties without any black mark. In the year 2011, while he was serving as Police Constable in Thiruvidadaimarudur Police Station, disciplinary proceedings under Rule 3(b) of the Tamil Nadu Police Subordinate Service (Discipline and Appeal) Rules was initiated against the petitioner by the fifth respondent - Superintendent of Police, Thanjavur, alleging that he absented for more than 21 days from 15.03.2011 and the petitioner was declared as a Deserter, vide order dated 07.04.2011. The Deputy Superintendent of Police, Pattukkottai, was appointed as Enquiry Officer. The petitioner gave written request to the Enquiry Officer to dispense with his personal appearance for hearing due to some untoward incidents in his Village and also due to his sudden ill-health. The petitioner also submitted his explanation stating that due to unavoidable family compulsion and ill-health, he could not attend duty and he will avoid such absenteeism in future. The Enquiry Officer submitted his report that the charge levelled against the petitioner is proved. The fifth respondent furnished a copy of the enquiry report and called for explanation. The petitioner submitted his explanation reiterating his statement made before the Enquiry Officer. The petitioner also requested the fifth respondent to take into account the circumstance under which he could not attend duty while passing the final order. The fifth respondent without properly considering the explanation submitted by the petitioner, imposed a punishment of compulsory retirement accepting the Enquiry Officer's report. Aggrieved over the same, the petitioner filed an appeal before the fourth respondent. The fourth respondent, by the order dated 02.12.2011, rejected the appeal, by a non-speaking order. Challenging the said order, the petitioner filed review petition before the third respondent. The third respondent after one year of filing the review petition, held that the review will not lie before him and the review has to be filed before the second respondent.

3. The petitioner also filed review to the second respondent on 30.06.2013. No order was passed on the review petition. In such circumstances, the petitioner filed W.P.(MD)No.1680 of 2015 before this Court, challenging the orders of the respondents 5, 4 and 2, dated 20.09.2011, 02.12.2011 and 22.05.2013, respectively. This Court, by order dated 30.06.2013, disposed the said Writ Petition directing the second respondent herein to pass appropriate orders on the review, dated 30.06.2013. On receipt of the order of this Court, the second respondent converted the review as Mercy Petition,



without considering the explanation of the petitioner, by a non-speaking order, rejected the same on 14.04.2015. Hence, the petitioner gave a representation, dated 01.08.2016, to the first respondent. Subsequently, he came to know that the first respondent will not entertain the representation of the petitioner, as the second respondent already converted the review petition as mercy petition. Challenging the above said orders, the petitioner has come out with the present Writ Petition.

4.The learned counsel appearing for the petitioner submitted that the second respondent *suo motu* converted the review petition as mercy petition and closed the petitioner's right of mercy petition before the Government. The impugned orders are passed without giving proper opportunity to the petitioner and without appreciation of materials on record. The authorities failed to see that the charge levelled against the petitioner is minor in nature and the punishment imposed is disproportionate to the charges levelled against the petitioner. In case of similarly placed persons, minor punishments were imposed for unauthorized absence either by the appellate authority or by the Government on review. Due to family problems and some untoward incidents arose in his family, the petitioner could not inform the authorities his inability to attend the duty. The absence of the petitioner in attending the duty is not willful and the Enquiry Officer did not give any finding that the petitioner willfully absented for duty. In the absence of such finding, the punishment imposed is disproportionate to the charges levelled against the petitioner.

5.The learned counsel appearing for the petitioner further submitted that the appellate authority and the authority, who treated the review petition as mercy petition failed to follow the procedures contemplated under Rule 6(1) of the Tamil Nadu Police Subordinate Service (Discipline and Appeal) Rules, before confirming the order passed by the disciplinary authority. The appellate authority ought to have seen that the enquiry report demonstrates that the findings recorded are only with regard to factual aspect that the petitioner unauthorisedly absented for duty and there was no finding to the effect that the unauthorised absence of the petitioner is willful and there is no *mala fide* on the part of the petitioner.

6.The learned counsel appearing for the petitioner further submitted that the second respondent erred in referring the earlier punishment, which was not mentioned in the charge memo or in the second show cause notice issued by the fifth respondent.

7.In support of his submissions, the learned counsel appearing for the petitioner relied on the following judgments:

(i) **Krushnakant B. Parmar vs. Union of India and another** reported in **2012 (3) SCC 178**. Paragraphs 16 to 19 and 25 read as

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follows:-

''16. In the case of the appellant referring to unauthorised absence the disciplinary authority alleged that he failed to maintain devotion to duty and his behaviour was unbecoming of a government servant. The question whether "unauthorised absence from duty" amounts to failure of devotion to duty or behaviour unbecoming of a government servant cannot be decided without deciding the question whether absence is wilful or because of compelling circumstances.

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.

19. In the present case the inquiry 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.

25. Taking into consideration the fact that the charged officer has suffered a lot since the proceeding was drawn in 1996 for absence from duty for a certain period, we are not remitting the proceeding to the disciplinary authority for any further action. Further, keeping in view the fact that the appellant has not worked for a long time we direct that the appellant be paid 50% of the back wages but there shall be no order as to costs.''

(ii) **Shir Bhagavan Lal Arya Vs. Commissioner of Police** reported in **2004 (4) SCC 560**. Paragraphs 9 to 12 and 14 read as follows:-

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'9. Rules 8(a) and 10 of the Delhi Police (Punishment and Appeal) Rules, 1980 read as under:

'8. Principles for inflicting penalties.—(a) Dismissal/Removal.—The punishment of dismissal or removal from service shall be awarded for the act of grave misconduct rendering him unfit for police service.

10. Maintenance of discipline.—The previous record of an officer, against whom charges have been proved, if shows continued misconduct indicating incorrigibility and complete unfitness for police service, the punishment awarded shall ordinarily be dismissal from service. When complete unfitness for police service is not established, but unfitness for a particular rank is proved, the punishment shall normally be reduction in rank."

10. In the instant case, the appellant had absented himself for 2 months, 7 days and 17 hours on medical grounds. The above two rules provide that penalty of removal can be imposed only in cases if grave misconduct and continued misconduct indicate incorrigibility and complete unfitness for police service. The absence of the appellant on medical grounds with application for leave as well as sanction of leave can under no circumstances, in our opinion, be termed as grave misconduct or continued misconduct rendering him unfit for police service.

11. The order dated 16-1-1995 passed by the respondents was produced by the respondents themselves in their reply to CWP before the High Court of Delhi that they had sanctioned leave without pay for the period from 7-10-1994 to 15-12-1994, the period of alleged unauthorised absence. The High Court has failed to appreciate and evaluate this aspect of the matter. The High Court also did not appreciate that after issuing sanction for leave for the period in question, the employee's legitimate expectation would be that no stern action would be taken against him with respect to the alleged act of misconduct which by no stretch of imagination can be considered an act of gross misconduct or continued misconduct indicating incorrigibility and complete unfitness for police service. 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 acts



of grave nature or as cumulative effect of continued misconduct proving incorrigibility or 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 the 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 Rules 8(a) and 10 of the Delhi Police (Punishment and Appeal) 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 which, not only he but his entire family totally dependent 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.

12. The disciplinary authority without caring to examine the medical aspect of the absence awarded to him the punishment of removal from service since their earlier order of termination of the appellant's service under the Temporary Service Rules did not materialise. No reasonable disciplinary authority would term absence on medical grounds with proper medical certificates from government doctors as grave misconduct in terms of the Delhi Police (Punishment and Appeal) Rules, 1980. Non-application of mind by quasi-judicial authorities can be seen in this case. The very fact that the respondents have asked the appellant for re-medical clearly establishes that they had received the applicant's application with medical certificate. This can never be termed as wilful absence without any information to competent authority and can never be termed as grave misconduct.

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 judgment. 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 up to the date on which the appellant



reports back to duty pursuant to this judgment shall not be counted as a period spent 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 judgment.''

8.The fifth respondent filed counter affidavit denying all the averments made by the petitioner. The learned Government Advocate appearing for the respondents submitted that the petitioner absented himself for more than 21 days and as per Rule 95 of the Police Standing Order, the petitioner was declared as Deserter and the petitioner was called upon to appear before the fifth respondent within 60 days. The petitioner appeared on 25.04.2011 and requested the fifth respondent to take him for duty and submitted that his parents were suffering from Cardiac problems and he attended them. The reason given by the petitioner was not convincing and the Enquiry Officer after conducting enquiry, submitted his report stating that the charge levelled against the petitioner was proved and the fifth respondent imposed a punishment of compulsory retirement.

9.The contention of the petitioner that the charge levelled against him is not grave in nature and it is only minor, is not correct. If really, the petitioner's father was having problem, the petitioner should have obtained necessary permission to attend his father. Due to frequent unauthorized absenteeism by the petitioner, problems were caused to other Police personnel. Further, the petitioner had not corrected himself on earlier 11 occasions, though he was given leniency and awarded with a punishment of giving monetary loss only. Considering the entire materials, he was awarded with the punishment of compulsory retirement. He cannot compare himself with other persons, who were imposed with minor punishment. The appeal and review petition filed by the petitioner were rejected. There is no provision for second review.

10.Heard the learned counsel appearing for the petitioner and the learned Government Advocate appearing for the respondents and perused the materials available on record.

11.From the materials on record, it is seen that the petitioner unauthorisedly absented himself for more than 21 days. In view of the same, the petitioner was declared as Deserter as per Rule 95 of the Police Standing Orders and was called upon to appear within 60 days before the fifth respondent to explain the reason for his unauthorized absence. The petitioner appeared and explained that due to Cardiac problem of his parents, he is attending them and therefore, he could not join and submit leave letter. Not being



satisfied with the explanation, an Enquiry Officer was appointed and he submitted his report that the charge is proved. The fifth respondent / disciplinary authority accepting the Enquiry Officer's report, imposed a punishment of compulsory retirement. The appeal and review filed by the petitioner were rejected. The petitioner has challenged said the orders in the present Writ Petition.

12.The petitioner is seeking to set aside the punishment on two grounds. Firstly, the learned counsel appearing for the petitioner submitted that due to unavoidable circumstances, viz., ill-health of his father, the petitioner could not report for duty. The contention of the learned counsel appearing for the petitioner is that all the unauthorized absence cannot be treated as willful. Similarly, this will not amount to failure to maintain devotion to duty and the petitioner's conduct is unbecoming of a Government servant. When the charge is that the petitioner absented himself unauthorisedly, then, it must be proved that such unauthorized absence is willful and amount to failure to maintain devotion to duty and unbecoming of Government Servant. There must be specific finding to that effect. When the petitioner absented himself for duty, due to illness of his father, the same cannot be termed as willful and failure to maintain devotion to duty. The judgment reported in **2012 (3) SCC 178** [supra] relied on by the learned counsel appearing for the petitioner, to substantiate the above proposition, wherein the Hon'ble Apex Court held that it must be proved that unauthorized absence was wilful and if absence is due to compelling circumstances under which it is not possible to report for or perform duty, such absence cannot be held to be wilful and employee cannot be guilty of misconduct. The said ratio is squarely applicable to the facts of the present case.

13.The petitioner has explained the reason for failure to report for or perform duty. The Enquiry Officer as well as the respondents have not given any finding that the unauthorized absence of the petitioner is wilful and the charge is that the petitioner failed to maintain devotion to duty and conduct of the petitioner is unbecoming of a Government servant. When the respondents have not given such a finding, the punishment of compulsory retirement imposed is not sustainable. In Paragraphs 16 to 19 of the judgment reported in **2012 (3) SCC 178** referred to above, the Hon'ble Apex Court has categorically held that all unauthorized absence cannot be termed as wilful.

14.The second contention of the learned counsel appearing for the petitioner is that in any event, punishment of compulsory retirement for 21 days absence is disproportionate to the charges levelled against the petitioner. For this proposition, the learned counsel appearing for the petitioner relied on Paragraph 25 of the judgment of the Hon'ble Apex Court reported in **2012 (3) SCC 178** [supra] and Paragraphs 9 to 12 of the judgment reported in **2004 (4)**



SCC 560 [supra], which are extracted above. In this judgment, the Hon'ble Apex Court held that the punishment of removal from service of the appellant therein for absenting himself on medical ground, is disproportionate. In both the cases, the Hon'ble Apex Court set aside the punishment imposed on the appellant therein and ordered reinstatement. In the judgment reported in **2012 (3) SCC 178** [supra], the Hon'ble Apex Court reinstated the appellant therein with 50% back wages. In the judgment reported in **2004 (4) SCC 560** [supra], the Hon'ble Apex Court ordered reinstatement of the appellant therein with a condition that the period during which the appellant remained absent for duty and the period upto which, the appellant reported back to duty, pursuant to the said judgment, shall not be counted as the period spent on duty. The Hon'ble Apex Court after setting aside the order of removal, imposed the punishment referred to above, due to lapse of long period and in order to shorten the period of litigation, has imposed the punishment referred to above. In the present case, the punishment of compulsory retirement was issued in the year 2011 and now, 10 years have lapsed. As per the said judgments of the Hon'ble Apex Court in stead of remitting the matter back to the disciplinary authority, the order of compulsory retirement is set aside and the petitioner will not be entitled to back wages from the date of absence till the date on which he joins duty.

15. In view of the above, the punishment of compulsory retirement is set aside. The respondents are directed to permit the petitioner to join duty within in four weeks and the petitioner is directed to report duty within four weeks from the date of receipt of a copy of this order. The petitioner will not be entitled for back wages from the date of absence till the date on which he joins duty, within four weeks.

16. In the result, this Writ Petition is partly allowed. No costs. Consequently, connected Miscellaneous Petition is closed.

Sd/-

Assistant Registrar (CO)

// True Copy //

/ /2021

Sub Assistant Registrar(CS)

smn2

Note :- In view of the present lock down owing to COVID-19 pandemic, a web copy of the order may be utilized for official purposes, but, ensuring that the copy of the order that is presented is the correct copy, shall be the responsibility of the advocate/litigant concerned.



To

1.The Principal Secretary to Government of Tamil Nadu,
Home (Police) Department,
Secretariat,
Chennai - 600 004.

2.The Director General of Police,
Tamil Nadu, Chennai - 600 004.

3.The Additional Director General of Police,
Law and Order, Chennai - 600 004.

4.The Deputy Inspector General of Police,
Thanjavur Range,
Thanjavur.

5.The Superintendent of Police,
Thanjavur District,
Thanjavur.

+1 CC to M/s.GP (SR-23881[F] dated 26/07/2021)

W.P. (MD)No.5405 of 2020
23.07.2021

RD(3.08.2021) 10P 7C