

Meena

IN THE HIGH COURT OF BOMBAY AT GOA

WRIT PETITION NO.440 OF 2015

MR. HANAMATARAO M. KULKARNI,
aged 59 years, married,
Indian National, r/o. Flat No. F-4,
1st Floor, Crimson Vale
Colva Road, Mungul-Margao – Goa. ...Petitioner

VS

1. STATE OF GOA
through the Chief Secretary, having
office at Secretariat,
Porvorim, Bardez, Goa.
2. THE SECRETARY (POWER)
APPELLATE AUTHORITY,
having office at Alto, Porvorim - Goa.
3. THE CHIEF ELECTRICAL ENGINEER,
GOVERNMENT OF GOA,
Vidyut bhavan, 3rd Floor, Panaji, Goa. ...Respondents

Mr. V. Ameya Nayak Salatry, Advocate *for the Petitioner.*

**Ms. S. Pinto, Advocate h/f. Ms. Priyanka Kamat, Additional
Government Advocate *for the Respondents.***

**CORAM: M. S. SONAK AND
R.N. LADDHA, JJ.**

DATE: 28th January, 2022

ORAL JUDGMENT : (Per R.N. Laddha, J.)

This petition, under Articles 226 and 227 of the Constitution of India, is directed against the order dated 22/11/2013 passed by the Secretary (Power)/Appellate Authority, Government of Goa, imposing a minor penalty upon him, as per the provision contained under Rule-11(iv) of the Central Civil Services (Classification, Control and Appeal) Rules, 1965.

2. The case of the petitioner is that he was recruited in the Electricity Department, Government of Goa, in the year 1983 and during the relevant period posted as Junior Engineer (Electrical) at Panaji. He was, by an order dated 09/02/2011, placed under suspension in contemplation of a disciplinary enquiry. The respondent No.3, therefore, in exercise of its power under Rule 14 of the Central Civil Services (Classification, Control and Appeal) Rules, 1965 directed that a departmental enquiry be held against the petitioner, *inter alia*, on the grounds that the petitioner had frequently remained absent from duties unauthorizedly and had not attended the official correspondence.

3. An enquiry was held into the said charges. The Enquiry Officer recorded a finding that the charges levelled against the petitioner have been proved. The Disciplinary Authority accepted the findings and passed an order imposing upon the petitioner major penalty of reduction to a lower stage in the time scale of pay for the period of five years. The suspension of the petitioner was also revoked by the said order.

4. The petitioner then preferred statutory appeal challenging the findings against him on the merits. The Respondent No.2 being the

Appellate Authority, partly accepted the conclusions of the disciplinary authority and reduced the quantum of penalty imposed on the petitioner from reduction to a lower stage in the time scale to pay for the period of 5 years to withholding one increment of pay for the period of two years, by stating thus:

“ This Order shall dispose off the Appeal dated 15.04.2013, filed before the undersigned by Shri H.M. Kulkarni, Junior Engineer(Elect) attached to the Electricity Department, Government of Goa, Panaji — Goa, against the major penalty imposed by the Disciplinary Authority, vide its Order dated 28.03.2013, whereby Shri Kulkarni was penalized with reduction of his Band pay by five stages from Rs.20,450/- to Rs. 18,090/-and grade pay from Rs. 6,600/- to 4,200/- for the period of five years, i.e. with effect from the date of his increment falling due.

The said Shri H.M. Kulkarni, Junior Engineer (Elect) was heard in person on 4th and 19th September 2013 as well as on 4th October 2013.

I have carefully gone through the records of the Disciplinary proceedings for major penalty, as well as the Order dated 28.03.2013 of the Disciplinary Authority imposing the aforementioned penalty.

In the appeal filed before the undersigned, the aforesaid, Shri H.M. Kulkarni, Junior Engineer(Elect) has confirmed that the Charge-Sheet Memorandum dated 31.05.2011 have been duly served on him, however he was not satisfied with the Inquiry Report. His plea has been that the Article-I contained in the Charge-Sheet Memorandum dated 31.05.2011 which charged that he had remained un-authorisedly absent from duties and not honoured the official correspondence assigned to him, has not been proved in the Inquiry proceedings. Further, he also pleaded that the penalty imposed on him vide order dated 28.03.2013 by the Disciplinary Authority is too harsh.

In the personal hearing, Shri H.M. Kulkarni, Junior Engineer(Elect) presented the documentary evidence in his defence before the undersigned such as medical certificates and also the certified copies of the attendance register. Further, he also tried to convince the undersigned that on some occasions, his absence was not willful, but due to his deteriorated health.

I have carefully examined the pros and cons of the case and it is confirmed by documentary evidence placed before me, that on some occasions the said Shri H.M. Kulkarni, Junior Engineer(Elect) had remained unauthorisedly absent from duties and on some occasions he had recorded initial on the attendance register, which proves that he had attended the duty on the contentions days.

Further, it has also been noted by the undersigned that during the last period, while he has been on duty, he has shown improvement as certified by his Supervisory Officer.

In his aforesaid personal hearing, the said Shri H.M. Kulkarni, Junior Engineer(Elect) pleaded for mercy, keeping in view his domestic circumstances, financial conditions and the large number of year of service rendered by him.

In the light of the aforementioned facts, the undersigned in the capacity of being the Appellate Authority, is inclined to take a lenient view in the matter and reduce the quantum of punishment as imposed on Shri H.M. Kulkarni, Junior Engineer (Elect), vide Order dated 28.03.2013 of Disciplinary Authority and hereby impose the minor penalty, as per the provision contained under Rule-11(iv) of the Central Civil Services (Classification, Control and Appeal), Rules-1965, i.e. with-holding one (1) increment of pay for the period of two years, i.e. from the date of his increment falling due and on expiry of this period of penalty, it will not have the effect of postponing his future increments of pay.”

5. By a subsequent order dated 12/03/2014 passed by the respondent No.3, it was directed that the period of suspension was to be treated as period spent on duty for all purposes and full pay and allowances should be paid to the petitioner for the period of the aforementioned interregnum of his suspension.

6. Further, it is the case of the petitioner that the person suffering a minor penalty can be considered for promotion even during the currency of the penalty and in his case the period of the minor penalty imposed upon him by the impugned order had expired in June, 2017. He was retired from service on 31/05/2016 and therefore, the impugned order had stalled his promotion. It is stated that he had completed 30 years unblemished service in the department as of 22/11/2013 and was eligible for MACP benefits, however, the same were denied simply because of his illegal suspension which was subsequently revoked. According to the petitioner, the period of suspension cannot be counted for refusal of MACP.

7. The respondents in the reply affidavit, defending the impugned order, denied that the impugned order was passed in violation of the principles of natural justice. In addition, the reply states that the GPSC had considered the petitioner for promotion in the Departmental Promotion Committee (for short “the DPC”) meeting held on 18/01/2015. However, the period of penalty imposed on the petitioner was to be over by 30/06/2016 and therefore the question of giving promotion to the petitioner after retirement did not arise. Further, the Benchmark prescribed for the grade pay of ₹7,600/- was “Very Good” whereas the

petitioner was graded as “Satisfactory” and hence the petitioner was not entitled to the grant of MACP.

8. Mr. V. Ameya Nayak Salatry, learned Counsel appearing on behalf of the petitioner urged with vehemence that the appellate authority conducted a farce of hearing of appeal and concluded the hearing in flagrant violation of principles of natural justice. He further submitted that the period of suspension of the petitioner from service was directed to be treated as period spent on duty for all purposes and further directing full pay and allowances to be paid to the petitioner for the interregnum of the period of his suspension. This fact itself shows that the period of suspension cannot be taken into consideration for the refusal of MACP.

9. On the other hand, the learned Additional Government Advocate appearing on behalf of the respondents submitted that the petitioner was given hearing before passing the impugned order and there was no violation of principles of natural justice. The issue of promotion to the post of Assistant Engineer was considered by the duly constituted DPC of the Goa Public Service Commission in its meeting dated 18/01/2015 wherein the case of the petitioner was also considered, however, he was not found fit for grant of promotion. The petitioner did not possess the required Benchmark “Very Good” for grant of MACP in the grade pay of ₹7600/-.

10. We have carefully considered the rival submissions advanced by the learned Counsel for the parties and perused the material available on record.

11. It is settled principle of law that when disciplinary proceedings have been initiated and findings of fact have been recorded in such enquiry, the

same cannot be interfered with unless such findings are based on no evidence or the punishment is totally disproportionate to the proved misconduct of the employee or in such domestic enquiry there was flagrant violation of the principles of natural justice. In the case of ***B.C. Chaturvedi vs. Union of India and Others***¹, it was held that the disciplinary authority is the sole judge of facts. Where appeal is presented, the appellate authority has coextensive power to re-appreciate the evidence or the nature of punishment.

12. Adverting to the facts of the present petition, it is to be noticed that the petitioner did not file the copy of the charge-sheet nor did he bother to file the enquiry report. This apart, it must be noticed that no specific averments have been made by the petitioner that as to how many days he remained absent or the period of his absence from duties and the reasons for his absence. Further, there is nothing on record or the pleadings even to suggest as to how the respondent-Appellate Authority concluded the hearing in violation of the principles of natural justice. It is nowhere clarified in the petition as to whether any evidence was adduced or not.

13. On the other hand, the impugned order demonstrates that the respondent-Appellate Authority heard the petitioner on 4th and 19th September 2013 as well as on 4th October 2013. In view of this, it cannot be said that proper opportunity of hearing was not given to the petitioner by the respondent-Appellate Authority and the appeal was decided in flagrant violation of the principles of natural justice. The impugned order passed by the respondent-Appellate Authority also indicates that during the personal hearing, the petitioner pleaded for mercy. The aforesaid

¹ (1995) 6 SCC 749

averment that the petitioner had pleaded for mercy has not been controverted by the petitioner.

14. Now, we may advert to the second contention of the petitioner that his case ought to have been considered for promotion and he ought to have been promoted even during the currency of the penalty. In the present case, the DPC was constituted for considering officers for promotion in which the case of the petitioner was also considered. However, the petitioner was not recommended for promotion by the DPC in its meeting held on 02/03/2016 on the ground of currency of penalty, by recording thus:-

“ Shri H.M. Kulkarni (Srty. No.26):- The Appellate Authority has reduced major penalty to a minor penalty of with-holding one (1) increment of pay for a period of two (2) years vide order dated 22/11/2013. His period of penalty will be over in the month of June 2016 which is the date of his retirement.”

15. In this backdrop, a profitable reference can be made to the ruling of the Hon'ble Supreme Court in the case of ***Union of India and Others vs. K.V. Jankiraman and Others***², wherein the legal position was expounded in the following words:-

“29. According to us, the Tribunal has erred in holding that when an officer is found guilty in the discharge of his duties, an imposition of penalty is all that is necessary to improve his conduct and to enforce discipline and ensure purity in the administration. In the first instance, the penalty short of dismissal will vary from reduction in rank to censure. We are sure that the Tribunal has not intended that the promotion should be given to the officer from the original date even when the penalty

2 (1991) 4 SCC 109

imparted is of reduction in rank. On principle, for the same reasons, the Officer cannot be rewarded by promotion as a matter of course even if the penalty is other than that of the reduction in rank. An employee has no right to promotion. He has only a right to be considered for promotion. The promotion to a post and more so, to a selection post, depends upon several circumstances. To qualify for promotion, the least that is expected of an employee is to have an unblemished record. That is the minimum expected to ensure a clean and efficient administration and to protect the public interests. An employee found guilty of a misconduct cannot be placed on par with the other employees and his case has to be treated differently. There is, therefore, no discrimination when in the matter of promotion, he is treated differently. The least that is expected of any administration is that it does not reward an employee with promotion retrospectively from a date when for his conduct before that date he is penalised in praesenti. When an employee is held guilty and penalised and is, therefore, not promoted at least till the date on which he is penalised, he cannot be said to have been subjected to a further penalty on that account. A denial of promotion in such circumstances is not a penalty but a necessary consequence of his conduct. In fact, while considering an employee for promotion his whole record has to be taken into consideration and if a promotion committee takes the penalties imposed upon the employee into consideration and denies him the promotion, such denial is not illegal and unjustified. If, further, the promoting authority can take into consideration the penalty or penalties awarded to an employee in the past while considering his promotion and deny him promotion on that ground, it will be irrational to hold that it cannot take the penalty into consideration when it is imposed at a later date because of the pendency of the proceedings, although it is for conduct prior to the date the authority considers the promotion. For these reasons, we are of the view that the Tribunal is not right in striking down the said portion of the second sub-paragraph after clause (iii) of

paragraph 3 of the said Memorandum. We, therefore, set aside the said findings of the Tribunal.”

16. Similarly, the Hon’ble Supreme Court in the case of ***Union of India and Another vs. A.K. Narula***³, has further made clear that the DPC is required to make an overall assessment of the performance of each candidate separately, but by adopting the same standards, yardsticks and norm. It is only when the process of assessment is vitiated either on the ground of bias, malafides or arbitrariness, the selection calls for interference. Where the DPC has proceeded in a fair, impartial and reasonable manner, by applying the same yardsticks and norms to all candidates and there is no arbitrariness in the process of assessment by the DPC, the court will not interfere.

17. In the case of ***Union of India and Another vs. S.K. Goel and Others***⁴, it was enunciated that DPC enjoyed full discretion to devise its method and procedure for objective assessment of suitability and merit of the candidate being considered by it. Hence, interference by High Court is not called for.

18. The Government of India (Ministry of Personnel, Public Grievances and Pension Department of Personnel and Training) vide its Office Memorandum No. 22011/4/2007-Estt. (D), after a survey of the previous pronouncements of the Hon’ble Supreme Court, issued guidelines on treatment of effect of penalties on promotion – role of Departmental Promotion Committee. The relevant portion of the said Memorandum reads as under :-

3 (2007) 11 SCC 10

4 (2007) 14 SCC 641

“g) In assessing the suitability of the officer on whom a penalty has been imposed, the DPC will take into account the circumstances leading to the imposition of the penalty and decide whether in the light of general service record of the officer and the fact of imposition of penalty, the officer should be considered for promotion. The DPC, after due consideration, has authority to assess the officer as ‘unfit’ for promotion. However, where the DPC considers that despite the penalty the officer is suitable for promotion, the officer will be actually promoted only after the currency of the penalty is over (para 13 of DoPT OM dated 10.4.89).”

19. Upon perusal of the aforesaid OM, it is clear that the officer should be promoted only after the currency of penalty is over. In view of this, we are of the considered opinion that the DPC has not committed any mistake in arriving at its decision of not recommending the petitioner in the currency of penalty. It is pertinent to note that the aforesaid decision of the DPC of not recommending the petitioner for promotion is also not under challenge in this petition.

20. There is yet another aspect which is relevant and needs our consideration. According to the petitioner, he had completed 30 years unblemished service in the department as on 22/11/2013 and was eligible for MACP benefits, however, the same were denied to him. In this context, the minutes of DPC demonstrate that the case of the petitioner was considered in the DPC. The Committee after considering the A.C.R.s for the corresponding five years found that the petitioner was graded as “Satisfactory”, whereas, the Benchmark prescribed for the grade pay of ₹7,600/- was “Very Good” and hence, he was denied the third MACP for not possessing the required Benchmark “Very Good” as per the guidelines. In the aforesaid view of the matter, no fault can be found with the decision of the DPC in refusing third MACP to the petitioner.

21. In the present case, it is not in dispute that the enquiry is held by the competent authority. There is no allegation that the authorities have allowed themselves to be influenced by irrelevant or extraneous considerations. The conclusions arrived at by the appellate authority cannot be said to be wholly arbitrary or capricious that no reasonable person could ever have arrived at such conclusion. There is no allegation that the disciplinary authority had erroneously admitted inadmissible evidence which influenced the findings. There is nothing on record to show that the finding of fact is based on no evidence. In the writ jurisdiction, we cannot go into the proportionality of punishment unless it shocks the conscience. The respondent-Appellate Authority has already reduced the major penalty to a minor penalty.

22. The decision of the Hon'ble Supreme Court in the case of ***Union of India and Others vs. P. Gunasekaran***⁵, wherein the aforesaid aspect was considered, illuminates the path. It reads as under:-

“12. 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. I 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 re- appreciation 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.*

13. 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.*

23. Similarly, the Hon'ble Supreme Court in the case of ***State of A.P. vs. Chitra Venkata Rao***⁶, has held that:-

“23. The jurisdiction to issue a writ of certiorari under Article 226 is a supervisory jurisdiction. The Court exercises it not as an appellate court. The findings of fact reached by an inferior court or tribunal as a result of the appreciation of evidence are not reopened or questioned in writ proceedings. An error of law which is apparent on the face of the record can be corrected by a writ, but not an error of fact, however grave it may appear to be. In regard to a finding of fact recorded by a tribunal, a writ can be issued if it is shown that in recording the said finding, the tribunal had erroneously refused to admit admissible and material evidence, or had erroneously admitted inadmissible evidence which has influenced the impugned finding. Again if a finding of fact is based on no evidence, that would be regarded as an error of law which can be corrected by a writ of certiorari. A finding of fact recorded by the Tribunal cannot be challenged on the ground that the relevant and material evidence adduced before the Tribunal is insufficient or inadequate to sustain a finding. The adequacy or sufficiency of evidence led on a point and the inference of fact to be drawn from the said finding are within the exclusive jurisdiction of the Tribunal. (See Syed Yakoob v. K.S. Radhakrishnan.)

24. The High Court in the present case assessed the entire evidence and came to its own conclusion. The High Court was not justified to do so. Apart from the aspect that the High Court does not correct a finding of fact on the ground that the evidence is not sufficient or adequate, the evidence in the present case which was considered by the Tribunal cannot be scanned by the High Court to justify the conclusion that there is no evidence which would justify the finding of the Tribunal that the respondent did not make the journey. The Tribunal gave reasons for its conclusions. It is not possible for the High Court to say that no reasonable person could have arrived at these

6 (1975) 2 SCC 557

conclusions. The High Court reviewed the evidence, reassessed the evidence and then rejected the evidence as no evidence. That is precisely what the High Court in exercising jurisdiction to issue a writ of certiorari should not do.”

In the backdrop of the aforesaid legal position, we observe the restraint in disturbing the order of the respondent-Appellate Authority.

24. For all the aforesaid reasons, we find no merit in this petition and the same is liable to be dismissed and is hereby dismissed. There shall be no order for costs.

R.N. LADDHA,J.

M. S. SONAK, J.