Harish M. Mankodi Vs. State of Gujarat

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Court : Gujarat

Decided On : Jun-14-2001

Reported in : (2002)3GLR50

Judge : Kundan Singh, J.

Acts : Service Law; Bombay Civil Services Rules, 1959 - Rule 161; Constitution of India - Article 226

Appeal No. : Special Civil Application No. 8726 of 1993

Appellant : Harish M. Mankodi

Respondent : State of Gujarat

Advocate for Def. : Vidhatriben K. Parekh, A.G.P. for Respondent No. 1

Advocate for Pet/Ap. : Asim Pandya, Adv.

Disposition : Petition partly allowed

Judgement :

Kundan Singh, J.

1. This petition has been filed for declaration that the impugned order dated 19-7-1993 compulsorily retiring the petitioner from service is illegal, unjust and arbitrary and for a direction to the respondent to treat the petitioner in continuous service of the respondent for all purposes as if the impugned order was not passed against the petitioner.

2. The petitioner was selected through the Gujarat Public Service Commission (G.P.S.C.) in the year 1963 as an Assistant Section Officer, and thereafter, he was promoted as Section Officer, Class-II post and he worked on the said post in the Irrigation Department known as Narmada Water Resources Department, till 15-10-1955. Thereafter, vide transfer order transferred and shifted to the Health and Family Welfare Department as Assistant Section Officer with effect from 16-10-1986. Later on, he was promoted as Section Officer and continued to work in that department. It is also stated that the petitioner has rendered continuous 31 years Government service and had a clean and unblemished record. The petitioner received memorandum dated 8-4-1986 calling upon him to explain as to why he continued to retain six files from 15-10-1985 when he left the charge from the Irrigation Department to another department till 22-1-1986 as he was serving in the Health and Family Welfare Department. The petitioner requested for inspection of all the original files as well as the said six files before filing his reply. But no such inspection was given and the department insisted for the explanation from the petitioner, and therefore, by the letter dated 8-8-1986 the petitioner submitted his explanation stating that he had not retained any file at his residence. The petitioner has also denied that those six files were collected from his residence on 22-1-1986. The charge-sheet was issued by the Irrigation Department and served on the petitioner in the Health and Family Welfare Department. The petitioner

submitted his reply to the charge-sheet on 17-2-1987. It is also stated that the statement of Mr. P. J. Shukla, Assistant Section Officer, was recorded on 28-8-1986 i.e. after the preliminary inquiry was made and the explanation was sought from the petitioner by the order dated 8-4-1986 alleging that the said files were collected from the residence of the petitioner. One Shri P. M. Acharya was working as Deputy Secretary in the Irrigation Department who decided to hold an inquiry against the petitioner in the capacity of the Deputy Secretary and said Mr. Acharya was entrusted with as an Inquiry Officer contemplated against the petitioner. During the inquiry, the statement of Shri P. J. Shukla, Assistant Section Officer, was recorded on 12-5-1990 wherein he has stated that he had collected six files from the residence of the petitioner on 22-1-1986. One Shri R. C. Vadodiya, Section Officer was also examined as witness on 29-5-1990 who has stated that Mr. Shukla, informed him that he had collected six files from the residence of the petitioner and that he was not personally present and/ or had not gone to the residence of the petitioner. Mr. Acharya, Inquiry Officer submitted his report on 15-9-1990 holding that the charges levelled against the petitioner were proved. It is also stated therein that there was no allegation about reason or intention of the petitioner in retaining six files as he was not required to decide any issue, and therefore, he came to the conclusion that the charge of negligence or dereliction of duty was proved against the petitioner. Thereafter, on 19-7-1990 the resolution was passed by the State Government imposing punishment of compulsory retirement.

3. The contention of the learned Counsel for the petitioner is that the order of compulsory retirement from service is illegal, arbitrary and contrary to law as the same has been passed on extraneous and irrelevant consideration. The charges levelled against the petitioner have not been proved at all and no reasonable person could have arrived at a conclusion that there was evidence connecting the petitioner in respect of the charges levelled against him. There is no evidence except the bare statement of Shri P. J. Shukla to show that the files were taken by the petitioner at his residence. There is also no evidence to connect the petitioner with the charge that the petitioner retained the files at his residence. It is also stated that there is no evidence about any financial loss caused to the Government and there is no justification to assume for coming to the conclusion that the Government has suffered financial loss because of absence of six files for the period of three months and one week particularly when the dispute against M/s.. Vadodara Transport Company about the breach of tender contract was pending since 1980. The disciplinary authority could not have concluded that the Government could not recover a large amount of Rs. 7,44,377/- from the Carting Contractor because of the files having remained with the petitioner for a period of three months. The matter as to whether any loss was caused to the Government or not in the year 1980 is in respect of the suit which is pending in the Court of Law. As such, no question arises that due to retention of the file by the petitioner at his residence for about three months in the year 1986 huge financial loss has been caused to the Government. It was wholly improper and unjust on the part of the respondent to hold that there was serious misconduct on the pan of the petitioner and major penalty was required to be imposed upon the petitioner. It is also submitted that the petitioner was not supplied necessary documents though demanded by him right from beginning. The petitioner made an applications on 7-5-1986, 8-8-1986 and 7-2-1986 and later on after the inquiry was over on 15-9-1990 and 21-11-1990 and the petitioner was not permitted to inspect the tiles which were purported to have been taken from the residence of the petitioner. The petitioner requested for inspection of those files. But he was not permitted to do so. The department during the pendency of the departmental proceedings the petitioner was not supplied copies of the files which are said to have been taken by Mr. Shukla from the petitioner's residence. As such, non-supply of the relevant material documents vitiate the whole departmental proceedings. No corroborative or supporting evidence was produced or filed by the department concerned to show that Shri Shukla had visited residence of the petitioner and had collected six files from his residence and his statement is unreliable and he could not have gone for the second time without any order from the department concerned and could not have collected the papers on his own accord without preparing any panchnama. There is no other evidence to show that Shri Shukla had actually gone and collected the files from the residence of the petitioner. The impugned order is based on the surmises and conjectures drawn by the respondents totally irrelevant consideration. The order of penalty was passed without affording any reasonable opportunity to the petitioner and in violation of principles of natural justice. The decision of the Government with regard to penalty of compulsory retirement of the petitioner from service is patently

disproportionate to the charge levelled against the petitioner and the authority was required to consider gravity of the charge, nature of the consequences and whether the fault was such as has resulted in serious detriment to the public interest.

4. The affidavit-in-reply has been filed on behalf of the respondent wherein it is stated that the petitioner who was working as Section Officer was served with charge-sheet for unauthorized retaining six files at his residence, even when, he was not working in that department at the relevant time, connected with breach of conduct made by M/s. Vadodara Transport Co. with the Government in which the Government has suffered loss of Rs. 7,44,377-61ps. The petitioner was given full opportunity to defend his case in the departmental proceeding and the Inquiry Officer has considered all the material on record and the Government has decided to impose major penalty of compulsory retirement after full-fledged departmental inquiry by the order dated 19-7-1993. The connected following files were with the petitioner at the residence of the petitioner and the same were collected on 22-1-1986.

i. File No. DAP-1077-234-H (103).

ii. Draft Audit Para 4/4 (1976-77) Kadana Hippo Vehicles.

iii. No. SUT-1080-6166(1)K, Pt. I.

iv. No. SUT-1080-6166(1)K, Pt. II

v. No. SUT-1080-6166(1), Pt. II (temporary file).

vi. No. SUT-1080-6166(1)K, Pt. III.

5. When the petitioner was asked for clarification as to why he had kept the aforesaid files at his residence after he was transferred from 15-10-1985 to 22-1-1986 particularly when he left charge on 15-10-1985 on transfer to another department and under whose permission he had brought the aforesaid files at his residence. The petitioner by the letter dated 7-5-1986 requested the respondents to show those files. But the request of the petitioner was not granted and he was informed under memorandum dated 2-8-1986 as to why he had retained those files at his residence but he could not clarify that under whose permission he had brought the said files at his residence. Hence, the petitioner was not permitted to see the said files. Thereafter, the petitioner submitted his reply dated 8-8-1986 stating therein that he had not brought any papers or file of the office and kept the same at his residence. He has also denied that any paper was collected from his residence on 22-1-1986. The charge-sheet along with the statement of allegations as well as list of evidence was served on the petitioner. The departmental inquiry was initiated and the petitioner was asked to submit his reply under letter dated 8-4-1986 and there was sufficient proof on record when the decision to inquire into the matter was taken by the department. Statement of Mr. Shukla was recorded on 28-8-1986 in which he has mentioned that he had collected six files from the residence of the petitioner on 22-1-1986. Mr. R. C. Vadodiya was not initially a witness but he was added as additional witness vide Government memorandum dated 29-5-1990 and he was examined on 25-7-1990. The Inquiry Officer submitted his report on 17-9-1990 and under Government memorandum dated 8-10-1990 a copy of the report was supplied to the petitioner and the petitioner was required to submit his final representation or explanation. But the petitioner made his representation dated 21-11-1990 requesting for inspection of all the related documents but the said request was turned down by the order dated 16-5-1991. It is also stated that the petitioner moved an application dated 10-7-1991 requesting for voluntary retirement from the Government service with effect from 31-10-1991. But that request was also rejected under the Government memorandum dated 7-10-1991. The Government after considering the inquiry report as well as representation of the petitioner, decided to impose major penalty on the petitioner and he was compulsory retired vide order dated 19-7-1993. As the charges levelled against the petitioner were found to be proved by the Inquiry Officer, the act of taking six files to his residence without any permission of the competent authority and to retain the same for more than three month even after leaving charge of the concerned branch and department and to return them to the

representative of the Government when he came to collect them at his residence, is itself a misconduct, and proves that his integrity is doubtful. As such, the order of penalty is legal and just penalty of compulsory retirement is proportionate and was not excessive in the facts and circumstances of the case. The impugned order is fully justified and in accordance with law. The petitioner was served with the charge sheet on 12-2-1987 and in the statement of allegations which is part of the charge-sheet specific mention was made that a note dated 5-6-1986 was submitted against him for indiscipline conduct and careless shown while performing his duties. Due to breach of the contract the Government has suffered loss Rs. 7,44,377-61 ps. and audit objections was raised in that respect. The original file was lost and other files connected with original files were kept by the petitioner at his residence upto 22-1-1986 even leaving charge of 'A' Branch on 15-10-1985. There was no satisfactory explanation offered by the petitioner in that respect. After full fledged departmental inquiry reasoned and detailed order was passed on 19-7-1993 as the charge against the petitioner was proved and that was a serious lapse on the part of the petitioner being a gazetted officer and his conduct was not free from doubt. Therefore, major penalty was imposed for taking away the files at his residence without permission of the competent authority and keeping the same at his house itself is misconduct. Therefore, the impugned order is fully justified and reasonable. During the inquiry witness Shri J. P. Shukla and R. C. Vadodiya were examined and there was no enmity and prejudice against the petitioner. That was direct and first evidence against the petitioner. Shri R. C. Vadodiya stated in his statement that he was posted as a Section Officer 'K' Branch in place of the petitioner with effect from 15-10-1985. He has also stated that U.S. (E) had asked the branch for files pertaining to Hippo Vehicles, cement carting contract, and members of the branch and these files were with the petitioner. Both Shri Shukla and Vadodiya went to the residence of the petitioner to collect the files but the petitioner was at Delhi and for the second time Shri Shukla went alone to collect the files. The preliminary inquiry was instituted against the petitioner on the basis of the note dated 5-2-1986 and the petitioner was required to file his reply regarding retaining the files at his residence without permission. The petitioner replied on 7-5-1986 that he desires to see the original files. He refused that he had taken away the files at his residence. It is also stated that there was a note dated 10-1-1986 to show that the Government files were lying with the petitioner who was reverted as Assistant in Health and Family Welfare Department and the said files were collected on 22-1-1986 though the petitioner was reverted from 15-10-1985 and he left the charge of that branch but he retained the files at his residence upto 22-1-1986. Because of breach of tender contract, the Government suffered loss of Rs. 7,44,377-61 ps. Therefore, an audit objection as raised. The original files were lost and other six files connected with original files were kept at the residence of the petitioner, and hence, he was responsible for this lapse on his part. Recovery could not be effected as the relevant files were kept by the petitioner for which he was not authorised. The concerned Officer/Branch would have taken appropriate immediate action for recovery of huge amount which was due to breach of contract. As such, there was loss of huge amount to the Government. The petitioner had kept the said files at his residence for a sufficient longer period even after his transfer to another department with ulterior motive. This cannot be considered as negligence. But, it is a case of misconduct. Hence, punishment of compulsory retirement was just and proper. The application dated 7-5-1986 was filed by the petitioner for supply of necessary documents. The petitioner was required to give reasons as to why the files were required by him and he could not furnish the reasons and he gave evasive reply on 8-8-1986 that he had not taken any file from the department to his residence. He also denied that the files were collected from his residence on 22-1-1986. The petitioner had not specifically asked for supply of the documents in the application dated 17-2-1987. Hence, the request made by the petitioner was rejected. Regarding the application of the petitioner dated 21-11-1990 for supply of the documents no action was taken as the Inquiry Officer has already submitted his report to the Government on 17-9-1990. It was also denied that the decision to give charge-sheet to the petitioner was taken by Shri P. M. Acharya. Actually, it was taken by Shri N. K. Dholakia, Deputy Secretary and the same was approved by the Additional Chief Secretary. It was denied that the Inquiry Officer had prepared a report without applying his mind. There is nothing wrong in conducting the departmental inquiry by Shri Acharya. The statement of Shri Shukla was recorded on 28-8-1986. After preliminary inquiry and issuance of the charge-sheet dated 12-2-1987 the impugned order of compulsory retirement of the petitioner from the Government service was made after conducting full-fledged departmental inquiry and

without violating the principles of natural justice. Punishment of compulsory retirement is fully justified. The Inquiry Officer placed reliance on the statement of two witnesses and came to a conclusion that the charge levelled against the petitioner was proved. The Disciplinary Authority after applying its mind came to a conclusion that the punishment of compulsory retirement was awarded to the petitioner was proper. The conduct and integrity of the petitioner were doubtful. Hence, major punishment was awarded to the petitioner. The charge is not based on the conjectures and surmises as alleged and penalty of compulsory retirement of the petitioner is not disproportionate to the charge levelled against the petitioner. The rejoinder affidavit was also filed by the petitioner.

6. The first contention of the learned Counsel for the petitioner is that reasonable opportunity of being heard was not afforded to him as he applied for inspection of the files and asked for supply of the copies of the documents but the same was denied by the department concerned. He made applications on 7-5-1986, 8-8-1986 and 7-2-1987 for this purpose before the inquiry officer. Even after the inquiry was over, the petitioner made further applications for me same purpose on 15-9-1990 and 21-11-1990.

7. It is stated in the counter-affidavit in response of the application dated 7-5-1986 for supply of the necessary documents the petitioner was required to give reasons as to why the files were required by him at his residence. The petitioner could not furnish the reasons and that request was turned down. The petitioner has not specifically asked for supply of the documents in his application dated 17-2-1987 hence it appears that the application was also rejected. The fundamental principles of the departmental inquiry is that whenever any reliance is placed to any documents by the disciplinary authority, the concerned department is required to supply the copies of the papers/documents which were purported to be relied on by the inquiry officer and whenever the delinquent requires any inspection of the files or documents the concerned department is required to produce those papers/documents before the concerned person for inspection purpose. In absence of supply of required documents and inspection, and non-supply of copies of the documents the rights of the delinquent are breached and that is violative of the principles of natural justice.

8. The next contention of the learned Counsel for the petitioner is that it is case of no evidence. Witness Mr. Shukla might have files in his possession but he had produced those files after taking away files from the department to show that he had collected those files from the residence of the petitioner. There is no authorization or right given by the department concerned to witness Mr. Shukla to collect the said files from the residence of the petitioner and no such authorization has been produced during the course of the inquiry nor panchnama for recovery of the files was prepared when the files were collected from the residence of the petitioner. In absence of any authorization given by the department concerned to witness Mr. Shukla or any panchnama with regard to recovery of the files from the residence of the petitioner no prudent person will believe that the files were returned by the petitioner and were recovered from his house. I have considered this contention of the learned Counsel for the petitioner. Rule of evidence is not applicable to the departmental proceedings. As such, in case the Inquiry Officer believes that evidence produced before him is sufficient, this Court should not re-appreciate the evidence already placed on record. As such, this contention of the learned Counsel is not sustainable in the eye of law.

9. The next contention of the learned Counsel for the petitioner is that the order of major penalty travels beyond the financial loss. There is no charge regarding integrity or dishonesty on the part of the petitioner. Hence, the inquiry report is vitiated on this ground alone. Thus, this is not a case of major penalty. Even if it is assumed that there is some lapses on the part of the petitioner, that would amount to negligence or carelessness and not misconduct at all. In that respect, he has referred to Rule 6 of the Gujarat Civil Service (Discipline and Appeal) Rules, 1971 in which compulsory retirement has been shown in the category of major penalties. Minor penalties have been shown as censure, withholding of increments with or without future effect or promotion, recovery from his pay of whole or part of the pecuniary loss caused to the Government on account of negligence or breach of the orders.

10. Learned Counsel for the petitioner also referred to Rule 3 of the Gujarat Civil Services (Conduct) Rules,

1971, wherein every government servant is required at all times to maintain absolute integrity, maintain devotion of duty and to do nothing which is unbecoming of a Government servant.

11. It is also the contention of the learned Counsel for the petitioner that even if it is assumed that the petitioner had retained the aforesaid files at his residence for three months because he wanted to see as to whether the petitioner has made any noting on that file in respect of the case pending in the Court. It is probable that the petitioner was dealing with the case and he might be required to prepare a brief of the matter for the panel lawyer in the District Court where the suit proceedings were pending and in that connection the petitioner might have taken files for briefing the panel lawyer on behalf of the Government in the District Court. For that purpose, the petitioner was required to go through the entire files and then prepare a brief note for filing certain affidavits or applications before the Court concerned. For that purpose, the petitioner could have devoted much more time which could be available at the residence of the petitioner. There is no rule in the department concerned if any Section Officer is required to prepare the brief note for filing the affidavit or any application before the Court of Law, that he should obtain permission from the department concerned then he could have taken the said files at his residence for that purpose. But in absence of any Rule or authorisation for taking the files at his residence, the petitioner was fully justified in taking and retaining the files at his residence. Moreover, there is no charge against the petitioner that he had taken away the files without any authorisation. The charge is only that he retained the files for a period of three months. As such, no question arises regarding integrity or dishonesty or deliberate mala fide intention on the part of the petitioner for taking away the files at his residence with ulterior motive. Moreover, no charge is framed against the petitioner to the effect that the petitioner had kept the said files at his residence with deliberate and mala fide intention for a period of three months after he was transferred to another department. Thus, in absence of any charge framed against the petitioner, the allegations made by the department concerned against the petitioner that the integrity and honesty of the petitioner as doubtful is not sustainable in the eye of law. There is also no charge that the petitioner had kept the said files at his residence for a period of three months whereby the Government has suffered loss of Rs. 7,44,377-61. In absence of any charge, the Inquiry Officer was not at all justified to have found that the petitioner deliberately retained the files whereby the huge loss of Rs. 7,44,377-61 was caused to the Government.

12. Learned Counsel for the petitioner pointed out from the charge dated 12-2-1987 wherein it is stated that the Government has decided to inquire into the conduct of the petitioner in respect of the following charge while he was serving as Section Officer in the Irrigation Department.

Charges

The petitioner had taken to the place of his residence six files related to File No. 6168/68217 which were retained by him upto 22-1-1986 though he had relinquished the charge of the post of Section Officer on 15-10-1986.

13. The statement of allegations and list of documents have been attached with the charge dated 12-2-1987 and the petitioner was required to furnish his written statement of defence. It is also mentioned in the charge that in the event of. all or any of the above charges being held proved, he is directed to explain as to why the charges should not be considered as true and sufficient good to inflict any of the punishments mentioned in Rule 6 of the Gujarat Civil Services (Discipline & Appeal) Rules, 1971. No doubt, it is mentioned in the statement of allegations that the report was received by the note dated 5-2-1986 against the petitioner in connection with indiscipline conduct and carelessness. The tender from M/s. Baroda Transport Co. for transport of bulk cement from Sevaliya Factory to Kadana Dam site was accepted from M/s. Vadodara Transport Co. committed breach of tender agreement and had not completed the said work. Consequently, the Government suffered loss of Rs. 7,44,377-61 ps. for which an audit para was added. The original file was lost and six other files related to that file had been retained by the petitioner at his place of residence upto 22-1-1986 though he had relinquished the charge of the post of Section Officer on 15-10-1985 and an explanation was required from the petitioner but the petitioner has not offered any satisfactory explanation

for the same. Hence, he was responsible for those lapse.

14. Even if it is assumed that some loss was caused to the Government. But that loss caused in the year 1976 as per the audit report made by the Audit Section or Department. The matter was pending in the trial Court regarding recovery of that amount from the contractor for breach of tender agreement in the year 1980. The petitioner relinquished the charge of the post of Section Officer on 15-10-1985 and the files were alleged to have been collected from the residence of the petitioner on 22-1-1986. As such, no question arises regarding the loss caused to the Government due to retention of the files by the petitioner at his house.

15. Learned A.G.P. could not point out anything contrary to the statement made by the petitioner in this respect. It is stated in the counter-affidavit that on the basis of the inquiry report the averments made in the counter-affidavit that the loss was caused to the Government due to retention of the files by the petitioner at his residence.

16. I have careftilly gone through the papers on record and come to a conclusion that there no charge was framed against the petitioner that the petitioner has deliberately and mala fide kept those files at his residence or to gain something by retaining the files at his residence. No question arises that any integrity or honesty of the petitioner was doubtful on the basis of some retention of the files by the petitioner at his residence for a short period of three months. Moreover, there is no charge in respect of integrity or honesty of the petitioner as doubtful. As such, from the facts of this case it appears that the charge was framed only in respect of retention of the files by the petitioner at his residence for a period of three months as there is no rule has been quoted either in the inquiry report or in the affidavit-in-reply that the petitioner was not authorised to take the aforesaid files at his residence in connection with official purpose. In case, the petitioner was dealing with the matter which was pending in the Court in connection with the files, the petitioner would be at liberty to take the said files for preparing brief note to be given to the Government Pleader for moving any application or affidavit-in-reply in respect of the matter pending before the Court of Law. In the facts and circumstances of this case, it is established that the files were kept at his residence by the petitioner for a period of three months. There is no allegation mala fide intention or dishonesty on the part of the petitioner for keeping the aforesaid files at his residence.

17. Now, we have to look into the matter that mere retention of the files by the petitioner at his residence would amount to grave or gross misconduct for awarding major punishment or not. In this respect, the learned Counsel for the petitioner relied on the decision of the Supreme Court in the case of State of Punjab and Ors. v. Ram Singh Ex. Constable, reported in AIR 1992 SC 2188 wherein it is held as under :-

'The word 'misconduct' though not capable of precise definition, its reflection receive its connotation from the context, the delinquency in its performance and its effect on the discipline and the nature of the duty. It may involve moral turpitude, it must be improper or wrong behaviour, unlawful behaviour, wilful in character, forbidden act, a transgression of established and definite rule of action or code of conduct but not mere error of judgment, carelessness or negligence in performance of the duty, the act complained of bears forbidden quality or character. Its ambit has to be construed with reference to the subject-matter and the context wherein the term occurs, regard being had to the scope of the statute and the public purpose is seeks to serve. The police service is a disciplined service and it requires to maintain strict discipline. Laxity in this behalf erodes discipline in the service causing serious effect in the maintenance of law and order.'

18. Learned Counsel for the petitioner submitted that on the basis of the observations made by the Supreme Court as stated above, the alleged act of the petitioner was only careless or negligent for not returning files immediately on the date of transfer to another department within a short period. He retained the files for a period of about three months and that amount to only careless or negligence.

19. On the contrary, learned A.G.P. contended that this Court should not interfere with the finding recorded by the Inquiry Officer and the punishment awarded by the Disciplinary Authority and this Court cannot consider the issue regarding disproportionate of penalty. She has relied on the decision of the Supreme Court

in the case of Rae Bareli Kshetriya Gramin Bank v. Bhola Nath Singh and Ors., reported in 1997 (2) SLR 411, wherein it has been held as under :

'Under these circumstances, the question arises whether the High Court would be correct in law to appreciate the evidence arid the manner in which the evidence as examined and to record in that behalf? The judicial review is not akin to adjudication of the case on merits as an appellate authority. The High Court, in the proceedings under Article 226 does not act as an appellate authority but exercises within the limits of judicial review to correct errors of law or procedural errors leading to manifest injustice or violation of principles of natural justice. In this case, no such errors were pointed out nor any finding in that behalf was recorded by the High Court. On the other hand, the High Court examined the evidence as if it is a Court of first appeal and reversed the finding of fact recorded by the enquiry officer and accepted by disciplinary authority. Under these circumstances, the question of examining the evidence, as was done by the High Court, as a first appellate Court, is wholly illegal and cannot be sustained.'

20. Learned A.G.P. has also relied on the decision of Supreme Court in the case of High Court of Judicature at Bombay through its Registrar v. Udaysingh S/o Ganpatrao Naik Nimbalkar and Ors., reported in 1997 (4) SLR 691, wherein the Supreme Court has held as follows :

'The Inquiry Officer has recorded the finding that the integrity of the Judicial Officer was doubtful and on that basis punishment of dismissal was imposed by the Disciplinary Authority. The High Court did not find any ground for interference even on the ground of disproportionate of punishment or penalty imposed as it was a case of disintegrity wherein the Judicial Officer demanded certain bribe.'

21. I have carefully considered the material on record and the submissions made by the learned Counsel for the parties. It is undisputed fact that the charge was framed against the petitioner that the petitioner was responsible for lapse which amount to only carelessness and negligence. There is nothing on record to show that such the act was deliberate or intentional one or on the basis of carelessness or negligence the Government has suffered loss of huge amount of Rs. 7,44,377-61 due to retention of files by the petitioner at his residence for a period of three months after his transfer from one department to another. It has already been held that no loss was caused to the Government due to negligence of the petitioner. The Supreme Court has settled law regarding judicial review in respect of disproportionate penalty in case of Union of India and Anr. v. B. C. Chaturvedi, reported in AIR 1996 SC 484, wherein it has been held as under :

'A review of the above legal position would establish that the disciplinary authority, and on appeal the appellate authority, being fact-finding authorities have exclusive power to consider the evidence with a view to maintain discipline. They are invested with the discretion to impose appropriate punishment keeping in view the magnitude or gravity of the misconduct. The High Court/Tribunal while exercising the power of judicial review cannot normally substitute its own conclusion on penalty and impose some other penalty. If the punishment imposed by the disciplinary authority or the appellate authority shocks the conscience of the High Court/Tribunal, it would appropriately mould the relief either directing the disciplinary/appellate authority to reconsider the penalty imposed, or to shorten litigation, it may itself, in exceptional and rare cases, impose appropriate punishment with cogent reasons in support thereof.'

Hon'ble Hansaria, J. concurring the majority view has opined as under :

'The aforesaid has, therefore, to be avoided and I have no doubt that a High Court would be within its jurisdiction to modify the punishment/penalty by moulding the relief, which power in undoubtedly has, in view of long lines of decisions of this Court, to which reference is not deemed necessary, as the position is well settled in law. It may, however, be stated that this power of moulding relief in cases of the present nature can be imposed by a High Court only when the punishment/penalty awarded shocks the judicial conscience.'

22. In the present case, the petitioner is liable for the lapse which amounts to negligence or carelessness for keeping the files at his residence for a period of about three months without any deliberate or mala fide

intention and there is no integrity or dishonesty on the part of the petitioner. His act does not amount to gross or grave misconduct for which a major punishment has been awarded. As such, major punishment of compulsory retirement would shock the judicial conscience. As such, the facts and circumstances of this case require modification in the punishment to be awarded to the effect that finding is the act of negligence or carelessness in keeping the files at his residence for a period of three months. It is a case of the year 1986, and therefore I do not think it just and proper that the matter should be relegated to the department concerned for awarding minor punishment after a period of 16 years. Particularly age of superannuation is also over. The relief can be properly moulded either by directing the disciplinary authority to reconsider the penalty imposed or to shorten litigation, this Court may itself, in exceptional and rare cases, impose appropriate punishment with cogent reasons in support thereof, as held by the Supreme Court as well as by this Court. This Court in the case of D. T. Makwana v. Slate of Gujarat and Anr., reported in 1992 (1) GLR 194 has taken the similar view that there was no dispute about the proposition that if the Court finds punishment to be disproportionate or harsh, it can interfere in exercise of its writ jurisdiction. This Court has taken view in the case of D. T. Makwana (supra) as under :

'That there would be no point in sending the matter back to the disciplinary authority because the petitioner has already retired, and therefore, it would be proper to modify the order of penalty in this proceeding. It would, therefore, be appropriate to reduce the penalty imposed on the petitioner by limiting its operation. The punishment of stoppage of three increments as imposed by the Disciplinary Authority under the impugned order is, therefore, modified to the extent that stoppage of increments shall not operate beyond the date on which he retired i.e. 31-7-1980. In other words, stoppage of three increments of the petitioner will not have any future effect beyond 31-7-1980.'

23. This Court finds the punishment imposed by the Disciplinary Authority on the petitioner was harsh and disproportionate as the act of the negligence or carelessness of the petitioner which even does not amount to gross or grave misconduct. Particularly superannuation age of the petitioner is also over. I think it just, proper and reasonable to mould the punishment of withholding of two increments permanently with cumulative effect for a period of two years w.e.f. 19-7-1993.

24. Under these circumstances, this petition deserves to be allowed. Accordingly, this petition is allowed in part. The impugned order dated 19-7-1993 retiring the petitioner from service is quashed and set aside as the petitioner was to retire on superannuation age of 58 years on 30-11-1997 and the petitioner will be deemed to be in service continuously till 30-11-1997. The respondents are directed notionally to reinstate the petitioner from the date on which he was compulsorily retired from his service and treat him to continue in service till 30-11-1997. The petitioner is entitled to all consequential benefits and 50% of the back wages after deducting amount of withholding of two increments with cumulative effect for a period of two years. The respondents are further directed to refix the retirement benefits on the basis of continuous service of the petitioner till 30-11-1997 and calculate all consequential benefits including back wages as aforesaid and pay the same to the petitioner within a period of three months from the date of production of a certified copy of this order.

25. By this Court the petitioner was directed to vacate the residential quarter allotted to him vide order dated 22-12-1999. The respondents are directed to calculate and deduct the amount of usual rent of the residential quarter allotted to the petitioner as he was permitted to reside in the quarter by the order of this Court, for the period for which the petitioner retained the government residential quarter i.e. from date 19-7-1993 to the date on which he vacated the residential quarter. Rule is made absolute to the aforesaid extent, with no order as to costs.