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Court : Delhi

Decided On : Oct-03-2012

Judge : Pradeep Nandrajog &Amp; Manmohan Singh

Appeal No. : WP(C) 6657 OF 1999

Appellant : Sunil Kumar

Judgement :

PRADEEP NANDRAJOG, J.

1. Obtaining six days casual leave on the ground of his aunt being unwell, the petitioner, a Constable with Central Reserve Police Force, proceeded on leave on April 16, 1998, requiring him to report back on April 23, 1998. The petitioner did not report back till May 03, 1998 and the Commandant of the concerned battalion issued a letter dated May 04, 1999 directing the petitioner to report forthwith for duty. The petitioner did not report back. Being subject to the discipline of a Central Para Military Force where a Constable cannot simply desert, the Commandant moved an application before the Court of the concerned Magistrate within whose territorial jurisdiction the petitioner permanently resided to apprehend the petitioner and produce him before the Commandant of the nearest CRPF Battalion. A warrant of apprehension was issued on June 22, 1998, but could not be executed.

2. The petitioner reported for duty on August 28, 1998 and on September 23, 1998 a charge sheet was issued to him listing 1 article of charge, which reads as under:-

“ARTICLE-I

That the said No.943321972 Ct. Sunil Kumar of B/119 Bn, CRPF while performing the duties as Ct. in B/119 Bn, CRPF committed an act of misconduct in his capacity as member of the force U/S 11(1) of the CRPF Act, 1949 in that he absented himself from six days casual leave sanctioned to him, w.e.f. 16-4-1998 without obtaining prior permission/information from the competent authority and reported for duties on 28-8-98, after overstaying his leave by 127 days”

3. At the inquiry three witnesses were examined who proved that being granted six days casual leave on account of petitioner stating that his aunt was unwell he did not join back on April 23, 1998 and in spite of apprehension roll being issued could not be located and that he voluntarily joined back on August 28, 1998; facts which even otherwise are not in dispute. Evidence of past over-staying leave was also led.

4. After department led evidence, petitioner made a statement admitting overstaying leave but justified by stating that as per custom he had to stay back to perform religious ceremonies on the 30th day of his aunt expiring and that thereafter he fell ill and was diagnosed suffering from jaundice. The petitioner produced evidence of sending four telegrams to his Coy. Commander informing as aforesaid as also a death certificate pertaining to his aunt and two medical certificates.

5. Vide report dated November 21, 1998, the inquiry officer concluded that the justification given by the petitioner for overstaying leave by 127 days does not inspire confidence. In reaching said conclusion it was held by the inquiry officer:- (i) the claim of the petitioner that he had sent telegrams to his Coy. Commander intimating him of overstaying leave cannot be believed for the reason no such telegrams were received in the Coy. office; (ii) the death certificate pertaining to petitioner?s aunt, not recording the date of death as also the registration number, did not inspire any confidence i.e. it was doubtful whether at all the aunt had died; and (iii) the medical certificates produced by the petitioner merely show that the petitioner got himself treated as an Out Patient at two hospitals on two dates and do not establish that the petitioner was suffering from jaundice during the period of

leave overstayed, particularly when no bills pertaining to medicines allegedly taken by the petitioner were furnished.

6. Relevant would it be to note that the inquiry officer highlighted in his report that the petitioner was in the habit of overstaying leave granted to him thereby absenting himself from duty. It was noted that once earlier the petitioner had overstayed leave by 33 days and on another occasion by 54 days. Though not expressly so stated by the Inquiry Officer, the obvious purport of recording said facts is to bring out the propensity of the petitioner to be overstaying leave, and the instant incident not being due to circumstances beyond the control of the petitioner and in that context to highlight the frivolous nature of the documents produced by the petitioner.

7. Supplying a copy of the report of the Inquiry Officer to the petitioner for his response and not receiving any, but instead receiving another death certificate pertaining to the death of petitioner?s aunt and some more medical documents, agreeing with the report of the inquiry officer, vide order dated January 30, 1999, the Disciplinary Authority imposed the penalty of dismissal from service upon the petitioner. The relevant portion of the order dated January 30, 1999 reads as under:-

“3. I have gone through the enquiry proceedings and found that the enquiry has been conducted as per the laid down procedure. Due opportunity was given to the delinquent at every stage to defend himself. However, the documentary proofs submitted by the delinquent are not found to be satisfactory. Hence keeping in view, the evidence on records, I am inclined to concur with the findings of the enquiry officer, in that article of the charge framed against No.943321972 Ct. Sunil Kumar of B/119 Bn, CRPF STANDS FULLY PROVED. Moreover, keeping in view the fact that delinquent is habitual offender, I am of the view that the said No. 943321972 Ct. Sunil Kumar of B/119 Bn, CRPF is not fit person to be retained in the service.

(Emphasis Supplied)

8. Appeal and thereafter Revision filed by the petitioner were rejected vide orders dated May 11, 1999 and August 04, 1999 respectively.

9. The instant petition lays challenge to the orders dated January 30, 1999, May 11, 1999 and August 04, 1999 passed by the Disciplinary Authority, Appellate Authority and the Revisional Authority respectively.

10. During hearing of the petition, following 3 arguments were advanced by learned counsel for the petitioner:-

A. That the inquiry officer, the Disciplinary Authority, the Appellate Authority and the Revisional Authority did not correctly appreciate the documentary evidence produced by the petitioner to prove his defence that he was unable to join duty on expiry of leave granted to him firstly because of death and performance of last rites of his aunt and thereafter because of his illness.

B. That while imposing penalty of dismissal from service upon the petitioner the Disciplinary Authority committed an illegality in taking into account the past conduct of the petitioner when the charge sheet issued to the petitioner contained no charge relating to past conduct of the petitioner. It was urged that it was a settled legal position that the past conduct of a charged officer can be relied upon by the competent authority for imposition of punishment only when it was made a specific charge in the charge sheet issued to the delinquent. In support of said submission, learned counsel placed strong emphasis upon the latest decision on the subject by the Supreme Court, reported as 2010 (4) SLR 422 Indu Bhushan Dwivedi v State of Jharkhand and Ors.

C. That the penalty of dismissal from service imposed upon the petitioner is grossly disproportionate to the gravity of offence, if any, committed by him.

11. Pertaining to the first submission, in WP(C) No.79/1996 titled „Sant Singh v Union of India and Ors.', decided on May 2, 2011, a Division Bench of this Court of which one of us, namely; Pradeep Nandrajog J. was a member of, laid down the parameters of judicial review, applicability of rules of evidence and standard of proof required in disciplinary proceedings in the following terms:-

“I While exercising power of judicial review under Article 226 of the Constitution of India the High Court does not act as an Appellate Authority. Its jurisdiction is circumscribed and confined to correct errors of law or procedural law, if any, resulting in manifest miscarriage of justice or violation of principles of natural justice. Judicial review is akin to adjudication on merit by re-appreciating the evidence as an Appellate Authority.

II Judicial review is not an appeal from the decision but a review of the manner in which the decision is made. Power of judicial review is meant to ensure that the delinquent officer receives fair treatment and not to ensure that the conclusion, which the authority reaches, is necessarily correct in the eyes of the court.

III Courts can interfere where the disciplinary authority held the proceedings against the delinquent officer in an manner inconsistent with the rules of natural justice or in violation of rules of natural justice or in violation of statutory rules prescribing the mode of enquiry or where the findings or conclusions reached by the disciplinary authority are based on no evidence or perverse or such which no prudent person would have ever reached. If the enquiry has been properly held, the question of adequacy or reliability of the evidence cannot be canvassed before the High Court under Article 226 of Constitution of India.

IV Neither technical rules of evidence or procedure adopted by the by the civil courts nor rules of proof of fact contained in the Evidence Act apply to the disciplinary proceedings.

V The standard of proof which is required in the disciplinary proceedings is preponderance of probabilities and not proof beyond reasonable doubt.”

12. In the instant case, the inquiry officer has carefully scrutinized the documents produced by the petitioner and has concluded that the said documents do not inspire confidence to establish the defence projected by the petitioner. The Disciplinary, Appellate and Revisional Authorities have accepted the aforesaid finding returned by the inquiry officer.

13. Except for making bald assertion that the inquiry officer, Disciplinary, Appellate and Revisional Authorities have not correctly appreciated the documentary evidence produced by the petitioner, learned counsel appearing for the petitioner was unable to show any flaw in the reasoning pertaining to the finding returned by the Inquiry Officer that the petitioner had failed to prove the defence projected by him in order to justify overstaying leave by 127 days.

14. With respect to the second point urged, a survey of case law on the point would reveal that whereas on one end of the spectrum we have the decisions by the Supreme Court holding that the past conduct of a charged officer can be relied upon by the competent authority to impose punishment only when it was made a specific charge in the charge sheet issued to the delinquent, on the other end of the spectrum is the decision of the Supreme Court reported as (2007) 8 SCC 656 Govt of A.P. v Mohd. Tahir Ali where it was held that there can be no hard and fast rule that merely because the earlier misconduct has not been mentioned in the charge-sheet it cannot be taken into consideration while imposing punishment upon the delinquent by the Disciplinary Authority.

15. A perusal of the decisions of the Supreme Court, including the decision in Indu Bhushan?s case (supra), relied upon by the petitioner, holding that the past conduct of a charged officer can be relied upon by the Disciplinary Authority to impose punishment only when it was made a specific charge in the charge sheet issued to the delinquent officer would show that the said decisions are based upon the decision of the Constitutional Bench of the Supreme Court reported as AIR 1964 SC 506 State of Mysore v K. Manche Gowda.

16. Article 311(2) of the Constitution of India as it originally stood enacted, read as under:-

“(2) No such person as aforesaid shall be dismissed or removed or reduced in rank until he has been given a reasonable opportunity of showing cause against the action proposed to be taken in regard to him:

Provided that this clause shall not apply - (a) where a person is dismissed or removed or reduced in rank on the ground of conduct which has led to his criminal

on a criminal charge; or

(b) where an authority empowered to dismiss or remove or to reduce him in rank is satisfied that for some reason, to be recorded by that authority in writing, it is not reasonably practicable to give to that person an opportunity of showing cause; or

(c) where the President or the Governor, as the case may be, is satisfied that in the interest of the security of the State it is not expedient to give that person an opportunity."

17. The Constitution (Fifteenth Amendment) Act, 1963 amended Article 311(2) as under:-

"(2) No such person as aforesaid shall be dismissed or removed or reduced in rank except after an inquiry in which he has been informed of the charges against him and given a reasonable opportunity of being heard in respect of those charges and where it is proposed, after such inquiry, to impose on him any such penalty, until he has been given a reasonable opportunity of making representation on the penalty process, but only on the basis of the evidence adduced during such inquiry:

Provided that this clause shall not apply - (a) where a person is dismissed or removed or reduced in rank on the ground of conduct which has led to his criminal on a criminal charge; or

(b) where an authority empowered to dismiss or remove or to reduce him in rank is satisfied that for some reason, to be recorded by that authority in writing, it is not reasonably practicable to give to that person an opportunity of showing cause; or

(c) where the President or the Governor, as the case may be, is satisfied that in the interest of the security of the State it is not expedient to give that person an opportunity."

18. The Constitution (Forty-Second Amendment) Act, 1976 further amended Article 311(2) as under:-

“(2) No such person as aforesaid shall be dismissed or removed or reduced in rank except after an inquiry in which he has been informed of the charges against him and given a reasonable opportunity of being heard in respect of those charges:

Provided that where it is proposed that after such inquiry, to impose upon him any such penalty, such penalty may be imposed on the basis of the evidence adduced during such inquiry and it shall not be necessary to give such person any opportunity of making representation on the penalty proposed:

Provided further that this clause shall not apply - a) where a person is dismissed or removed or reduced in rank on the ground of conduct which has led to his criminal on a criminal charge; or

(b) where an authority empowered to dismiss or remove or to reduce him in rank is satisfied that for some reason, to be recorded by that authority in writing, it is not reasonably practicable to give to that person an opportunity of showing cause; or

(c) where the President or the Governor, as the case may be, is satisfied that in the interest of the security of the State it is not expedient to give that person an opportunity.”

19. Article 311(2) of the Constitution of India as it originally stood enacted prescribed that every government servant must have a reasonable opportunity of showing cause against the penalty proposed to be imposed against him. By virtue of the Constitution (Fifteenth Amendment) Act, 1963, Article 311(2) prescribed that every government servant must have a reasonable opportunity of:- (i) be heard at an enquiry conducted against him; and (ii) be granted an opportunity to make a representation against the penalty proposed to be imposed upon him after enquiry was conducted.

20. It would be relevant to note that the interpretation afforded to both, i.e. the original and the amended Article 311(2), by judicial decisions was that Article 311(2) envisaged the issuance of show cause notice(s) to the government servant by the concerned authority at two stages: (i) before the commencement of an

enquiry apprising the government servant of the charges framed against him; and (ii) after the conclusion of the enquiry apprising the government of the penalty proposed to be inflicted upon him.

21. Article 311(2) was, as noted above, amended by the Constitution (Forty-Second Amendment) Act, 1976. By virtue of which amendment, the requirement of giving an opportunity to the government servant of making a representation against the penalty proposed to be imposed upon him was done away with. In other words, the requirement of giving notice to the government servant after conclusion of the enquiry apprising him of the penalty proposed to be inflicted upon him was done away with. The only requirement was to supply him with a copy of the report of the Inquiry Officer for his response.

22. In Manche Gowda?s case (supra), the Supreme Court was dealing with Article 311(2) of the Constitution of India as it originally stood enacted, which prescribed that every government servant must have a reasonable opportunity of showing cause against the penalty proposed to be imposed against him. The facts before the Supreme Court were that the charged officer was not made aware that his past misconduct would be considered on the subject of penalty, and as per the report of the Inquiry Officer the penalty proposed was of reduction in rank, but the actual penalty imposed was one of dismissal from service. While holding as aforesaid, the Supreme Court observed:-

“It is incumbent upon the authority to give the Government servant at the second stage reasonable opportunity to show cause against the proposed punishment and if the proposed punishment is also based on his previous punishments or his previous bad record, this should be included in the second notice so that he may be able to give an explanation.

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Before we close, it would be necessary to make one point clear. It is suggested that the past record of a Government servant, if it is intended to be relied upon for imposing a punishment, should be made a specific charge in the first stage of enquiry itself and, if it not so done, it cannot be relied after the enquiry is closed

and the report is submitted to the authority entitled to impose the punishment. An enquiry against a Government servant is one continuous process, though for convenience it is done in two stages."

23. It is clearly discernible from the above that the observations made by the Supreme Court in Manche Gowda?s case (supra) that the past record of a Government servant should be made a specific charge if it is intended to be relied upon for imposing a punishment is based upon the premise that Article 311(2) of the Constitution of India envisages the issuance of show cause notice(s) to the government servant by the concerned authority at 2 stages: (i) before the commencement of an enquiry apprising the government servant of the charges framed against him; and (ii) after the conclusion of the enquiry apprising the government servant of the penalty proposed to be inflicted upon him.

24. As a necessary corollary to the aforesaid, the observation made by the Supreme Court in Manche Gowda?s case (supra) would have no application post amendment to Article 311(2) of the Constitution of India after the Constitution (42nd) Amendment Act 1976 where the requirement of giving notice to the government servant after conclusion of the inquiry apprising him of the penalty to be imposed was done away with.

25. Thus, post Constitution (42nd) Amendment Act 1976, the law as declared in Mohd.Tahir Ali?s case (supra) would be the correct view.

26. It may be true that observations by the Supreme Court in Indu Bhushan?s case (supra) appear to be to the contrary, but it needs to be highlighted that in said decision, the Supreme Court has held so more on the facts of the case before it rather than as a statement of law. The facts of the case were that the appellant, a Sub Divisional Judicial Magistrate was absolved of the grievous charge of having consumed alcohol, but since, while under suspension, had left the headquarters without the permission of the Registrar General of the High Court and had used somewhat intemperate language while making his comments with reference to the memorandum issued by the High Court, penalty of removal from service was inflicted by the High Court by considering un-communicated adverse remarks in his ACRs.

27. The Supreme Court observed that for the misdemeanour of leaving the headquarter while under suspension and using somewhat inappropriate language while responding to a communication sent from the High Court could not warrant the penalty imposed and highlighted that it was the uncommunicated adverse ACRs which had resulted in the penalty being imposed and thus, on said facts, held that it assumed importance that neither were the adverse ACRs communicated nor reliance thereon was made known to the appellant. The penalty was quashed holding that prejudice was caused to the appellant.

28. In the instant case, no prejudice whatsoever, much less serious has been caused to the petitioner by the action of the Disciplinary Authority of taking into account the past adverse conduct of the petitioner in deciding the quantum of punishment to be awarded to him. As already noted hereinabove, the report submitted by the inquiry officer made a mention about the past adverse conduct of the petitioner, which report was supplied to the petitioner and an opportunity was provided to him to make a representation against the said report. With the supply of the report of the inquiry officer the petitioner was clearly made aware that the Disciplinary Authority can take into consideration his past adverse conduct. No representation was submitted by the petitioner against the report of the inquiry officer, meaning thereby, that the petitioner had no explanation to offer in respect of his past adverse conduct.

29. With respect to the third submission advanced by learned counsel for the petitioner, suffice would it be to highlight that the petitioner had joined CRPF in the year 1994. As noted herein above, the petitioner had overstayed leave on 2 occasions in the year 1997. But we find something more. It has been averred in the counter affidavit filed by the respondents that the petitioner had overstayed leave on one occasion in the year 1995 and two occasions in the year 1996 apart from the two taken notice of by the inquiry officer, i.e. had overstayed leave not two times but five times during four years?service.

30. Under the circumstances the penalty imposed cannot be called disproportionate to the gravity of the offence and additionally keeping in view the fact that the petitioner had created fabricated evidence. We also highlight that

CRPF is a Para Military Force where discipline has to be maintained. The purpose of a penalty is not only to penalize the wrong doer, but even act as a detriment for others. If repeated acts of overstaying leave are condoned or result in lesser penalties being inflicted this misbehaviour may be tempted to be repeated by others. The discipline would vanish.

31. The writ petition is dismissed but without any order as to costs.

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