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IN THE HIGH COURT OF JUDICATURE AT BOMBAY
CIVIL APPELLATE JURISDICTION

WRIT PETITION NO. 12947 OF 2018

Mr. Rahul Hiraman Birhade .. Petitioner

Vs.

Union of India & Ors. .. Respondents

Dr. Abhinav Chandrachud a/w Mr. Vinod Sangvikar a/w Mr. Yogesh Morbale a/w Mr. Pranit Kulkarni i/by Mr. Vinod P. Sangvikar for petitioner.

Mr. Yogeshwar S. Bhate a/w Mr. Prasenjit Khosla for respondents/UoI.

C0RAM: DIPANKAR DATTA, CJ &
M. S. KARNIK, J.

DATE: JUNE 28, 2022

ORAL JUDGMENT [Per Chief Justice]:

1. The petitioner was a member of the Central Industrial Security Force (hereafter "the CISF", for short). While holding the post of a constable, the petitioner has been removed from service by an order dated 7th May 2012 issued by his disciplinary authority, i.e., the Commandant CISF RTC Arakkonam. Such order has been affirmed by an order dated 8th March 2018 of the appellate authority, i.e., the Deputy Inspector General, CISF RTC Arakkonam. The petitioner has taken exception to such orders in this writ petition.

2. It is not in dispute that the petitioner after availing 10 (ten) days of sanctioned earned leave from 18th August 2011, did not report back for duty. He did not also seek further leave or communicate the reason that disabled him from reporting for duty. Similarly worded call-up notices dated 3rd September 2011, 12th September 2011, 27th September 2011 and 10th/15th October 2011 were issued to him, whereby he was informed of his failure to report for duty from 29th August 2011 and that with effect from that date, he was overstaying leave without intimation or any permission from the competent authority. On each occasion, the petitioner was directed to report forthwith.

3. It is not in dispute that despite receipt of such call-up notices, the petitioner did not obey the order of his superior and report for duty. The aforesaid conduct of the petitioner overstaying his leave and remaining absent unauthorizedly, triggered disciplinary proceedings against him. A memorandum of charge dated 16th November 2011 was drawn up against the petitioner whereby he was charged as follows: -

> "No. 071680675 Constable/GD Rahul Hiraman Birhade of CISF RTC Arakkonam was granted 10 days Earned Leave w.e.f. 18.08.2011 to 27.08.2011 with eligible permission. On expiry of above sanctioned leave, he was required to report for duty on 29.08.2011 (F.N.). But he failed to report back for duty and remained on OSL w.e.f. 29.08.2011 to till date without intimation/permission of the competent authority. The above acts on the part of No.071680675 Constable/GD Rahul Hiraman Birhade of CISF RTC Arakkonam amounts to gross indiscipline and disobedience of orders. Thus unbecoming of a member of the disciplined Force."

4. Since the petitioner did not acknowledge the memorandum of charge, a constable was deputed for serving such memorandum on the petitioner at his residential address. The charge-sheet was finally served on 26th November 2011. Despite receipt thereof, the petitioner did not submit a written statement denying the charge. The disciplinary authority thereafter appointed an inquiry officer as well as a presenting officer vide order dated 19th December 2011. Despite being served with notice of inquiry, the petitioner did not attend the same. Instead, he sent a letter dated 27th March 2012 to the inquiry officer expressing his inability to resume duty as well as to attend the inquiry for the reasons stated therein. We consider it appropriate to reproduce the said letter in its entirety hereinbelow: -

> "Sub.: Giving reason for not attending CIS Force from 29.08.11 till date.
>
> Respected Sir,
>
> I the undersigned Rahul Hiraman Birade failed to attend the service from 29.8.11 till date Because there were issues of family turmoil with my brothers & mother, as there was always fights in home. Due to those fights my mother is in tension & she is suffered with Heart disease and she as on that, continuous treatment. Simultaneously, my wife is also pregnant. Because of these delicate situations & family problems I was mentally disturbed and I was not in a position to settle out mine mother's and wife's issues of stay & giving them personal consoladation (sic, consolation?) and I am trying to solve the problems. Even two times I removed tickets for Chennai [dated 15.10.11 & 17.10.11] to report on duty but because of same problems arised in home, I could not reply back & resume on duty.
>
> Also, my elder sister's husband is expired on February 2nd 2011. She is also with me with her two

> children, and I will have to take care of them also as my brothers are not showing any interest in the situation. Because of so many burdens & the situations which are to be solved & depend on me I was disturbed to give reply & could not resume on duty & I hope you will consider the situation & do the needful.
>
> Thanking you,"

5. The inquiry officer proceeded to record the depositions of the prosecution witnesses and submitted a report dated 11th April 2012 holding that the charge levelled against the petitioner stood proved. The report of the inquiry officer was forwarded to the petitioner by the disciplinary authority vide memorandum dated 14th April 2012. The petitioner was granted 15 (fifteen) days' time from date of receipt of such memorandum to submit his comments. Despite receiving the inquiry report on 21st April 2012, the petitioner chose not to submit any representation and take exception to the inquiry report. It is thereafter that the petitioner's disciplinary authority, while holding the petitioner guilty of the charge levelled against him, proceeded to impose the penalty of removal from service with immediate effect on the petitioner. While so removing the petitioner from service, the disciplinary authority informed the petitioner that he could prefer an appeal before the named appellate authority within 30 (thirty) days of receipt of such order. However, the petitioner carried the order of removal in appeal beyond the period of limitation. The appellate authority was not satisfied with the explanation offered by the petitioner for belated presentation of the appeal, yet, considered the appeal on merits. Ultimately, however, the

appeal was dismissed both on the ground of delay as well as on merits by the order dated 8th March 2018.

6. Appearing in support of the writ petition, Dr. Chandrachud, learned advocate has not questioned the order of removal passed by the disciplinary authority or the appellate order on the triumvirate grounds of illegality, perversity or procedural impropriety. However, it is contended by him that the punishment of removal from service inflicted on the petitioner for having overstayed leave for three months and that too without taking into consideration the fact that the petitioner was disabled from resuming duty after expiry of leave for genuine reasons, which included medical reasons, such punishment is grossly disproportionate to the gravity of misconduct committed by the petitioner and, therefore, applying the doctrine of proportionality we ought to interfere therewith. In support of his submission that a punishment imposed by a disciplinary authority must be commensurate to the fault or lapse committed by the charged employee, reliance has been placed on the decisions of the Supreme Court reported in (2009) 15 SCC 620 **(Chairman-Cum-Managing Director, Coal India Limited & Anr. vs. Mukul Kumar Choudhuri & Ors.)**, (2008) 8 SCC 469 **(State of Punjab vs. Dr. P. L. Singla)**, (2006) 1 SCC 589 **(State of Rajasthan & Anr. vs. Mohd. Ayub Naz)**, (2005) 13 SCC 228 **(Union of India & Ors. vs. Ghulam Mohd. Bhat)** and (2003) 3 SCC 309 **(Mithilesh Singh vs. Union of India & Anr.)**. He has, accordingly, prayed that the order of removal from service and the appellate order be set aside and the matter be remitted to

the disciplinary authority for deciding on an appropriate penalty suiting the nature of proved misconduct.

7. We have not considered it necessary to call upon Mr. Bhate, learned advocate for the respondents to answer the contentions of Dr. Chandrachud.

8. It is not desirable for an administrative authority, who is conferred the power to take punitive action, to exercise such power mechanically. Exercise of power must be consistent with the justification for conferment of power. The facts and circumstances before the administrative authority must be such that the adverse order, if any, in disciplinary proceeding suits the delinquency and the delinquent.

9. Bearing the above guiding principle in mind, let us now consider first what the doctrine of proportionality is and whether the same ought to be applied in this case.

10. The decision in **Mukul Kumar Choudhuri** (supra) took note of previous decisions of the Supreme Court reported in (1987) 4 SCC 611 (**Ranjit Thakur vs. Union of India**), (1995) 6 SCC 749 (**Union of India vs. B.C. Chaturvedi**) and (1997) 7 SCC 463 (**Union of India vs. G. Ganayutham**).

11. It follows from **G. Ganayutham** (supra), which quoted Sir John Laws, Judge of the Queen's Bench Division, that proportionality is concerned with the way in which the decision-maker has ordered his priorities. The very essence of decision-making consists, surely, in attribution of relative importance to the factors in the case. As part of the concept of judicial review, the doctrine of proportionality ensures that the decision of an administrator as to penalty (even on an aspect otherwise within

the exclusive province of such administrator) would not be immune from correction, if it were in outrageous defiance of logic and shockingly disproportionate. A decision which overrides a fundamental right without sufficient objective justification will, as a matter of law, necessarily be disproportionate to the aims in view.

12. Upon consideration of the decisions in **Ranjit Thakur** (supra) and **B.C. Chaturvedi** (supra) and other decisions on the doctrine of proportionality made applicable in other fields, we find that with the rapid growth of administrative law and the need and necessity to control possible abuse of discretionary powers by various administrative authorities, the Indian legal system has accepted the doctrine of proportionality. However, such doctrine has to be applied in appropriate cases as the depth of judicial review would depend on the facts and circumstances of each case. It is well settled in service jurisprudence that by deft modulation, the process leading to imposition of penalty under the governing rules be stern, where it should be, and tempered with mercy where it warrants to be. Taking a cue therefrom, we may observe that one does not use an axe if a knife would suffice. Whenever an employee is proceeded against for an alleged act of commission/omission amounting to misconduct, invariably he is not dismissed/removed from service; instead, he may be reduced in rank or his pay slashed, both being major penalties, as per the requirement of the situation. However, whatever be the quantum of punishment, the objective of deterrence or correction has to be present in the mind of the decision maker

and his decision would be open to test in the light of the attending circumstances as to whether the penalty is commensurate with the nature of delinquency committed by the delinquent.

13. Looking at the records forming part of the writ petition, we find that the petitioner was sanctioned 10 days' earned leave for attending to domestic problems as well as for his mother's treatment. Upon expiry of the sanctioned leave, the petitioner did not bother to communicate to his employer the reason that disabled him from resuming duty and/or for overstaying leave. Prior to the memorandum of charge being issued, the petitioner received four call-up notices. Even then, the petitioner maintained stoic silence. The memorandum of charge not having been acknowledged by him, the same had to be served through a constable of the CISF. There was no written statement of defence denying the charge, or even admitting the charge and seeking mercy. Once the departmental inquiry commenced by appointment of an inquiry officer, the petitioner was given due notice. Despite receipt of the notice of inquiry, the petitioner did not attend proceedings before the inquiry officer. Finally, he submitted the application dated 27th March 2012, the contents whereof have been extracted above. The alleged problems cited in such letter, to the mind of the inquiry officer, did not appear to be sufficient to warrant a conclusion that the petitioner, because of insurmountable miseries and disabilities, was prevented from resuming duty. We have noticed from the statement of imputations of misconduct that reference was made to the call-up notices, to which the

petitioner did not respond. Apart from overstaying leave without permission, which amounts to unauthorized absence, not reporting for duty despite receipt of the several call-up notices amounts to gross indiscipline and disobedience of orders at the instance of a member of the disciplined force. The conduct of the petitioner is, therefore, clearly blameworthy and called for stern action, lest a wrong message be sent to other members of the CISF that unauthorized absence/overstaying of leave are not considered to be grave at the end of the administrative/disciplinary authority. Having regard to the nature of misconduct proved against the petitioner, we find the order of removal from service to be unexceptionable.

14. Dr. Chadrachud urged that in view of the contents of paragraph 21 of the decision in **Mukul Kumar Choudhuri** (supra), the petitioner ought to be accorded similar treatment. It is indeed true that the Supreme Court interfered with the punishment labelling it as unduly harsh and grossly in excess of the allegations, but such a finding was rendered based on twin considerations: first, that the delinquent had admitted his guilt of remaining unauthorizedly absent from duty for six months and secondly, had explained the reasons for his absence by citing that the reason was purely personal and beyond his control and also that he did not have any intention or desire to disobey the order of his higher authority or violate any of the Company's rules and regulations.

15. We see little reason to hold that the reasons on consideration whereof the Supreme Court in **Mukul Kumar Choudhuri** (supra) was satisfied that the punishment inflicted

on the charged officer was unduly harsh and grossly excessive, exist in the present case. We have noticed that the petitioner neither responded to the call-up notices nor attended the inquiry to place on record the reasons for which he was disabled to report for duty after expiry of the sanctioned leave. From the facts and circumstances, it can clearly be gathered that the petitioner had no intention or desire to obey the orders of his higher authority. Being a member of a disciplined force, the least that was expected of the petitioner was a communication/intimation of his disabilities. Not having so communicated/intimated and by overstaying leave and/or by his unauthorized absence, it was a clear case of violation of the statutory rules by the petitioner.

16. Applying the test indicated in paragraph 20 of the decision in **Mukul Kumar Choudhuri** (supra), we hold that the disciplinary authority before imposing the punishment acted reasonably and upon taking into consideration the magnitude and degree of misconduct as well as all other relevant circumstances while excluding irrelevant matters.

17. In **Dr. P. L. Singla** (supra), the Supreme Court observed that in case an employee remains unauthorizedly absent without offering any satisfactory explanation or where the explanation offered by the employee is not satisfactory, the employer while taking recourse to disciplinary action may impose punishment ranging from a major penalty like dismissal or removal from service to a minor penalty like withholding of increments without cumulative effect, and that the extent of penalty would depend upon the nature of service, the position

held by the employee, the period of absence and the cause/explanation for the absence.

18. The decision in **Dr. P. L. Singla** (supra) has been perused. The law laid down is clear. We are, however, of the view that while considering the period of absence to decide what would be the appropriate punishment to be imposed, the period of absence is bound to differ from case to case; also, the duration of absence for which the absentee is charged would invariably depend upon the time taken by a disciplinary authority to issue the memorandum of charge. If an employee continues to remain unauthorizedly absent for years and the charge-sheet is issued thereafter, the duration of unauthorized absence is bound to be longer than the duration if the charge-sheet were issued within months of expiry of the sanctioned leave. We are, therefore, not persuaded to attach much importance to the contention of Dr. Chandrachud that the petitioner was absent only for three months and the situation called for a lenient punishment. Having regard to the petitioner's conduct of not responding to the four call-up notices and his disinclination to appear for contesting the disciplinary proceedings and persuading the inquiry officer to hold that he had genuine reasons to stay away from duty, we are inclined to view that had the memorandum of charge been delayed by a year and the petitioner not reported for duty in the meanwhile, the period of unauthorized absence would have automatically increased; but that, by itself, would not form the ground for deciding on the quantum of penalty. The manner in which the charged officer reacts after receipt of the charge-

sheet would assume importance. It is in view of the peculiar facts of the present case that we hold that the period of three months' absence, coupled with the conduct of the petitioner, was sufficient enough to attract the penalty of removal from service.

19. The decision in **Mohd. Ayub Naz** (supra) was cited to demonstrate that the charged officer there had remained unauthorizedly absent for more than three years. In that case, the punishment of removal inflicted on the delinquent by the disciplinary authority was reduced by the High Court to compulsory retirement and that the appeal, carried from the order of the High Court, was allowed by the Supreme Court. We have indicated in the preceding paragraph that the period of unauthorized absence may not be too relevant in all cases. It all depends upon the nature of service which the charged officer is required to render as well as the time taken by the disciplinary authority to initiate disciplinary action. The decision in **Mohd. Ayub Naz** (supra) is, thus, clearly distinguishable and the petitioner cannot derive any advantage from the fact that in such case the unauthorized absence was spread over three years.

20. We may hasten to add that the Supreme Court in **Mohd. Ayub Naz** (supra) had the occasion to observe that absenteeism from office for a prolonged period of time without prior permission by Government servants has become a principal cause of indiscipline which has greatly affected various Government services and that while considering the quantum of punishment/proportionality, the Supreme Court in its

decision reported in (2001) 2 SCC 386 **(Om Kumar vs. Union of India)** had observed that in determining the quantum, role of the administrative authority is primary and that of the Court is secondary, confined to see if discretion exercised by the administrative authority caused excessive infringement of rights. We do not see reason to hold that discretion exercised by the administrative authority in the present case has been arbitrary or injudicious.

21. Ghulam Mohd. Bhat (supra) was cited also for the purpose of bringing to the notice of this Court that the period of unauthorized absence was more than 300 days and that too without any justifiable reason. Having regard to our observations on the period of absence in the preceding paragraphs, and also having regard to the fact that the petitioner was charge-sheeted on 16th November 2011, i.e., within three months from the date he started overstaying leave, the decision in **Ghulam Mohd. Bhat** (supra) also does not advance his case.

22. The decision in **Mithilesh Singh** (supra) was cited for the purpose that the delinquent, who was posted in a terrorist-affected area, had failed to report for duty. The contention advanced is that the petitioner was not posted at a terrorist-affected area prior to proceeding on leave and, therefore, the stern action taken against the delinquent in **Mithilesh Singh** (supra) was not called for in the present case.

23. The decision in **Mithilesh Singh** (supra) refers to a decision reported in (1996) 1 SCC 302 **(State of U.P. & Ors. vs. Ashok Kumar Singh & Anr.)**. There, it has been held that

the High Court while modifying the punishment had failed to bear in mind that the delinquent was a police constable and was serving in a disciplined force demanding strict adherence to the rules and procedures more than any other department. The petitioner too, being a member of a disciplined force, was required to strictly adhere to the rules and procedures. Hence, no degree of leniency can be shown to him having regard to his conduct that we have noticed.

24. Although not cited by Dr. Chandrachud, we are not oblivious of the decision of the Supreme Court reported in (2012) 3 SCC 178 **(Krushnakant B. Parmar vs. Union of India)**. It has been held there as 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."

25. The law declared, as we read it, is that unless unauthorized absence is found to be wilful, the same would not amount to failure to maintain devotion to duty or conduct unbecoming of a Government servant. Here, however, the charge was different, i.e., gross indiscipline and disobedience of orders: gross indiscipline because a member of a disciplined force did not adhere to the statutory rules and overstayed leave without intimation, and disobedience of orders arising out of failure, if not neglect, to respond to the several call-up notices. In view of the nature of misconduct alleged and found to be proved at the inquiry, the law laid down in **Krushnakant B. Parmar** (supra) would also have no application here.

26. For the reasons aforesaid, we find no merit in this writ petition. The same stands dismissed. No costs.

(M. S. KARNIK, J.) **(CHIEF JUSTICE)**