IN THE HIGH COURT OF JUDICATURE AT MADRAS

DATED: 26.2.2010

CORAM

THE HON'BLE MR.JUSTICE M.JAICHANDREN

Writ Petition No.25665 OF 2006

1 V. RAMESH KUMAR TYPIST [PETITIONER]
(UNDER COMPULSORY RETIREMENT)
CENTRAL PRISON COIMBATORE.

Vs

1 THE STATE OF TAMIL NADU
REP. BY ITS SECRETARY TO GOVERNMENT
HOME (PR II) DEPARTMENT CHENNAI 600 009.

2 THE ADDITIONAL DIRECTOR GENERAL OF
PRISONS, CHENNAI-8.

3 THE DEPUTY INSPECTOR GENERAL
OF PRISONS, COIMBATORE RANGE,
COIMBATORE.

4 THE SUPERINTENDENT
CENTRAL PRISON COIMBATORE. [RESPONDENTS]

Prayer: Petition filed under Article 226 of the Constitution of India praying for the issuance of a Writ of Certiorarified Mandamus to call for the records of the fourth respondent in No.6617/Gen4/02, dated 23-10-2002 confirmed by the third respondent in Proc.No.9019/thaVoo/02 dated 13-09-2003 and by the second respondent in No.50140/ES.2/2003, dated 13-01-2004 and by the first respondent in G.O(D)No. 801, Home Department, dated 18-08-2005 and quash the same and direct the respondents to reinstate the petitioner in service and confer all service and monitory benefits.

For petitioner : Mr.Hidayathulla Khan

For respondents : Mr.R.Murali
Government Advocate

O R D E R

The petitioner has stated that he had joined, as a Typist, through the Tamil Nadu Public Service Commission, on 28.5.1990. During the year, 2001, while the petitioner was working in the office of the Director General of Prison, Chennai, the petitioner was on leave due to ill-health. On 18.7.2001, the petitioner had been transferred and posted at the Central Prison, Coimbatore. While so, he had applied for leave, in short spells, from 15.10.2001 to

5.2.2002. Again, from 3.4.2002 to 5.4.2002, the petitioner had applied for leave. Thereafter, since, the petitioner had been absent from 6.4.2002, without applying for leave, a charge memo, under Rule 17(b) of the Tamil Nadu Civil Services (Discipline & Appeal) Rules, had been issued by the fourth respondent, on 9.5.2002.

2. The allegation in the charge memo was that the petitioner had, unauthorisedly, absented himself from duty, from 6.4.2002. The said charge memo had been served on the petitioner, on 23.5.2002. Thereafter, an enquiry officer had been appointed and an exparte enquiry was conducted, on 6.9.2002. After conducting the enquiry, the enquiry officer had held that the charge levelled against the petitioner had been proved, without properly analysing the charge.

3. The petitioner has further stated that the enquiry had not been conducted, as per the procedures established by law and therefore, the enquiry report is arbitrary and illegal. Based on the findings of the enquiry, the fourth respondent called for further explanation from the petitioner, on 27.9.2002. The petitioner had submitted a detailed explanation, on 13.10.2002. Notwithstanding the explanation submitted by the petitioner, the fourth respondent had passed a final order, on 23.10.2002, imposing the punishment of compulsory retirement from service on the petitioner. Thereafter, the petitioner had preferred an appeal before the third respondent, on 26.11.2002. The third respondent, by an order, dated 13.9.2003, had confirmed the punishment imposed on the petitioner. The review petition, dated 17.10.2003, preferred by the petitioner, had also been rejected by the second respondent, on 13.1.2004. Thereafter, the petitioner had submitted another revision petition, before the first respondent, on 5.3.2004. The first respondent had also rejected the said revision petition submitted by the petitioner, without applying his mind, by way of a Government order, in G.O.(D) No.801, Home Department, dated 18.8.2005.

4. The respondents had failed to take into account the charges framed against the petitioner and the proportionality of the punishment imposed on the petitioner. In such circumstances, the petitioner had preferred the present writ petition before this Court, under Article 226 of the Constitution of India.

5. The learned counsel appearing for the petitioner had submitted that the impugned orders passed by the respondents are arbitrary, illegal and void. He had also submitted that the enquiry officer had failed to give a finding on the charge of unauthorised absence, from 6.4.2002. He had only conducted an enquiry on the statement of allegations contained in annexure-1 of the charge memo. Therefore, the enquiry report is perverse, illegal and liable to be set aside.

6. The learned counsel appearing for the petitioner had further submitted that the fourth respondent had not let in sufficient evidence to substantiate the charge levelled against the petitioner. The findings of the enquiry officer is based only on the statement of allegations and the past conduct of the petitioner. The question of unauthorised absence would arise only when the petitioner had

exceeded the period of one year, as contemplated in the Fundamental Rule 18(3). Since, the petitioner had absented himself, only from 6.4.2002, till the framing of the charge, it would not amount to unauthorised absence, as contemplated by the said rule. Since, the petitioner had not been permitted to rejoin the duty, it cannot be said that he had absented himself, unauthorisedly. In fact, the charge should have been framed only under Rule 17(a) of the Fundamental Rules, as there was no major charge against the petitioner. The enquiry officer had not conducted the enquiry, properly, following the procedures established by law. As the respondents had not applied their mind, while passing the impugned orders, such orders cannot be held to be valid in the eye of law. In such circumstances, the impugned orders are liable to be set aside.

7. The learned counsel appearing for the petitioner had relied on the decision of the Supreme Court, in CHAIRMAN CUM MANAGING DIRECTOR, COAL INDIA LIMITED AND ANOTHER Vs. MUKUL KUMAR CHOUDHURI AND OTHERS (2009) 8 MLJ 460 (SC), wherein, the Supreme Court, while dealing with the issue of proportionality of punishment, had held that the doctrine of proportionality is, a well recognized concept of judicial review in our jurisprudence. What is otherwise within the discretionary domain and sole power of the decision maker to quantify the punishment, once the charge of misconduct stands proved, such discretionary power is exposed to judicial intervention, if exercised in a manner, which is out of proportion to the fault. Award of punishment, which is grossly in excess to the allegations cannot claim immunity and remains open for interference under the limited scope of judicial review. One of the tests to be applied while dealing with the question of quantum of punishment would be: would any reasonable employer have imposed such punishment in like circumstances? Obviously, a reasonable employer is expected to take into consideration measure, magnitude and degree of misconduct and all other relevant circumstances and exclude irrelevant matters before imposing punishment. In a case like the present one where the misconduct of the delinquent was unauthorised absence from duty for six months but upon being charged of such misconduct, he fairly admitted his guilt and explained the reasons for his absence by stating that he did not have any intention nor desired to disboey the order of higher authority or violate any of the Company's Rules and Regulations but the reason was purely personal and beyond his control and, as a matter of fact, he sent his resignation which was not accepted, the order of removal cannot be held to be justified, since in our judgment, no reasonable employer would have imposed extreme punishment of removal in like circumstances. The punishment i is not only unduly harash but grossly in excess to the allegations. Ordinarily, we would have sent the matter back to the appropriate authority for reconsideration on the question of punishment but in the facts and circumstances of the present case, this exercise may not be proper. In our view, the demand of justice would be met if the respondent No.1 is denied back wages for the entire period by way of punishment for the proved misconduct of unauthorised absence for six months.

8. In J.PATRICK Vs. GOVT. OF T.N. (2006) 4 MLJ 1008), it has been held that when the employee is charged with the misconduct of unauthorised absence from duty and from the employee's explanation,

it is clear that his absence was not wilful, imposing the major punishment of dismissal or even compulsory retirement would be disproportionate to the charge framed.

9. In SHRI BHAGWAN LAL ARYA Vs. COMMR. OF POLICE (2004) 4 SCC 560), it has been held as follows:

> "10. In the instant case, the appellant had absented himself for 2 months, 7 days and 17 hours on medical grounds. The above two rules provide that penalty of removal can be imposed only in cases if grave misconduct and continued misconduct indicate incorrigibility and complete unfitness for police service. The absence of the appellant on medical grounds with application for leave as well as sanction of leave can under no circumstances, in our opinion, be termed as grave misconduct or continued misconduct rendering him unfit for police service.
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> 11. ..... It is not the case of the respondents that the appellant is a habitual absentee. He had to proceed on leave under compulsion because of his grave condition of health and, therefore, the punishment of removal from service is excessive and disproportionate. We are of the view that the punishment of dismissal/removal from service can be awarded only for acts of grave nature or as cumulative effect of continued misconduct providing incorrigibility or complete unfitness for police service. Merely one incident of absence and that too because of bad health and valid and justified grounds/reasons cannot become the basis for awarding such a punishment. We are, therefore, of the opinion that the decision of the disciplinary authority inflicting a penalty of removal from service is ultra vires Rules 8(a) and 10 of the Delhi Police (Punishment and Appeal) Rules, 1980 and is liable to be set aside. The appellant also does not have any other source of income and will not get any other job at this age and the stigma attached to him on account of the impugned punishment. As a result of which, not only he but his entire family totally dependent on him will be forced to starve. These are the mitigating circumstances which warrant that the punishment/order of the disciplinary authority is to be set aside."

10. In SYED ZAHEER HUSSAIN Vs. UNION OF INDIA (AIR 1999 SC 3367) the Supreme Court had held as follows:

> "3. The short question is whether the appellant who was working as Sorting Assistant under the respondents' organisation could have been dismissed from service only because he was alleged to be unauthorisedly absent from 9.1.1985 to 15.1.1985. When he tried to resume his duties thereafter, he was placed under suspension on 16.1.1985 and after a departmental enquiry, was dismissed from service. He went to the Tribunal. The Tribunal took the view that the punishment meted out to the appellant was grossly disproportionate but could not interfere in exercise of its jurisdiction. That is how the appellant is before us on

grant of special leave.

4. In our view, in the facts and circumstances of the case, the punishment of dismissal from service is too harsh and on the contrary it is required to be substituted by appropriate lesser punishment. Learned counsel for the respondents after instructions has stated that appropriate lesser punishment may be awarded by this Court. It will be acceptable to the respondents. In our view, ends of justice will be served if we set aside the order of dismissal of the appellant and instead direct reinstatement of the appellant in service with continuity and with all other benefits save and except withdrawing 50 per cent of back wages from the date of dismissal i.e. 11.10.1988 till today. In our view, this punishment which will involve substantial monetary loss to the appellant will meet the ends of justice and will be a sufficient corrective measure for the appellant. The request of learned counsel for the respondents that two future increments may also be withheld without cumulative effect does not appear to us to be justified on the peculiar facts and circumstances of the case. In our view, the aforesaid monetary loss to the appellant will meet the ends of justice so that he may be careful in future. It is ordered accordingly. At the request of learned counsel for the respondents eight weeks' time is granted to the respondents to comply with the present order and to reinstate the appellant with continuity in service and with all other benefits."

11. In view of the submissions made by the learned counsels appearing on behalf of the parties concerned and on a perusal of the records available and in view of the decisions cited supra, this Court is of the considered view that the petitioner has not shown sufficient cause or reason to grant the reliefs, as prayed for by the petitioner, in the present writ petition.

12. As seen from the records available, the petitioner had absented himself, unauthorisedly, on various occasions from 15.10.2001 to 5.2.2002. Thereafter, from 6.4.2002 he had absented himself from duty. Therefore, a charge memo had been issued by the fourth respondent, on 9.5.2002, under Rule 17B of the Tamil Nadu Civil Services (Discipline and Appeal) Rules. The charge memo had been served on the petitioner, on 23.5.2002. An enquiry officer had been appointed to conduct an enquiry, in respect of the charge levelled against the petitioner. The enquiry officer conducted an enquiry, on 6.9.2002, as the petitioner had not participated in the enquiry. Thereafter, based on the findings of the enquiry officer, the petitioner had been imposed with the punishment of compulsory retirement from service, by an order, dated 23.10.2002, issued by the fourth respondent. The appeal filed by the petitioner before the third respondent, on 26.11.2002, had been rejected by his order, dated 13.9.2002. The review petition, dated 17.10.2003, filed before the second respondent had also been rejected by an order, dated 13.01.2004. The second revision petition filed by the petitioner before the first respondent, on 5.3.2004, had also been rejected, on 18.8.2005. The appeal and the revision petitions were rejected by the

respective respondents, since, it had been found that in spite of reasonable opportunity having been given to the petitioner he had neither submitted his explanation to the charge memo, nor had he participated in the oral enquiry on the stipulated dates fixed by the enquiry officer. Therefore, the enquiry officer had conducted an exparte enquiry, duly following the procedures prescribed for conducting such enquiry.

13. Based on the findings of the enquiry officer, the petitioner was given an opportunity to submit his representation. Since, the representation, dated 13.10.2002, submitted by the petitioner was not satisfactory he was awarded the punishment of compulsory retirement from service, as per the proceedings of the Superintendent Central Prison, Coimbatore, the fourth respondent herein, dated 23.10.2002.

14. The petitioner had preferred an appeal to the Deputy Inspector General of Prisons, Coimbatore Range, against the order of the fourth respondent, stating that he was not given a reasonable opportunity to defend his case. He had also pointed out certain discrepancies in initiating the disciplinary proceedings against him. However, the Deputy Inspector of Prisons, Coimbatore range, the third respondent in the present writ petition, by his proceedings, dated 13.9.2003, had rejected the appeal filed by the petitioner, confirming the punishment awarded by the fourth respondent. Thereafter, the petitioner had submitted a review petition before the second respondent, which had also been rejected, as being devoid of merits. The second review petition filed by the petitioner before the first respondent was also rejected by way of a Government Order, in G.O.(D) No.801, Home (PR.II) Department, dated 18.8.2005. The impugned orders passed by the respective respondents cannot be said to be arbitrary and illegal. The impugned orders have been passed rejecting the request of the petitioner for setting aside the punishment of compulsory retirement from service, since, the petitioner had not submitted an explanation for his unauthorised absence, nor had he participated in the enquiry conducted, in respect of the charges leveled against him, in spite of sufficient opportunities having been given to him.

15. The claim of the petitioner that the punishment imposed on him is disproportionate in nature cannot be accepted, especially, in view of the fact that the petitioner was employed in a disciplined service. As such, the present writ petition filed by the petitioner is devoid of merits and therefore, it is liable to be dismissed. Hence, it stands dismissed. No costs. Consequently, connected M.P.No.1 of 2006 is closed.

Sd/-
Asst. Registrar.

/true copy/

Sub Asst. Registrar.

To

1 THE SECRETARY TO GOVERNMENT
THE STATE OF TAMIL NADU
HOME (PR II) DEPARTMENT CHENNAI -09.

2 THE ADDITIONAL DIRECTOR GENERAL OF
PRISON CHENNAI-8.

3 THE DEPUTY INSPECTOR GENERAL
OF PRISONS COIMBATORE RANGE COIMBATORE.

4 THE SUPERINTENDENT
CENTRAL PRISON COIMBATORE.

+ 1 CC TO The Govt., Pleader, SR 13765

+ 1 cc to Mr.M.Hidayathulla Khan, Advocate Sr 13230

Writ Petition No.25665 OF 2006

JSV (CO)
RH (26.3.10)