(2007) 10 MAD CK 0123

Madras High Court

Case No: Writ Petition No. 7503 of 2005

Naganathan		APPELLANT
	Vs	
The Superintendent of Police, The Deputy Inspector General of Police, Madurai Range, The Additional Director General of Police (Law and Order) and The Director General of Police		RESPONDENT

Date of Decision: Oct. 25, 2007

Acts Referred:

- Tamil Nadu Police Subordinate Service (Discipline and Appeal) Rules, 1955 - Rule 3

Hon'ble Judges: V. Dhanapalan, J

Bench: Single Bench

Advocate: P.I. Thirumoorthy, for the Appellant; A. Edwin Prabakar, A.G.P., for the Respondent

Final Decision: Allowed

Judgement

@JUDGMENTTAG-ORDER

V. Dhanapalan, J.
The writ petition has been filed praying to quash the order of respondents 1 to 4 in (i) C. No. F1/PR 29/03 u/r 3(b)

dated 12.07.2003 (ii) P.R. No. 29/2003/C. No. A2/6299/2003, dated 13.10.2003 (iii) R.C. No. P.R.II(3)/052404/2004 dated 26.05.2004 and

(iv) R.C. No. 174640/P.R.II/3/2004, dated 20.11.2004 and consequently to direct the first respondent to reinstate the petitioner as Head

Constable with all attendant benefits.

2. The case of the petitioner, in a nutshell, is as follows:

(i) The petitioner was appointed as Grade-II Constable in the year 1981. He was promoted as Grade-I Constable in the year 1996 and

subsequently promoted as Head Constable in the year 2000. While the petitioner was serving as a Head Constable in Alanganallur Police Station,

he fell sick and subsequently, he entered on medical leave with effect from 07.09.2002 and extended from time to time upto 08.01.2003 by

producing Medical Certificate due to the infection of piles complaint. Thereafter, his health was drastically affected due to jaundice and Small Pox

and he was unable to submit his extension of Medical Leave beyond 08.01.2003.

(ii) The petitioner was then referred to the Medical Board by the Superintendent of Police, Madurai Distrtict vide procedings in Na.Ka. No.

L.1/L.R./1616/2002, dated 21.11.2002 with a copy marked to him. Due to the non-receipt of intimation from the Medical Board, the petitioner

was not able to appear before the Medical Board, Madurai. As per the orders of P.S.O. No. 95(Vol.1) vide proceedings in D.O. No.

35/2003/L.R./L.1/1616/2002, dated 02.01.2003, the petitioner was treated as deserted for 21 days, with effect from 09.12.2002 to 30.12.2002

by the first respondent and a copy of the same was served to the petitioner on 25.01.2003. Thereafter, the petitioner appeared before the first

respondent in the first week of February 2003 and submitted a representation with a request to take him for duty, for which the first respondent

informed that his request would be considered after the disposal of the departmental action and further directed the petitioner to extend co-

operation for the expeditious completion of the enquiry.

(iii) In the meanwhile, a Charge Memo was served on the petitioner on 27.01.2003, stating that he was unauthorisedly absent from 09.12.2002 to

29.12.2002. Based on the charge memo, an enquiry was conducted relying on the official witness and a report proving the charges was submitted.

But, no independant witnesses were examined. Aggrieved by the report, the petitioner submitted his explanation. However, the first respondent

passed an order of compulsory retirement on 12.07.2003. Challenging the order of compulsory retirement, the petitioner preferred an appeal

before the second respondent, which was also rejected in a non-speaking manner. Aggrieved by the rejection of the second respondent, the

petitioner preferred a Review Petition before the third respondent and the same was also rejected. Thereafter, the petitioner preferred a mercy

petition before the fourth respondent, which was also rejected on 20.11.2004. Left with no other option, the petitioner has approached this Court

for the relief as stated above.

3. The first respondent, in his counter affidavit has contended that the petitioner was dealt with on a charge under Rule 3(b) of TNPSS (D&A) in

PR.29/03 for having deserted from duty, since 09.12.2002 to 30.12.2002 as per the first respondent office, D.O. No. 35/2003 Lr.L1/1616/2002

dated 02.01.2003 as per the orders of Police standing order No. 95 (Vol.I), which was served on him on 25.01.2003 and he was then referred to

the Medical Board, Madurai for his sickness, but he did not appear before the Medical Board, which was dealt with on a Punishment Roll No.

29/2003 under Rule 3(b) of TNPSS (D & A) Rules and he was given a chance for oral enquiry and he had submitted his petition stating that he

had sent his leave letter till 08.01.2003, belatedly, due to the ill-health of his children and on merits of the findings in PR.29/2003, he was

compulsorily retired from service with effect from 12.07.2003.

4. Heard Mr. P.I. Thirumoorthy, learned Counsel appearing for the petitioner and Mr. A. Edwin Prabhakar, learned Additional Government

Pleader appearing on behalf of the respondents.

5. The learned Counsel for the petitioner has contended that the first respondent has passed the order of compulsory retirement unilaterally,

without application of mind, since when a person is referred to the Medical Board, an order of desertion cannot be passed unless and until a

certificate of evidence is given by the Medical Board to report duty. He has submitted that after desertion, the mandatory period of 60 days has

been given by the Police Standing Orders to report before the Disciplinary Authority enabling to avoid disciplinary proceedings if the absence is

found to be genuine, but the desertion order was passed on 02.01.2003, within the mandatory period and the copy of the order was served on the

petitioner on 25.01.2003. He has strongly contended that the respondents have relied on the past punishment and have given no opportunity to the

petitioner which is impermissible in law and therefore, the disciplinary authority, while passing the impugned proceedings, has taken into account,

the past record without including the same in the charge sheet and without affording an opportunity to the petitioner and has imposed the

punishment of compulsory reitrement from service and the same has been confirmed by the other respondents. It is also contended by the learned

Counsel for the petitioner that the respondents have inflicted the punishment disproportionate and excessive to the facts and circumstances for the

absence of 21 days.

6. It is the vehement contention of the learned Counsel that the Enquiry Officer as well as the Disciplinary Authority ought to have waited for the

report of the Medical Board to decide whether the petitioner has deserted or not. He also contended that it is the duty of the fourth respondent to

forward the mercy petition to the Government, enabling the Government to decide the mercy petition as per the Rules. At the end, he has

submitted that the proceedings of respondents 1 to 4 have put the petitioner to a great loss and hardship and pleaded that the proceedings of the

respondents need to be quashed.

7. In support of his contentions, learned Counsel for the petitioner has placed reliance on the following decisions:

(i) In 2006 (8) Supreme 670 in the case of the Government of Andhra Pradesh and Ors. v. A. Venkata Prabhu, the Andhra Pradesh High Court

has held as follows:

9. ...It is a settled principle of natural justice that if any material is sought to be used in an enquiry, then copies of that material should be suplied to

the party against whom such enquiry is held. In charge No. 1, what is mentioned is that the respondent violated the orders issued by the

Government. However, no details of these Orders have been mentioned in Charge No. 1. It is well settled that a charge sheet should not be vague

but should be specific. The authority should have mentioned the date of the Government Order which is said to have been violated by the

respondent, the number of that Government Order, etc. but that was not done. Copies of the said G.Os. or directions of the Government were not

even placed before the Enquiry Officer. Hence, Charge No. 1 was not specific and hence no finding of guilt can be fixed on the basis of that

Charge. Moreover, as the High Court has found, the respondent only renewed the deposit already made by his predecessor. Hence, we are of the

opinion that the respondent cannot be found guilty for the offence charged.

(ii) The Supreme Court in Union of India and others Vs. Giriraj Sharma, has held as follows:

2. ...so far as the present case is concerned, the allegation is in regard to the incumbent having over-stayed the period of leave by 12 days in the

said circumstances which have not been controvered in the counter is harsh since the circumstances show that it was not his intention to wilfully

flout the order, but the circumstances force him to do so. In that view of the matter, the learned Counsel for the respondent has fairly conceded

that it was open to the authorities to visit him with a minor penalty. If they so desired, but a major penalty of dismissal from service was not called

for....

(iii) In Shri Bhagwan Lal Arya Vs. Commissioner of Police Delhi and Others, , the Honourable Supreme Court of India has held as follows:

11. ...Merely one incident of absence of that too because of bad health and valid and justified grounds/reasons cannot become 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 of Rule 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 not only he but his entire family totally dependant 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.

(iv) This Court in P. Erajan, Inspector of Police, District Crime Branch Vs. The Deputy Inspector General of Police and Others, , has held as

follows:

18. The enquiry officer should have examined the said Kulandaivelu or she should have allowed the petitioner to examine Kulandaivelu as defence

witness. Such non-examination of the important and indispensable witness makes the second charge as baseless. Further, in our opinion, in the

wake of non-examination of Kulandaivelu as prosecution witness, the enquiry officer should have permitted the petitioner to examine Kulandaivelu

as defence witness. But the claim of the petitioner was denied. Such denial, closed the door of both sides, namely cross examination or chief

examination of Kulandaivelu by the petitioner and prevented him to prove his case and therefore, such denial, is a clear violation of principles of

natural justice. For such violation of principles of natural justice, we are of the view that the finding of the enquiry and the punishment imposed

thereupon as well as the order of the Tribunal have to be set aside. Accordingly they are set aside.

(v) In 1996 (2) Supreme 541 in the case of Malkiat Singh v. State of Punjab and Ors. the Supreme Court of India has held as follows:

3. The appellant was appointed on April 20, 1990 and was discharged from service on July 22, 1992 on the ground that he remained absent from

duty for more than 1 month 9 days. Another ground was that he was irregular in attending to the duty. So he could not prove himself to be an

efficient Constable. We had sent for the records which disclose that he was absent on three occasions. On the first occasion, when he was called

upon to report for duty at 12 noon, he reported on September 10, 1990 and was late by six hours. On the second occasion, he was absent, on

June 30, 1991, from night duty. The third occasion was on April 24, 1995. The explanation offered for the absence on third occasion was that

since in his wife''s delivery certain complication had arisen, he had to attend to his wife and so he could not be present. The Medical Certificate in

that behalf was produced. In view of the Medical Certificate, it cannot be said that he had deliberately absented himself from duty. On the previous

two occasions, the absence for one day and in another year for one night cannot be considered to be regular absence so as to reach the conclusion

that he had not proved his efficiency. It is true that discipline is required to be maintained. However, absence may sometimes be inevitable. In the

facts and circumstances of this case, an opportunity may be given to the appellant to work efficiently, to prove his excellence. The order of

discharge is set aside. The respondents are directed to take the appellant into service forthwith. If the appellant absents himself again for two

consecutive days within one year without prior permission, appropriate action may be taken by dismissing him from service. The appellant

however, is not entitled to back-wages.

8. The learned Counsel for the respondents, per contra, has contended that the petitioner was referred to Medical Board, but, he did not appear

before the Medical Board, by which he had failed to prove his sickness and subsequently, he was absent from duty from 09.12.2002 to

30.12.2002; hence, he was treated as deserted. In support of his contention, learned Counsel relied on a decision reported in Union of India

(UOI) and Another Vs. K.G. Soni, , wherein the Honourable Supreme Court has held as follows:

15. ...Unless the punishment imposed by the disciplinary authority or the Appellate Authority shocks the conscience of the court/tribunal, there is

no scope for interference. Further, to shorten litigations, it may, in exceptional and rare cases, impose appropriate punishment by recording cogent

reasons in support thereof. In the normal course, if the punishment imposed is shockingly disproportionate, it would be appropriate to direct the

disciplinary authority or the Appellate Authority to reconsider the penalty imposed.

9. I have given careful consideration to the submissions made by the learned Counsel on either side and have also perused the material documents

produced before this Court.

10. It is seen that the petitioner joined service as Grade-II Constable in the year 1981 and he was promoted as Grade-I Constable in the year

1996; he was posted to Alanganallur police station in the year 1999 as Grade II constable and in the year 2000, he was promoted as Head

Constable; while he was serving as Head Constable in the Alanganllur police station, he fell sick and and went on Medical Leave from 09.07.2002

and extended it from time to time upto 08.01.2003 by producing medical certificate due to infection of piles complaint and after having been

operated, he was hit by jaundice followed by small pox due to which he could not submit his extension of medical leave beyond 08.01.2003;

thereafter, he was referred to Medical Board by the first respondent vide proceedings dated 21.11.2002; due to the non-receipt of intimation from

the Medical Board, he could not appear before the Medical Board at Madurai and therefore, he was treated as deserted for the period of 21 days

from 09.12.2002 to 30.12.2002.

11. It is further seen that the desertion order dated 02.01.2003 was served on the petitioner on 25.01.2003 and he appeared before the first

respondent in the last week of February 2003 and submitted representation with a request to take him for duty from desertion; however, he was

served with a Charge Memo on 27.01.2003 stating that he was unauthorisedly absent and an enquiry was conducted; frther, the Enquiry Officer

examined the official witnesses and submitted a report holding that the charges are proved in response to which the petitioner submitted

explanation; but, the first respondent passed an order of punishment of compulsory retirement on 12.07.2003; since the petitioner could not

succeed either in the appeal before the second respondent or in the revision petition before the third respondent, he preferred a Mercy Petition

before the fourth respondent who is supposed to forward it to the Government; instead of doing so, the fourth respondent himself rejected the

Mercy Petition preferred by the petitioner and the orders passed by the disciplinary authority-the first respondent, the appellate authority-the

second respondent, the revisional authority-the third respondent and the order passed by the fourth respondent in the Mercy Petition are impugned

in this writ petition.

12. While deciding this case, it may be worth referring to the relevant portion of the order passed by the first respondent which reads as under:

The contention of the delinquent that he could not extend medical leave in time due to his severe illness and that of his two sons is not acceptable. If

he was really ill, he ought to have represented it to his superiors and obtained medical leave. But he failed to do so. Hence his plea is nothing but

after thought and cover-up strategy to extricate from the charge. Hence, I am not inclined to accept his explanation.

The delinquent Head Constable had previously deserted the force in 2 occasions and absented from duty in 4 occasions and awarded the

punishment of reduction in time scale of pay and postponement of increments, etc. Though he was given a long rope to mend his ways, he did not

change his ways and deserted the force on 09.12.2002. Thus he is found incorrigible and he is unfit to continue in the highly disciplinary force.

Considering the gravity of the delinquency he is compulsorily retired from the service w.e.f. the date of this order."" Further, the first respondent has

certified that he is competent and he has followed the procedure and the delinquent has been informed to prefer an appeal within a month''s time.

13. A careful reading of the above order reveals that the disciplinary authority, while considering the facts and circumstances of the case as well as

the enquiry report, has not at all taken into account any finding of the enquiry report and has failed to give adequate reasoning in support of his

conclusion to impose the major punishment of compulsory retirement from service on the petitioner. It is seen from the Enquiry Report that the

Enquiry Officer has examined the official witnesses, namely the Sub-Inspector of Police and an Assistant of the respondents and no other

witnesses have been examined. Further, in the conclusion of the enquiry report also, it is stated that when there are various communication facilities

available, the delinquent ought to have submitted the extension of Medical Leave and the reasoning given by the petitioner has been taken as an

after-thought, though in his explanation, he has stated that he is undergoing treatment and submitted the Medical Certificates and the same have

been admitted by the respondents. The report of the enquiry also reveals that only due to his continued sickness, he could not submit the

application for extension of medical leave for 21 days. This has been considered while imposing the punishment. However, the disciplinary

authority has gone to the extent of saying that the delinquent had previously deserted the force in two occasions and absented from duty in four

occasions. This past record has been taken into account without affording an opportunity to the petitioner. Though the petitioner has preferred an

appeal and a revision before the appellate authority and revisional authority respectively, they have been rejected by both the authorites concerned

mechanically, by way of a non-speaking order, without assigning any reason therein, thereby simply confirming the order passed by the disciplinary

authority.

14. It is settled proposition that play of fairplay is to secure justice, procedural as well as substantive. The substance of the order, the effect thereof

is to be looked into. Whether no misconduct spurns the action or whether the services of the petitioner is imposed with the punishment without

imputation of the mis-conduct, is the test. It must be hedged with a bona fide overall consideration of the previous conduct without being tainted

with either mala fide or colourable exercise of power or for extraneous considerations and such action must be done only with due care and

diligence as held by the Supreme Court in its decision reported in Delhi Transport Corporation Vs. D.T.C. Mazdoor Congress and Others, . In

this case, the disciplinary authority has relied on past record but without giving an opportunity to the delinquent petitioner and without including the

imputation of misconduct. Therefore, this action of the disciplinary authority is against fairplay to secure justice, both procedural and substantive.

Though the disciplinary authority has passed the impugned proceedings without following substantive procedure and taking note of the past record

without affording an opportunity to the petitioner and without imputation of the misconduct, the impugnity and infirmities of the order passed by the

disciplinary authority have not been properly looked into by both the appellate as well as revisional authority. Therefore, the impugned proceedings

passed by the respondents 1 to 3 suffer from legal infirmities and failure of substantive procedural justice and also fairplay. In that view of the

matter, the impugned orders passed by the respondents 1 to 3 cannot be sustained on the ground the past record has been taken into

consideration without affording an opportunity to the delinquent.

15. The next point for consideration is that though the petitioner was referred to the Medical Board, the first respondent did not wait for the report

of the Medical Board and ignoring this relevant factor, he has proceeded further. Further, taking note of the enquiry report which is the basis for his

conclusion, he has imposed the punishment on the petitioner. The factor that the petitioner had availed medical leave and continued to be in medical

leave and only extension of 21 days of medical leave should have been considered based on the report of the medical board and this aspect has

not been properly looked into by the first respondent, the disciplinary authority who had proceeded further without waiting for the medical report

to decide either to treat the petitioner as a deserter or to permit him to join duty as per the opinion of the medical board or at least, the first

respondent could have waited to receive the report of the medical board stating that the delinquent has not turned up for medical examination. In

other words, the first respondent has given a go-by to the proper procedure in getting the medical report to decide the matter. But, he has taken

into consideration the minutes and the connected records as the enquiry officer has rightly held that the charge against the delinquent is proved.

Therefore, the impugned order passed by the first respondent is vitiated by his improper approach resulting in imposition of penalty of compulsory

retirement on the petitioner.

16. Further, as per the Police Standing Orders, the delinquent has to report before the first respondent, the disciplinary authority within a period of

60 days and this aspect has been urged by the petitioner as one of the grounds. But, the irony is that even before the petitioner reported before the

first respondent, the latter has proceeded against him. Thus, it is made cyrstal clear that the first respondent has not taken into consideration, the

mandatory requirement as per the Police Standing Orders while passing the order of compulsory retirement from service which has been simply

endorsed by the appellate and revisional authorities without any reason being assinged and thereby passing non-speaking orders.

17. The last limb of the legal infirmity in the impugned proceedings is that normally, Mercy Petition has to be considered by the Government which

is the competent authority. In the instant case, though the petitioner has forwarded the Mercy Petition to the fourth respondent, contrary to the

established procedure, the fourth respondent, without forwarding the same to the Government, has himself passed the rejection order. Even in the

counter, there is no whisper as to whether the fourth respondent is competent enough to decide the Mercy Petition on his own or whether he is

required to forward the same to the Government. Thus, it is clear that the fourth respondent, without proper application of mind and material

consideration, has rejected the Mercy Petition. In the absence of any denial or any averment to dislodge this specific ground raised by the

petitioner, there is every reason to accept that the Mercy Petition has to be forwarded to the Government which the fourth respondent has failed to

do. Accordingly, I have no hesitation in holding that the rejection order passed by the fourth respondent in the Mercy Petition is not in accordance

with the procedure contemplated and it suffers from procedural infirmity and it is accordingly set aside.

18. In overall consideration of the issue and on consideration of the material documents, it is seen that the order of the disciplinary authority suffers

from material irregularity, failure of fairplay to secure substantive procedural justice. When the fact remains that the petitioner has served the

department for 22 long years and had availed medical leave due to continuous sickness, suffered not only by him but also his two sons, by duly

submitting medical certificate and when this is not disputed by the respondents and when he could not forward his leave application only for the

extended period of leave due to his continued illness, the authorities could have considered the facts and circumstances of the case before imposing

the punishment and considered the case by following the due procedure. Instead, they have acted contrary to the established procedure. Normally,

in a case of compulsory retirement, the scope of interference by this Court is very limited except in circumstances where the punishment imposed

by the disciplinary authority or the appellate authority shocks the conscience of this Court. But, in exceptional and rare cases, if there are

warranting circumstances to interfere, this Court is not powerless to interfere and set right the irregularities committed by the respondents and no

doubt, this is one such case where the procedural anomaly on the part of the respondents has to be set right.

19. In the decision reported in Union of India and others Vs. Giriraj Sharma, where over-stayal of leave by 12 days by the delinquent fell for

consideration, the Supreme Court has taken a view that the penalty imposed has to be re-looked as a major penalty could not be imposed and it

was open to the authorities to visit the delinquent with a minor punishment, if they so desired as a major penalty of dismissal from service was not

called for.

20. The above view taken by the Supreme Court is very much applicable to the instant case and in the normal course, if the punishment is

shockingly disproportionate, it would be only appropriate to direct the disciplinary authority and appellate authority to reconsider the penalty

imposed. Accordingly, as the orders of the respondents, which are non-speaking in nature, suffer from procedural irregularity, non-application of

mind, denial of opportunity, failure of fairplay and substantive procedure and also violation of principles of natural justice, they cannot be sustained

and the same are set aside with a direction to the respondents to re-consider the petitioner''s case by following the due procedure and after

affording an opportunity to the petitioner and pass appropriate orders, taking note of the overall circumstances of the case, within a period of

twelve weeks from the date of receipt of a copy of this order.

In the result, the writ petition is allowed with the above directions.