(2007) 03 JH CK 0020

Jharkhand High Court

Case No: Writ Petition (Service) No. 2671 of 2006

Indu Bhushan Dwivedi	APPELLANT
Vs	
The State of Jharkhand	RESPONDENT

Date of Decision: March 29, 2007

Acts Referred:

- Civil Services (Classification, Control and Appeal) Rules - Rule 49

Citation: (2007) 2 BLJR 1294 : (2007) 3 JCR 272

Hon'ble Judges: M. Karpaga Vinayagam, C.J; Permod Kohli, J

Bench: Division Bench

Advocate: Jai Prakash Jha, Ajay Kumar Trivedi and S.P. Jha, for the Appellant; S.B. Gadodia, A.G. and Anubha Rawat Choudhary, for the Respondent

Final Decision: Allowed

Judgement

M. Karpaga Vinayagam, C.J.
Indu Bhushan Dwivedi, the petitioner herein, aggrieved by the order of the Government dated 22.02.2006 dismissing him from service from the post of Sub Divisional Magistrate, Chaibasa on the basis of the recommendations sent by the High Court through the letter dated 30.01.2006, has filed this writ petition praying to quash the same and to grant consequential benefits.

2. The short facts, relevant for the disposal of the writ petition, are as follows.

3. The petitioner was appointed as a Munsif in the year 1982. He was promoted in the year 1986 and posted as a Sub Divisional Judicial Magistrate, Madhubani. In the year 1989, he was transferred to Chaibasa as Sub Divisional Judicial Magistrate.

4. On 02.07.2003 a news was published in the daily newspaper "Dainik Jagran" alleging that the petitioner assaulted the accused, who was remanded before him in his residence and the constable escorting the said accused. On noticing this news, the petitioner sent a letter to the District Judge, Chaibasa on 03.07.2003, the copy of

which was sent to the Registrar General requesting them to inquire into the matter as this news was false. However, on the basis of the report from the Registrar of the Civil Court, the High Court passed a suspension order on 05.07.2003, initiating the disciplinary proceedings and asking him not to leave the headquarters without obtaining prior permission of the Registrar General of the High Court.

5. Even before the service of the said suspension order, he obtained the permission on 04.07.2003 from the District Judge, Chaibasa to leave the headquarters as he became sick and was suffering from loose motions. On permission, he went to Ranchi for taking treatment. Having received the said order, he sent an application on 07.07.2003 requesting to grant him permission to remain away from the headquarters in the light of the advice of the doctor. However, the permission, sought for, was rejected by the High Court. Then on 19.07.2003, he addressed a letter to the District Judge, explaining his physical disability to report to the headquarters and indicating that the order rejecting the request for the permission to stay away from the Headquarters and the direction given to him that he should not leave the Headquarters inspite of his grave illness is merciless. After completion of the treatment, the petitioner came back to Headquarters at Chaibasa on 10.09.2003 and remained there continuously.

6. On 16.12.2003, three charges were framed against him. The first charge relates to his alleged assault, in an intoxicated condition, made on the accused, who was remanded before him as well as the constable, who produced before him in his residence.

The second charge relates to the violation of the direction by the High Court to the delinquent not to leave headquarters during suspension period without permission till 10.09.2003.

The third charge relates to the use of the derogatory words mentioned in his reply dated 09.07.2003 stating that the direction given for reporting to the headquarters is merciless.

7. The petitioner filed preliminary explanation of all these charges on 30.01.2004. Thereafter, the inquiry officer was appointed on 28.05.2004. During the inquiry, the District Judge of Chaibasa was also examined as P.W.4. On behalf of the delinquent, D.W.1 the doctor and D.W.2 were examined to support his plea that he was under treatment during the relevant period at Ranchi. Ultimately, on 04.06.2005, the inquiry officer submitted his inquiry report holding the petitioner not guilty of the charge No. 1 relating to the assault on the constable and the accused and holding guilty of charge No. 2 and 3 relating to the violation of the orders as well as using derogatory words in the letter sent to the District Court.

8. On accepting the said report, the High Court issued a second show cause notice on 30.06.2005, asking him as to why the punishment of dismissal should not be imposed against him. The delinquent, on receipt of the notice, sent, a reply on

22.07.2005, offering unqualified apology for inability to comply with the order by immediately reporting to the Headquarters and also for choosing the unsavoury words inadvertently in his letter. Having not accepted the said explanation through the show cause reply dated 22.07.2005, the High Court recommended for his dismissal through the letter dated 30.01.2006 to the Government, which, in turn, passed the order of dismissal accepting the recommendation, by the order dated 22.02.2006.

The recommendation and the order of dismissal are the subject matter under the challenge before this Court in this writ petition filed by the petitioner.

9. Learned senior counsel for the petitioner would make the following submissions.

(A) The Service Code of Jharkhand State, which is applicable to the officers of the Subordinate judiciary, does not provide that during the period of suspension the suspendee is required to be present throughout in the Headquarters. During the said period, he took treatment at Ranchi He obtained permission on 04.07.2003 from the District Judge, Chaibasa even before the suspension order was served on him. He was to stay at Ranchi on the advice of the doctors and he produced oral and documentary evidence with reference to the treatment taken by the delinquent during that period. Therefore, the inquiry officer, having disbelieved the first charge, ought to have absolved the petitioner from the 2nd charge by giving due credence to the oral and documentary evidence adduced by DW 1 and DW 2 examined by the delinquent. Even with reference to 3rd charge relating to use of derogatory words, the delinquent from the beginning sent letters after letters offering unqualified apology. The petitioner came back to Headquarters, immediately, after finishing the treatment on 10.09.2003 and remained there throughout the suspension period of 2 1/2 years and he never became defaulter and he was throughout present in all the hearings before the inquiry officer. Therefore, accepting his apology, he must have been exonerated from this charge also.
(B) The disciplinary authority, without any notice, took into account the past records while imposing punishment. Taking into consideration the past records to pass an order of recommendation for maximum punishment of dismissal without giving opportunity with regard to the same would vitiate the order of punishment.

(C) In any event, the charges 2 and 3 are not so serious and therefore, the order imputing punishment is too harsh and shockingly disproportionate and does not commensurate with the gravity of charges as per the Service Rule 49. Since he was rendering services for about 24 years, the punishment for compulsory retirement could have been considered instead of giving the maximum punishment of dismissal.

10. In support of the impugned orders, counsel for the respondents 1 and 2 would make the following submissions.

The suspension order dated 05.07.2003 in contemplation of the initiation of departmental proceeding, directing the delinquent not to leave headquarters without obtaining previous permission of the High Court cannot be assailed on the ground the rule does not permit it. Admittedly, the said order has not been challenged before any Forum on that ground. Further, the relevant rules provides for issuing a suspension giving a direction not to leave headquarters pending departmental inquiry.

(B) After inquiry report is accepted by the High Court, the second show cause notice dated 30.06.2005 was issued to the petitioner informing the petitioner that High Court accepted the inquiry report submitted by the inquiry officer, who held the charges 2 and 3 to be proved. Therefore, disciplinary authority, by way of giving opportunity called upon the delinquent to submit his show cause reply as to why a major punishment such as dismissal from service be not inflicted upon the petitioner. In his reply, to the show cause notice, dated 22.07.2005 the delinquent himself volunteered to request the High Court to take into consideration all his past records while imposing punishment as his past records are good. In view of the claim of the delinquent that he had unblemished past record, the High Court was duty bound in its administrative side to have a look at the past records of the petitioner to decide if any lesser punishment could be imposed upon the petitioner, even though show cause notice was issued proposing for imposing major punishment, namely, dismissal. Accordingly, past records were considered and past records revealed that there are adverse remarks against him for the earlier period. Hence, the High Court was unable to consider the lesser punishment and having considered his past records and also the nature of the proved charges, the High Court was constrained to pass an order of dismissal. Therefore, there is no requirement to give a show cause notice to the petitioner prior to consideration of his past records.

(C) The punishment of dismissal is not disproportionate to his misconduct of indiscipline and insubordination and, as such, the same is perfectly justified. This Court, under Article 226 in the light of the Wednesburry principles cannot take the role of a primary reviewing authority to reduce the punishment.

11. Learned Counsel for the petitioner would cite the following authorities:

(i) M.V. Bijlani Vs. Union of India (UOI) and Others,

(ii) Management of Northern Railway Co-operative Society Ltd. Vs. Industrial Tribunal, Rajasthan, Jaipur and Another,

(iii) 1994(2) PLJR 861

(iv) 1995(2) PLJR 690

(v) 1980 SLJR 682

(vi) State of Mysore Vs. K. Manche Gowda,

12. Learned Counsel appearing on behalf of the respondent No. 2, Registrar General of the High Court would cite the following authorities.

(i) The State of Uttar Pradesh and Others Vs. Harish Chandra Singh,

(ii) (2006) 8 SCC 776 [P.D. Agrawal v. SBI]

(iii) A. Sudhakar Vs. Post Master General, Hyderabad and Another,

(iv) (2001) 2 SCC 386 [Om Kumar v.Union of India]

(v) Hombe Gowda Edn. Trust and Another Vs. State of Karnataka and Others,

(vi) Mahindra and Mahindra Ltd. Vs. N.B. Naravade etc.,

(vii) General Manager, Appellate Authority, Bank of India and Another Vs. Mohd. Nizamuddin,

(viii) (2005) 13 SCC 709 [Union of India v. Datta Linga Toshatwad]

13. Learned senior counsel for the petitioner would elaborately urge all the points mentioned in the writ petition. Though, initially, he argued that suspension order directing the delinquent not to leave Headquarters is not under the rule and as such the said direction is not valid, ultimately, he did not press it further in the light of the submission made by the counsel for the respondent No. 2 that the format of the suspension, as contained in the manual, would provide for such a direction by the disciplinary authority. He confined himself with two other points. They are as follows:

(i) Even according to the counter filed by the Registrar General, High Court, respondent No. 2, the past records of the petitioner have been taken into consideration for imposing a punishment of dismissal along with the proved charges, while imposing punishment. Before considering the past records, which give particulars about the alleged past misconduct of the petitioner, the show cause notice should have been issued to provide the opportunity to the delinquent to explain the same. Admittedly, this was not done. As per the judgment reported in State of Mysore Vs. K. Manche Gowda, while the disciplinary authority decides to take into account the previous punishment or his previous bad records, it is incumbent upon the authority to give the delinquent at the second stage a reasonable opportunity to show cause against the proposed punishment. Therefore, the particulars of previous bad record should have been mentioned in the second show cause notice so that delinquent would be able to give an explanation. If it is not so done, the past records cannot be considered. Hence, the punishment of dismissal after taking into consideration the past records without notice to the delinquent is illegal.

(ii) The punishment of dismissal inflicted upon the petitioner is disproportionate to the charges proved against the petitioner as the said charges are not so serious, especially, when the 1st charge, which is so serious, has been held to be false.

14. We have carefully considered the above points urged by the learned senior counsel for the petitioner as well as the reply made by the counsel for the respondents.

15. The 1st point relates to the consideration of the past records without notice. It is not in dispute that in the second show cause notice, issued by the High Court, dated 30.06.2005, it is clearly mentioned that the High Court has accepted the inquiry report and called upon the petitioner to submit his show cause as to why a major punishment such as dismissal from service be not inflicted upon the petitioner. It is also not in dispute that in the said show cause notice there is no reference about the past records proposed to be taken into consideration for imposing the major punishment. On this basis, learned senior counsel for the petitioner would heavily rely upon the judgment reported in State of Mysore Vs. K. Manche Gowda, in support of his plea that the said punishment is illegal. Though the said argument at the first blush looks attractive, the deep probe into the said aspect, as referred to in the judgment cited, supra, would clearly indicate that the said judgment would not apply to the present facts of the case and the contention urged by the counsel for the petitioner does not deserve acceptance.

16. On going through the said judgment of Supreme Court, it is clear that in the said case, the inquiry authority had recommended the punishment of reduction in rank and the Government issued show cause as to why a severe punishment of dismissal be not imposed and in the final order of punishment instead of reduction in rank as suggested by the inquiring authority, the punishment of dismissal was imposed, on the basis of the past records, and, under such circumstance, it was held that when the punishment for dismissal was mainly based upon the previous bad records, the second show cause notice must disclose the said past records. That is not the case here.

17. As correctly pointed out by the counsel for the respondents, the second show cause notice dated 30.06.2005 would contain that the proposed punishment, i.e., dismissal is the maximum punishment. But, in the show cause reply dated 22.07.2005 the petitioner, himself, requested the disciplinary authority to consider his past records, which are good, and decide the issue. That means, the disciplinary authority was requested by the delinquent, himself, to consider his past records and then come to a conclusion. The relevant portion of his request, as contained in reply dated 22.07.2005 in paragraph 17 is as follows:

17. Sir, Most humbly and respectfully I submit that in the entire period of my service there is no report against my integrity honesty and sincerity. I was never found guilty of any act of insubordination or indiscipline ever before in this entire period of

service, also that recently proceeding this suspension my District Judge in their annual report have commended my work.

18. When such a request has been made by the delinquent himself, it is the bounden duty of the disciplinary authority to have a look at the past records of the petitioner as desired by him mainly to consider if any lesser punishment than the dismissal like demotion or compulsory retirement could be inflicted upon the petitioner, on the basis of the past records.

19. In this context it would be appropriate to refer to the decision in The State of Uttar Pradesh and Others Vs. Harish Chandra Singh, cited by the counsel for respondent No. 2. As a matter of fact, this State of Mysore Vs. K. Manche Gowda, cited by the counsel for the petitioner has been referred to in this case.

20. Let us now refer to the relevant observation made by the Supreme Court in The State of Uttar Pradesh and Others Vs. Harish Chandra Singh, .

9. ... However, where the past record was taken into consideration for imposing lesser punishment and not for the purpose of increasing the quantum or nature of punishment, then it is not necessary that it should be stated in the show cause notice that his past record would be taken into consideration.

21. Thus, the ratio decided in the above case is where the past records is considered for awarding lesser punishment, no notice about the proposal that the past records will be considered is necessary. In this case, the stand taken by the 2nd respondent, namely, the High Court, the past records were taken into consideration in addition to the charges proved only to consider if any lesser punishment than the dismissal could be inflicted, as desired by the petitioner. In case, the past records were not considered by the disciplinary authority, then the petitioner may raise a grievance non-consideration of his past records white awarding punishment inspite of his request. Under those circumstances, the past records as admitted in the counter affidavit filed by the respondent No. 2 have been considered.

22. As indicated above, when specifically the petitioner has made a request in his reply to consider his past records, while awarding punishment as his past records are good, the disciplinary authority was constrained to go into the past record. But, according to the counter by the respondent No. 2, the past records did not support the claim of the petitioner that his past records were good. On the contrary, his past records contained various details about his bad records in so many words as mentioned in the counter. There is no question of consideration or past records for giving higher punishment than the proposed punishment, namely, dismissal in view of the fact that the disciplinary authority felt while issuing 2nd show cause notice that the maximum punishment alone, would commensurate the proved charges. In the aforesaid circumstance, there is no requirement to mention in the show cause notice regarding his past records. As stated by the counsel for the respondent No. 2, the past records were considered at the instance of the petitioner and also with a

view to consider if any lesser punishment than the dismissal could be inflicted upon the petitioner. As such the first contention would fail.

23. Nextly, it was urged that the punishment of dismissal for the proved charges is disproportionate. It is contended by the counsel for the petitioner that the proved charges would not be considered to be so serious and admittedly the delinquent has been from the beginning pleading in the preliminary reply as well as in the written statement and in the reply to the second show cause notice, for the pardon by offering unconditional apology. Therefore, the appropriate punishment is not the maximum punishment and lesser punishment other than dismissal would be appropriate. In this context it would be relevant to refer to the statement of the petitioner with reference to the above point made in the writ petition contained in paragraphs 40 and 46 thereof:

40. That even if it is accepted that the act done during suspension in the two earlier months of suspension for which charge II and III were framed are misconduct they are not so serious and thus the order inflicting punishment of dismissal is too harsh and shockingly disproportionate and does not commensurate with the gravity of charges as per service Rule 49 (classification control and appeal).

46. That the principle of natural justice has been completely ignored by depriving the petitioner from pension benefits even, for rendering about twenty four years of judicial service with unblemished conduct ever before, as the removal not as dismissal but compulsory retirement could have been considered in view of the length of service rendered by petitioner and his age. Hence, the order of the dismissal suffers with severe prejudices.

24. These two paragraphs would clearly indicate that it is the plea of the petitioner that, even assuming that the 2nd and 3rd charges are proved and the past records can be taken into consideration for imposing punishment, dismissal is not the appropriate punishment and the compulsory retirement could have been considered in view of the length of service rendered by the petitioner and his age.

25. Even in the second show cause reply dated 22.05.2007 he has made a specific mention about requesting for lesser punishment:

7. Apart from the above the proposed punishment is not in consonance with Rule 49 of Civil Services (Classification, control and Appeal) Rules.

Rule 49(Supra) prescribes-various punishments, which may be, imposed regard of being have to the gravity of the charges.

Paragraph 13 of the show cause reply contains the following:

13. ...I was not in a position to take journey due to weakness under illness and as per medical advise I was unable to return back to Headquarter. I was very much mentally puzzled and perturbed on account of my physical inability to follow the

Hon''ble Courts directions and I was not able to decide what to do and what not to do under such mental situation, I used the word "merciless" to describe my physical inability and compulsion to follow Hon''ble court''s direction. In no way it was interpretation of Hon''ble Courts order, because I could not have dared to do so.

Sir, I have already tendered my unqualified apology for the wrong choice of the word to express my physical inability. I repeat my apology again and again and pray that I may kindly be forgiven.

26. In the light of the stand taken by the petitioner in the writ petition as well as the request made by the counsel for the petitioner before this Court, let us now consider whether the punishment of dismissal is disproportionate to the misconduct committed by the delinquent-petitioner.

27. We are conscious of the dictum laid down by the Supreme Court in Hombe Gowda Edn. Trust and Another Vs. State of Karnataka and Others, wherein it has been held that discretionary jurisdiction to interfere with the quantum of punishment can only be exercised if it is found that no reasonable person could inflict such punishment so as to cause shock to one''s conscience and in Mahindra and Mahindra Ltd. Vs. N.B. Naravade etc., wherein it has been held that the punishment of dismissal for the charge of insubordination and act of the workman subversive to discipline is not disproportionate.

28. However, there are some exceptional circumstances where the High Court can interfere with quantum of punishment. It is held in (2001) 2 SCC 386 [Om Kumar v. Union of India] that where an administrative tribunal''s decision relating to punishment in disciplinary cases is questioned as arbitrary, the Court is confined to Wednesbury principle as the secondary review. The Court will not normally apply proportionality as a primary reviewing Court. However, the Court while reviewing punishment and if it is satisfied that Wednesbury Principles are violated, it has clearly to remit the matter to the administrative tribunal for a fresh decision as to the quantum of punishment. But, in rare cases where there has been a long delay in the time taken by the disciplinary proceeding and in the time taken in the Courts and in such extreme rare cases, Court can substitute its own view as to the quantum of punishment. So this ratio decided by the Supreme Court, as contained in paragraph 71 of the said judgment, this Court is not a primary reviewing authority; but in some cases, the Court can substitute its own view as to the quantum of punishment where there is some special circumstances like long delay etc. In the light of the above proposition laid down by the Supreme Court, let us now deal with the question regarding the quantum of punishment.

29. Even at the threshold, it should be stated that, the disciplinary proceedings were initiated and suspension order was passed mainly on the basis of the report of an officer in the Civil Court complaining that the delinquent-petitioner, in an intoxicated condition, assaulted the accused who was produced before him for remand as well

as the constable, who produced before the delinquent. This is truly a very serious charge. If this charge is proved, it would have been a very serious misconduct on the part of the judicial officer, which would entail him to maximum punishment. But, in this case, the inquiry officer has not only observed the charge is not proved, but also indicated that the delinquent had been falsely implicated at the instance of the police personnel of the local police station with whom relationship of delinquent was not cordial. It is true that merely, because the first charge had been held to be false, we cannot hold the other charges do not need any serious consideration. Other charges also are serious, but it shall be remembered that they are not so serious as that of the first charge. As indicated above, the petitioner, himself, requested the disciplinary authority to take into consideration the past record. There is no dispute in the fact that the past records were taken into consideration where it was recorded as his conduct was not good in respect of some period. But the show cause reply sent by the delinquent, dated, 22.07.2005, would indicate that he has specifically asked the authority to take into consideration all the entire period of service. He further referred in his show cause that his District Judge, Chaibasa has commended his work in his annual report. Admittedly, there is no reference about this in the counter filed by the respondent No. 2. On the other hand, the counsel for the 2nd respondent would submit that his entire past records are not good.

30. In view of this, it would be better to look into the relevant entries in his A.C.R. This Court called for the A.C.R. and perused the same. The relevant entry in A.C.R. in respect of 1988-89, 1989-90, 1991-92, 1996-97, 1997-98 would show various adverse remarks, as referred to in the counter. However, in the counter, there is no mention about the entries made during the year 2002-2003. As per the entry, the District Judge, Chaibasa certified him as a good officer which is as follows:

Year	2002-2003
Name of Judgeship	Chaibsa
Reporting Officer /Hon''ble Judge	Mr. B.N. Pandey
Knowledge	Good
Promptness in disposal	Yes
Quality of Judgment	Good
Supervision of Business	NA
Efficiency	Yes
Reputation	Yes
Attitude towards Colleagues	Good behaviour
Relation with Bar & Public	Good behaviour
Net Result	Good Officer

31. There is no reason as to why the respondent No. 2 has not chosen to refer to these entries in relation to his good behaviour. The respondent No. 2 only was particular about giving reference about the earlier years in which some adverse remarks had been passed against him, but in the later year, as indicated above, he got an entry from the District Judge in his A.C.R. that his knowledge and behaviour is good and he was certified as good officer.

32. Thus, it is clear while imposing punishment, this aspect has not been taken into consideration despite the request made by the delinquent to take into consideration the recent entry made by District Judge, Chaibasa commending his work.

33. Admittedly, the suspension order was issued on 05.07.2003. His suspension was not revoked during the pendency of the inquiry. The inquiry commenced and the charges have been framed only on 16.12.2003. The inquiry officer was appointed only on 28.05.2004. Thereafter inquiry held. The inquiry report was submitted on 04.06.2005. Show cause notice was issued on 30.06.2005. Show cause reply was sent on 22.07.2005. Ultimately, dismissal order was passed only on 26.02.2006. Thus, he was facing inquiry from 2003 to 2006. Admittedly, during the said period his suspension was not revoked and he was continued to be under suspension. Thus, he was facing inquiry for two years and seven months approximately and during that long period, he was constrained to stay at Chaibasa at Headquarters as per the direction of this Court. So, this aspect of the long delay as well as the good conduct certificate obtained by the delinquent in the recent past from the District Judge would be the relevant aspect which ought to have been taken into consideration by the disciplinary authority, while imposing punishment. Admittedly, both these aspects have not been considered.

34. At this stage, we may refer to the powers of this Court as indicated by the Supreme Court for reviewing the punishment imposed upon the delinquent by the disciplinary authority. Let us refer to the relevant portion of judgment of the Supreme Court in (2001) 2 SCC 386 [Om Kumar v. Union of India].

14. ... The court while reviewing punishment and if it is satisfied that Wednesbury principles are violated, it has normally to remit the matter to the administrator for a fresh decision as to the quantum of punishment. Only in extreme and rare cases where there has been long delay in the time taken by the disciplinary proceedings and in the time taken in the courts, can the court substitute its own view as to the quantum of punishment.

35. In the light of the above rule, we are vested with the power to review the punishment. As we are of the view that the Wednesbury principles have been violated in this case, we are constrained to review the quantum of punishment. As Supreme Court would observe, this Court would normally remit the matter to the disciplinary authority to take a fresh decision as to the quantum of punishment. However, this Court is not inclined to do the same, as in this case there has been a

long delay in the time taken by the disciplinary proceedings as well as in the time taken in this Court. The proceedings were started in the year 2003. We are in 2007. Therefore, instead of remitting the matter, we ourselves inclined to review the punishment. In our view, instead of dismissing the petitioner from service, it would be appropriate to impose the punishment of compulsory retirement, which would meet the ends of justice.

36. Accordingly, order of dismissal is set aside and instead petitioner is imposed with the punishment of compulsory retirement. The writ petition is allowed to the extent, as indicated above.