**(2002) 12 MAD CK 0152**

**Madras High Court**

**Case No:** Writ Petition No. 18759 of 1998 and W.M.P. No. 28482 of 1998

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| N. Rajan | | APPELLANT |
| | Vs | |
| Deputy Commandant, CISF Unit, The Commandant, CISF, Deputy Inspector General, CISF, Inspector General, CISF and The Director General of CISF | | RESPONDENT |

**Date of Decision:** Dec. 5, 2002

**Acts Referred:**

- Constitution of India, 1950 - Article 26

**Hon'ble Judges:** P.K. Misra, J

**Bench:** Single Bench

**Advocate:** K. Chandru, for M. Ravi, for the Appellant; J. Madana Gopal Rao, S.C.G.S.C., for the Respondent

**Final Decision:** Allowed

**Judgement**

P.K. Misra, J.
The petitioner has challenged the order of dismissal from service as confirmed by the appeal and revisional authorities.

2. The petitioner was appointed as Constable under Central Industrial security Force and joined duty on 1.3.1979. While he was serving as constable in Adilabad district, he received a letter regarding his wife''s illness and he submitted an application for leave. However, he was told by the Deputy Commandant that leave could not be sanctioned. The petitioner left for his native place in Tamil Nadu to look after his ailing wife. A call-up notice was sent in the address of the petitioner directing the petitioner to resume duty immediately, but the petitioner gave a reply stating his difficulties in rejoining duty due to illness of his wife. In his absence, departmental proceedings was initiated and he was called upon to submit explanation. The petitioner in his explanation reiterated that he had returned to his native place to

attend his ailing wife. Ultimately after completion of the enquiry, order of dismissal was passed on 16.5.1994. The appeal and the revision filed by the petitioner were dismissed. The writ petition is against these orders.

3. A counter affidavit has been filed on behalf of the respondents stating that the petitioner was a member of disciplined force and he should not have abandoned the duty.

4. Learned senior counsel appearing for the petitioner has tried to assail the conclusions arrived at in the disciplinary proceedings on several grounds relating to procedural aspects as well as on merit. However, on going through the records of the proceedings and keeping in view the limited scope for interference, it is not possible to uphold the contention of the learned counsel for the petitioner on these aspects as it cannot be said that there is error of law apparent on the face of record.

5. Learned senior counsel has further submitted that even assuming that the allegations regarding unauthorised absence had been proved, in the facts and circumstances of the case, the punishment of dismissal imposed is shockingly disproportionate and the order of dismissal is required to be quashed. This submission of the counsel for the petitioner is combated by the counsel for the respondents stating that since the petitioner is a member of disciplined force, it is not expected from him to leave the place of posting when his leave application was yet to be allowed. Such rival contentions of the learned counsels appearing for the parties require serious consideration.

6. There is no dispute that before leaving the place of posting, the petitioner had filed a leave application enclosing a letter stating about the illness of his wife. It is true that the Deputy Commandant had orally told the petitioner that leave could not be sanctioned. The petitioner at that stage returned to his native place to look after his ailing wife. Even though some doubts are being raised by the counsel for the respondents regarding illness of the petitioner''s wife, from the materials on record it is apparent that in fact the wife of the petitioner was ailing at that time. When the leave application of the petitioner was orally turned down, the petitioner in his anxiety rushed back to the side of his ailing wife. In the above perspective, it has to be seen whether the order of dismissal, which practically deprives the petitioner, his means of livelihood, can be said to be shockingly disproportionate.

7. In D.V. Kapoor Vs. Union of India and others, the delinquent was charged of wilful misconduct in not reporting of duty after his transfer from Indian High Commission at London to the office of External Affairs Ministry, Government of India, New Delhi. In the disciplinary proceedings, it was found that due to his wife''s illness he had failed to report for duty. The President of India accepted the finding, but passed an order with-holding gratuity and payment of pension. The matter ultimately reached the Supreme Court. It was observed that the employee''s right to pension is a statutory right. The measure of deprivation therefore must be correlative to or

commensurate with the gravity of the grave misconduct or irregularity. Ultimately the Supreme Court quashed the order.

8. Even though the aforesaid decision is not strictly applicable in the present case, it clearly lays down that the punishment should be commensurate with the gravity of misconduct.

9. The decision reported in Malkiat Singh Vs. State of Punjab and Others, is more apposite. In the said case a Constable employed under the State of Punjab was discharged on the ground that he remained absent from duty for more than one month and nine days and he was irregular in attending to the duty. The absence on one occasion was on account of the fact that he had to attend to his wife, who was ailing.

10. It was observed by the Supreme Court that

" . . . The explanation offered for the absence on the third occasion was that since in his wife''s delivery certain complications 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 from duty. On the previous two occasions, the absence for one day and in another year for on 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."

11. From the aforesaid decision, it is clear that a lenient view is to be taken where absence cannot be termed as deliberate or wilful and absence at times may be inevitable due to circumstances beyond the control of an employee.

12. The Division Bench decision of this Court reported in 1997 WLR 626 (D. SAINSON v. THE CHIEF SECURITY COMMISSIONER, RAILWAY PROTECTION FORCE, MADRAS AND 3 OTHERS) is equally applicable. In the said case, an employee under Railway Protection Force was removed from service on account of unauthorised absence from duty for 45 days. It was observed :

" . . . There cannot be any second opinion that the appellant who belongs to the disciplined service is to behave and conduct himself in a disciplined manner. Admittedly he had failed to conduct himself in a disciplined manner by not intimating the authorities and unauthorisedly remained absent for 45 days. We are of the view that for such an unauthorised absence, the punishment of withholding of increments for a period of three years with cumulative effect and the non-payment of back wages would be just, reasonable and fair in the facts and circumstances of the case. In our opinion, the order of the Chief Security Commissioner dated 17.5.1995 in treating the period from 21.3.1981 to 22.5.1995 as non qualifying service is not only disproportionate for the offence alleged against the appellant but also harsh and excessive. Hence, this part of the order alone is set

aside."

13. A perusal of the aforesaid three decisions indicates a common thread of principle to the effect that even in a disciplined service the question of unauthorised absence is to be considered with a humane approach. A person when given the option of attending to his ailing wife or to stick to a duty at a distance place really faces a Hobinson''s choice and if a person absents duty temporarily for the sake of attending to his ailing wife, even though guilty of misconduct should not be dismissed from service effectively depriving him of his right to livelihood which is considered to be a fundamental right under Article 21 of the Constitution. Punishment of dismissal in such circumstances would be too harsh and disproportionate. This is not to suggest an employee has the choice to remain absent as and when he likes. Where however, the absence is due to extenuating circumstances, extreme punishment or removal from service would not be meet and proper.

14. For the aforesaid reasons, keeping in view the peculiar facts and circumstances of the case, I am of the opinion that the order of dismissal is required to be quashed. In normal course the matter is to be remitted to the disciplinary authority for imposing any other lesser punishment. However, since the matter has remained pending for quite sometime, it would be more appropriate to give a quietus to the matter by quashing the order of dismissal and instead directing that there shall be stoppage of one increment with cumulative effect and by further directing that the petitioner shall not be paid any backwages for the past period till his reinstatement. It is however made clear that the petitioner shall be deemed to be in continuous service for the purpose of other service benefits such as seniority and pension, etc. The petitioner shall be allowed to rejoin duty within a period of one month from the date of communication of the order.

15. The writ petition is accordingly allowed subject to the directions given above. There would be no order as to costs. Consequently, W.M.P.NO.28482 of 1998 is closed.