

No.1R

OA-2699/97


13.11.2001


43

Present : Sh. Shyam Babu, counsel for applicant.  
Sh. Vijay Pandita, proxy for Sh. Rajinder  
Pandita, counsel for respondents.

We are informed that Sh. Rajinder Pandita is  
still unwell.

List on 06.12.2001.

  
(Dr. A. Vedavalli)  
M(J)

  
(S.R. Adige)  
VC(A)

/vv/

Item No.R-1

O.A. No.2699/1997

6th December, 2001

Present: Shri Shyam Babu, learned counsel for  
the applicant

Shri H.P. Chakorverti, learned proxy counsel  
for Shri Rajinder Pandita, learned for the  
respondents

Learned proxy counsel for respondents' counsel  
seeks an adjournment to study the case.

List the case on 21.12.2001.

(M.P. Singh)  
Member (A)

(Dr. A. Vedavalli)  
Member (J)

/ravi/

2<sup>1</sup>/<sub>2002</sub> Present: Sh. Shyam Babu Lt. Counsel  
for the applicant -  
Sh. Ramphal Singh, sub inspector  
from the Dept.

Argument heard & the case  
is closed for order by a JB of  
Honble U.C. (A) & Honble Sh. Shanker Singh,  
Member (J).

Bo  
original  
C/C-II  
2/1/2002

4-4-2002

Order pronounced today, on  
Dismissal, over on separate sheet  
Bo  
C

CENTRAL ADMINISTRATIVE TRIBUNAL, PRINCIPAL BENCH

OA No.2699/97

New Delhi this the 4<sup>th</sup> day of January, 2002.

HON'BLE MR. S.R. ADIGE, VICE-CHAIRMAN (ADMNV)  
HON'BLE MR. SHANKER RAJU, MEMBER (JUDICIAL)

Shamsher Singh (4812/DAP),  
S/o Shri Tek Chand,  
R/o Vill: Mirzapur,  
P.S. Narnaul, PO Bachod,  
Distt. Mahendergarh (Haryana) -Applicant

(By Advocate Shri Shyam Babu)

-Versus-

1. Sr. Addl. Commissioner of Police,  
(AP&T),  
Police Headquarter,  
I.P. Estate,  
New Delhi.

2. Dy. Commissioner of Police,  
5th Bn. DAP,  
Kingsway Camp,  
Delhi.

-Respondents

(By departmental representative SI Ramphal Singh)

O R D E R

By Mr. Shanker Raju, Member (J):

The applicant, a Constable in Delhi Police, being aggrieved by an order of dismissal passed by the disciplinary authority on 17.10.96, which was affirmed by the appellate authority on 10.12.96, approached this Tribunal, assailing the impugned orders. By order dated 4.8.98, as one of the grounds to challenge the order was non-compliance of Rule 8 (a) and Rule 10 of the Delhi Police (Punishment & Appeal) Rules, 1980, the matter has been tagged with similar cases which have been referred to the Full Bench for decision. By an order dated 28.7.99 the reference has been answered by the Full Bench and the case of the applicant in view of the findings of the Full Bench was considered and rejected without being referred to the Division Bench. Subsequently by filing review before the Full Bench the matter was reviewed and by an order dated

23.4.2001 the case has been listed before the Division Bench for being disposed of on merits.

2. Briefly stated, the applicant who was enrolled in Delhi Police as a Constable, on 1.5.94 on account of his unauthorized and wilful absence w.e.f. 23.11.94 to 11.4.96, i.e., for a period of one year, four months, 18 days and 19 hours has been placed under suspension w.e.f. 8.12.95 and was proceeded against in a department enquiry (DE). The Inquiry Officer (IO) through his findings dated 31.7.96 proved the charge against the applicant. The disciplinary authority agreeing with the findings of the IO where the charge has been proved and keeping in view the long absence period of the applicant in a disciplined force, dismissed him from service and treated the period of suspension as not spent on duty and the period of absence as leave without pay. The appeal preferred against the order of dismissal by the applicant has been considered and rejected by the appellate authority by an order dated 10.12.96.

3. Though the applicant has raised several contentions in support of his claim, but at the outset, he has raised two legal pleas. According to him, once the period of absence in the order of the disciplinary authority has been decided as leave without pay, the same amounts to regularising the period of absence and condoning the charge. As such the punishment imposed is not legally sustainable. The applicant's counsel placed reliance on a decision of the Apex Court of two Judges in State of Punjab v. Bakshi Singh, JT 1998 (7) SC 142. It is further stated that in view of the decision of a larger Bench consisting

of three Judges in State of M.P. v. Harihar Gopal, 1969 SLR SC 274 the High Court of Delhi in Man Singh v. Union of India, set aside the order of Tribunal against which the applicant has preferred an SLP No.14738/2000, where notices have been issued in view of the decision of the larger Bench being per incuriam in the judgement of Bakshi Singh (supra) and further it has been stated that now the matter has been referred to a larger Bench for adjudication.

4. Another contention of the learned counsel for the applicant is that though neither in the summary of allegation nor in the charge framed in the DE the previous bad record of the applicant has been incorporated as a specific charge but yet the IO in his findings has taken into consideration this extraneous material to arrive at a finding of guilt against the applicant without putting it to the applicant and giving him a reasonable opportunity to defend. In this context it is further stated that the disciplinary authority by agreeing with the findings of the IO has also taken into consideration the previous bad record of the applicant while imposing a severe punishment of dismissal, which in view of Rule 16 (xi) of the Delhi Police (Punishment & Appeal) Rules, 1980 could not have been taken into consideration without following the due procedure for incorporating such previous record in the charge framed against the applicant in the DE.

5. On the other hand, the respondents in their reply have strongly rebutted the contentions of the applicant and stated that the remaining absent in a disciplined force for a long period of one year and four months and not responding to the absentee notices and

notice for second medical examination is a grave misconduct rendering the applicant completely unfit for police service. It is also stated that though the applicant has taken treatment as per his medical record at Safdarjung Hospital but he has not cared to report to the Bn. and in absence of any communication sent to the competent authority, i.e., an application stating about the illness and his non-submission of medical record clearly contravenes standing order No.111 as well as CCS (Leave) Rules, 1972. It is also stated that the previous absence of the applicant do indicate towards his continued misconduct and incorrigibility for which the punishment as provided under Rule 10 of the Rules ibid is either dismissal or removal. It is stated that the charge against the applicant has been fully proved in the enquiry and the disciplinary authority as well as the appellate authority have recorded reasons in support of the orders passed by them. As regards the contention of treating the period of absence as leave without pay, placing reliance on a decision of the Apex Court in Harihar Gopal (supra) as well as the decision of the Delhi High Court in ex-Head Constable Kali Ram v. Union of India, 2000 (3) ATJ 460 it is contended that as held by the High Court that the decision in Bakshi Singh's case (supra) is per incuriam and does not over-rule nor differentiate the judgement in Harihar Gopal's case (supra) the treatment of period of absence as leave without pay is nothing but to keep the complete service record of the Government servant and in no manner be construed as regularising the absence period. In this conspectus it is stated that till the decision in

Harihar Gopal's case (supra) is set aside by the larger Bench the same holds the field and is a binding precedent under Article 141 of the Constitution of India.

6. As regards the previous bad record is concerned, it is stated that the IO has though made a mention about the previous record of the applicant but yet before that he has conclusively proved the charge on the basis of evidence and material brought in the DE. In no manner this previous bad record has been relied upon to hold the applicant guilty of his remaining absent for a period of more than one year and this charge has been proved by the IO in his finding. Mere agreement by the disciplinary authority to the findings of the IO would not be construed as also taking into consideration the previous bad record as what has been agreed to is the charge proved by the IO which is not the previous bad record but the absence for more than one year. By referring to Rule 16 (xi) *ibid* it is contended that the previous bad record shall form specific part of a charge in the event the disciplinary authority takes into consideration such record to hold the applicant guilty of a grave misconduct and while awarding the severe punishment. In the order passed by the disciplinary authority there is no whisper about the previous record of the applicant and as the applicant has absented himself for a period of more than one year without submission of the medical record and information and the reasons have been found not justifiable. Mere production of medical record would not entitle the applicant for accord of leave and such a misconduct, more particularly, in a disciplined force renders the applicant completely unfit for police service and warrants extreme punishment of

dismissal. By further referring to the ratio laid down by the Full Bench in its decision dated 28.7.99 it is contended that it is not required to record a specific finding about the grave misconduct or complete unfitness of a police official from service but while passing the order it should be indicated that the mandate of Rule 8 (a) has been borne in mind by the disciplinary authority. According to them the disciplinary authority in the instant case has kept the mandate in mind and having regard to the unauthorized and wilful absence of the applicant for more than one year he has been observed to be such undisciplined who cannot be retained in the department.

7. We have carefully considered the rival contentions of the parties and perused the material on record. The first contention of the applicant regarding treatment of period of absence as leave without pay by the disciplinary authority amounts to regularising and condonation of charge is liable to be rejected at the threshold. As held by the larger Bench of Apex Court in Harihar Gopal's case (supra) which has been re-iterated by the High Court in Kali Ram's case (supra) the treatment of the period of absence as leave without pay is for the purpose of maintaining the correct service record of the applicant and is not regularising the same. The decision in Harihar Gopal's case (supra) being of a larger Bench and is per incuriam in Bakshi Singh's case (supra) holds the field and is to be treated as precedent under Article 141 of the Constitution of India. There is nothing on record to show that the Apex Court in a decision of a larger Bench has set aside/modified or stayed the decision in Harihar Gopal's case (supra). As such we hold that merely because



the disciplinary authority has treated the absent period as leave without pay would not amount to either condoning the charge or regularisation of the period of absence.

8. Another contention of the applicant that having taken into consideration the previous bad record and held the applicant guilty of the charge the disciplinary authority by agreeing with the findings, has, by implication, taken into consideration the previous bad record while imposing the severe punishment of dismissal upon him without following the mandate of Rule 16 (xi) of the Rules *ibid*, cannot be countenanced. What has been provided under Rule 16 (xi) is that in the event a severe punishment, which is dismissal or removal, is awarded to a police official by taking into consideration his previous bad record the aforesaid record was formed part of definite charge and against which a reasonable opportunity to defend is to be provided to the delinquent official. In our considered view in the findings of the IO and more particularly in the conclusion the applicant has been held guilty of remaining absent unauthorizedly and wilfully for a period of more than one year, four months on the basis that neither he informed the department despite opportunity nor produced the medical record by sending an application. Thereafter the IO has referred to the previous record of the applicant to conclude that the pleas taken by the applicant for his deliberate absence are not valid and he is not innocent as in past also the same pleas have been taken and he is a habitual absentee. But while recording his finding of guilt on the charge there has been a reference to the previous bad record which has not at all been the deciding factor regarding proof of the charge.

The disciplinary authority in its order has agreed to the findings of the IO not with reference to the previous record but with reference to the fact that the IO had held the charge fully proved against the applicant. In this view of the matter mere reference of the previous record by the IO in his findings and the fact that the disciplinary authority in its order has not even whispered or made any mention about the previous bad record of the applicant would not be construed to have an effect of consideration of the previous bad record even indirectly. The findings arrived at by the disciplinary authority to impose the severe punishment is not the previous record but the absence of the applicant in a disciplined force for a period of more than one year and in this backdrop it is observed that the applicant has violated the rules and as such cannot be retained in service. As the previous bad record has not been taken into consideration by the disciplinary authority to award a severe punishment to the applicant, we are of the firm view that provisions of Rule 16 (xi) would have no application in the facts and circumstances of the case.

9. Apart from it, the applicant has to act in accordance with the provisions of Rule 19 of CCS (CCA) Rules, 1972 as well as Standing Order No.111 issued by the Commissioner of Police. Leave cannot be claimed as a matter of right. It was incumbent upon him when he specifically reported back for duty on 23.11.94 to have intimated the competent authority about his illness. Despite the fact that the applicant has taken treatment in Safdarjung Hospital at Delhi, nothing prevented him from informing the competent authority about his illness. The

✓ applicant has also not responded to the absentee notices as well as notice for second medical examination which throws doubt about the genuineness of his medical record. The applicant has thereafter also has not sent any information to the competent authority from his native place. In this view of the matter a callous and negligent attitude has been adopted by the applicant, which cannot be countenanced. The IO as well as the disciplinary authority has taken cognizance and considered the defence of the applicant, including his medical record and passed a detailed and speaking order, which cannot be found fault with. The appellate authority too has also dealt with all the contentions of the applicant taken in his appeal and passed a reasoned order.

10. Having regard to the reasons recorded above, we do not find any merit in the present OA, which is accordingly dismissed. No costs.

*S. Raju*  
(SHANKER RAJU)  
MEMBER(J)

*S.R. Adige*  
(S.R. ADIGE)  
VICE-CHAIRMAN (A)

"San."