HIGH COURT OF GUJARAT

JITENDRASINH K GOHIL
V/S
STATE OF GUJARAT

Date of Decision: 05 October 2007

Citation: 2007 LawSuit(Guj) 2603

Hon'ble Judges: S R Brahmbhatt

Eq. Citations: 2008 (1) GLR 595, 2008 (1) GCD 127, 2008 (2) CurLR 198

Case Type: Special Civil Application

Case No: 4393 of 1994

Subject: Constitution, Criminal

Head Note:

Bombay State Reserve Police Force Act, 1951 – Sec 14, 19, 21 – Bombay State Reserve Police Force Rules, 1959 – Rule 47 – Public Servant (Inquiries) Act, 1850 – Constitution of India – Art 226 – Dismissal – Member of police force refused to joint active duty as per order of superiors officer – Delinquent Subsequent admitted to hospital, leave sanctioned by authority – Dismissal order passed – Whether refusal by inquiry officer to summon a witness who delinquent wanted to examine in his offence vitiates enquiry – Held, to obey order of superior officer to join active duty a grave misconduct and punishment of dismissal disproportionate – Fact that delinquent was Subsequent admitted to hospital or leave was sanctioned by authority not material – Not summoning witness who delinquent wanted to examine in his defence will not vitiate inquiry – It is delinquent who has to bring defence witness – Petition dismissed

Acts Referred:

Constitution of India Art 226

Bombay State Reserve Police Force Act, 1951 Sec 14, Sec 19, Sec 21

Bombay State Reserve Police Force Rules, 1959 R 47

Final Decision: Petition dismissed

Important Para: 12

Advocates: Sangeeta N Pahwa,Hemant Makwana

Reference Cases:

Cases Referred in (+): **3**

Judgement Text:-

S R Brahmbhatt, J

[1] The petitioner under Article 226 of the Constitution of India has challenged the order dated 31/12/1990 dismissing the petitioner from services on the ground of defiance and disobeying the order of his superiors for performing internal securities at Bihar on 15/4/1989, on the ground that the impugned order is suffering from patent illegality and the same could not have been passed.

[2] Brief facts deserves to be set out in order to appreciate the controversy as under.

[3] The petitioner was appointed as Police Constable in State Reserve Police Force in the year 1981. The petitioner was required to proceed to Bihar for discharging his duties in respect of internal securities in Bihar. The petitioner was informed by his superiors on 14/4/1989 that he and others will have to proceed for discharging their duties in Bihar as their terms of attachment had been over. The said orders were repeated in the morning parade of 7.00 'O' clock and the Rear Commander had ordered them to report at 11.30 'O' clock. As per the case of the petitioner, he could not remain present as he was admitted in New Civil Hospital, Surat, on account of abdominal pain on 15/4/1989 and was discharged on 17/4/1989. The certificate to that effect issued by Civil Surgeon which was also sent to the authority concerned. The petitioner's leave for the period was also regularised. However the regularisation was subsequent to the charge sheet and

petitioner was issued charge sheet on 4/6/1989. Petitioner reported for duty in Bihar on 15/6/1989. As per the charge sheet dated 4/6/1989 authority levelled charge against the petitioner that the petitioner had acted as unbecoming a member of the Armed Force in disobeying and defying the legitimate order of his superior in proceeding to performing his duties in Bihar as he was required to attend the duty for internal securities in the State of Bihar. The petitioner had been ordered to remain present for marching to Bihar earlier, i.e. 14/4/1989 and again on 15/4/1989 in the morning parade also it was repeated that he was to be in readiness for marching to Bihar for performing duties in Bihar. The petitioner was spotted roaming around village Vav, where from petitioner was to proceed for Bihar, in plain clothes. This fact was reported to Rear Commander who sent a constable to fetch the petitioner. The petitioner came and again he was ordered by Rear Commander to get ready within 15 minutes for marching to Bihar for performing his duty known for internal securities in Bihar. The petitioner defied said order and said that he was not going to Bihar and left from the place. The inquiry was conducted by the very authority, and on finding him guilty, imposed punishment of dismissal vide its order dated 31/12/1990 which is impugned in this petition.

[4] The petitioner preferred appeal and appellate authority also did not accept the contention of the petitioner and dismissed the same. Where from petitioner filed Revision Application before competent authority which also did not accept the contention of the petitioner and ultimately said revision also came to be rejected and the petitioner therefore filed the present petition.

[5] Mrs. Pahwa, learned counsel appearing for the petitioner has contended that the petitioner could not attend the duty as he was required to be admitted in Civil Hospital at Surat. The authorities have accepted certificate of Civil Surgeon and granted him leave for the period of absence and disciplinary authority has not taken the same into consideration and proceeded with inquiry as if the petitioner had of his own volition defied the order of Rear Commander for marching to Bihar. Mrs. Pahwa has further submitted that the petitioner was actually restrained from going to Bihar on account of his ailment which warranted his hospitalisation from 15/4/1989 to 17/4/1989 and the medical certificates prescribing rest thereafter are produced on record of this petition, and on the strength of the certificates it was urged that the non reporting by the petitioner on duty despite the order can not be construed as defiance and the legitimate order of the superiors. In fact it was petitioner's ailment which rendered him incapacitated to attend the call and remain present on the appointed day and time. The Inquiry Officer should not have brushed aside the testimony of petitioner's witness Shri.

Nathabhai Ukabhai Ahir and therefore the inquiry proceedings are also vitiated. Mrs. Pahwa has further submitted that the authorities ought to have summoned Civil Surgeon Shri. Bhagat who could have thrown light upon the fact that, at that time the petitioner was required to be admitted. Petitioner's request for summoning Shri. Bhagat as witness was arbitrarily rejected which has prejudiced petitioner's entire case and therefore, the resultant order of punishment and its confirmation by appellate authority and revisional authority also are vitiated and therefore the same deserved to be quashed and set aside.

[6] Ms. Pahwa has further submitted that, had it been the intention of the petitioner to evade reporting for duty in Bihar, then he would not have reported to Bihar after a period of 2 months as it could be seen from the record that the petitioner did report at Bihar on 15/6/1989. The petitioner has not only reported at Bihar but concerned authority has accepted and acted upon the certificate issued by Civil Surgeon as his leave for the period from 15/4/1989 to 17/4/1989 has been duly sanctioned. This aspect ought to have been taken into consideration by the respondents and as they have not taken it into consideration the inquiry proceeding stands vitiated.

[7] Mrs. Pahwa has submitted that the decision in case of M.N. PARMAR v. DY. COMMISSIONSER OF POLICE, BARODA CITY & ANR, reported in 2001 (4) GLR pg. 3543 would be of no avail to the respondents in as much as the facts in both the cases are entirely different and the fact remains to be noted that in the case of Mr. Parmar (supra) the authorities were justified in passing the order impugned in the petition as the delinquent had admitted his guilt for remaining unauthorised absent for a period of 316 days. Moreover in the case of Mr. Parmar (supra) the delinquent did not submit medical certificate in time and after submitting medical certificate the inquiry was initiated when the period of absence was condoned by sanctioning leave. In the instant case the petitioner had been prompt enough to produce medical certificate after his discharge from Government hospital. The first certificate produced at page-20 clearly indicate that the petitioner was required to be hospitalised from 15/4/1989 to 17/4/1989 and thereafter he was advised complete rest for a period of 15 days from 17/4/1989. The 2nd certificate at page 26 indicate that the petitioner was again examined and was advised rest of 3 weeks from 2/5/1989, said certificate is dated 20/5/1989. The 3rd certificate on page 27 dated 13/6/1989 indicate that petitioner was treated and was advised rest and in the same certificate factom of fitness was also recorded and after getting fitness certificate petitioner proceeded for resuming his duty in Bihar in respect of internal securities. Mrs. Pahwa has submitted that, therefore the authority who has

sanctioned the leave on the strength of the certificate could not have initiated departmental proceedings as it goes without saying that the factom of his ailment on 15/4/1989 had been accepted even by the authorities who has issued charge sheet. It deserves to be noted that the charge sheet was issued earlier in point of time than the sanctioning of leave which is subsequent in point of time as it is apparent from the report. The petitioner made request calling upon the authorities to produce the record indicating sanctioning of his leave as well as to examine the clerk who was handling the table. As the request was not acceded, disciplinary proceedings to that extent also stood vitiated which warrants quashing of the same. Mrs. Pahwa has further submitted that from any point of view the punishment of dismissal which is in fact an economic death not only to the delinquent but also to his family members ought not to have been imposed for such an act which in fact go to show that petitioner could not report in time as he was hospitalised. As it is stated herein above, had the petitioner ever been nourishing the design of avoiding his duties at Bihar then he would not have proceeded after 2 months as he would have continued on the same pretext of illness thereafter. The certificate issued by the Civil Surgeon and which has been acted upon by the authorities therefore can not be brushed aside by the very same disciplinary authority, who is nothing but an appointing authority and leave sanctioning authority in the present case. Mrs. Pahwa submitted that therefore, in view of these the petition deserves to be allowed.

[8] Shri. Hemant Makwana, learned AGP has submitted that the disciplinary proceedings can not be equated with criminal proceedings and the fine distinction between the two deserves to be borne-in -mind while examining the challenge to the order of penalty which has resulted into disciplinary proceeding. The requirement of proof and evidence and onus of producing proof is different in criminal proceeding which can not stricto senso be applicable in the disciplinary proceedings. In case of disciplinary proceedings preponderance of probability is always treated to be sufficient for imposing appropriate punishment. Shri. Makwana has submitted that in the instant case the charge deserves to be taken into consideration which is not petitioner's absence for the period he was under treatment or hospitalised. Charge is only to the effect that he had defied the order of his superiors and thereby shown a rebellion act which was unbecoming of a member of police force which can not be in any way condoned as it would amount to giving license or setting bad precedent for his colleagues. Shri. Makwana has pressed into service proviso of Rule 14 (g) of State Reserve Police Force Act 1951 in order to show the gravity of the charge against the petitioner. Shri. Makwana has submitted that such kind of disobedience is always

viewed with utmost seriousness which if proved in the court of law is capable of incurring punishment of 14 years rigorous imprisonment. He submits that the provision of Rule 14 therefore deserves to be borne in mind while examining the submission of delinquent in respect of his delinquency and the punishment imposed upon him for such delinquency which is proved on the basis of valid disciplinary proceedings.

[9] Shri Makwana has drawn attention of this Court to a document at page 33 and submitted that the investigating officer had in fact issued notice to the delinquent, calling upon him to bring his witness if he was to rely upon his testimony in the disciplinary proceedings because said witness was cited by the delinquent and therefore a duty was cast upon him to procure his presence if he wanted to prove his case. Assuming for the sake of argument, without conceding that the delinquent petitioner did suffer on account of ailment on 15/4/1989, then also at what point of time he was required to be hospitalised has not been proved by the delinquent. It was the assertion of the delinquent that on account of ailment he could not report for duty as instructed and ordered on 14/4/1989 and 15/4/1989. This assertion is made by delinquent and therefore duty was cast upon the delinquent to make it good by adducing evidence at his command. Delinquent petitioner has examined only one witness from his side who also from his testimony could not be said to be a witness worth relying upon. The credibility of the witness cannot be said to be impeccable as could be seen from the tenor of his deposition.

[10] This Court heard learned counsels of the parties at length and perused the record. The fact deserves to be noted that the charge levelled against the petitioner is in respect of his defiant attitude and audacity in disobeying the legitimate order of the superiors for remaining present and marching for attending his internal security duties in Bihar. It is very important to note that the charge is not in respect of not reporting in Bihar at all. The charge is petitioner's attitude which deserves to be deprecated as he defied the order of his superiors for no justifiable reasons. Keeping this in mind the rival submissions of the counsels for the parties and various provisions deserves to be examined. The inquiry authority issued charge sheet on 4/6/1989 and the petitioner reported for his duty in Bihar on 15/6/1989. The delinquent- petitioner received the charge sheet on 21/6/1989. During inquiry proceedings the the delinquent-petitioner was called upon to give his version on the charges levelled against him in the charge sheet dated 4/6/1989 and indicate his desire whether he would like to examine the witness etc. The petitioner did not avail the opportunity and on the contrary addressed a letter stating that it would not be possible for him to bring Civil Surgeon Shri. Bhagat for

deposing before the inquiry authority and he stated that the concerned officer holding inquiry shall summon him and examine him. The Inquiry Officer has concluded the inquiry and found the charge were proved against the delinquent and the concerned authority provided copy of the Inquiry Officer's Report to the delinquent for showing cause as to why the penalty of dismissal shall not be imposed upon him. The second show cause notice was issued on 25/3/1990. The delinquent did not respond to the second show cause notice for a period of 9 months. The authorities waited and ultimately the disciplinary authority passed an order dismissing the petitioner from the services on 31/12/1990.

[11] Shri. Makwana, learned AGP has drawn attention of this Court to the averment made in the affidavit-in-reply filed on behalf of the respondent and affirmed on 17/7/2001, wherein the deponent of the affidavit on behalf of the respondent has unequivocally stated that, the City of Surat is situated about 25 K.ms from Vav and one could reach to the hospital within an hour or so. It is also averred in the affidavit on internal page 5, running page 15 that the facility of ambulance for carrying ailing or injured SRP Soldiers was available in the Vav camp but the petitioner for the reasons best known to him did not choose to avail the same and he got himself admitted in the Surat Civil Hospital at about 6.20 p.m. in the evening. Shri. Makwana has produced on record, the record of the medical case papers wherein it is stated that the present petitioner was admitted in the hospital for complaint of abdominal pain on 15/4/1989 at 6/20 and was discharged on 17/4/1989 at 5.00 p.m. Thus the admission in the hospital can not be said to be a ground which was available or which prevented the petitioner from obeying the legitimate order of marching for his duties at Bihar. The petitioner has clearly disobeyed the order. This Court can not agree with the submission made by Mrs. Pahwa that the disciplinary authority and or the inquiry authority had no reason to disbelieve the version of the private defence witness who stated that he had taken the petitioner on his motor cycle to the hospital at around 11.30. The testimony of the sole witness produced by the petitioner was required to be viewed in juxtaposition to the testimony of as many as 6 prosecution witnesses who have unequivocally stated that the petitioner did disobey and defied the order of the superiors. The testimony of Rear Commander and the person who had been sent to fetch the petitioner go to show that the same were beyond reasonable doubt. Therefore, Mrs. Pahwa's submission with regard to perversity in the inquiry is without merit and the same deserves rejection.

[12] The act of defiance of legitimate orders of superiors for being in readiness for marching to Bihar for performing duties in respect of internal securities is certainly a

serious and grave misconduct. Section 14 of the Bombay State Reserve Police Force Act, 1951 provides for prosecuting such officers who while on active duty disobeys the lawful command of his superior officer. The active duty is defined under Section 2 (a) as under:

> ?S2(a) ?Sactive duty?? means -
>
> (i)the duty to [prevent or] investigate offences involving a breach of peace or danger to life or property and to search for and apprehend person concerned in such offences or who are so desperate and dangerous as to render their being at large hazardous to the community. ?S

[13] The orders for being in readiness can though not be said to be a direction, the delinquent who is said to be in active duty to the defiance of his superior officer of legitimate order to be in readiness for marching to Bihar for performing duties in respect of internal security, can not be said to be no misconduct or less misconduct in eye of law.

[14] Rule 47 of the Bombay State Reserve Police Force Rules, 1959 provides for initiating disciplinary proceedings to be taken against the delinquents. It also provides that in case the disciplinary proceedings initiated thereunder and the delinquent is found to be guilty, then the punishment prescribed under Section 21 of the Bombay Police Act read with Section 19 of the Act could be awarded.

[15] As it appears from the record the petitioner was in fact required to accompany his colleagues in the Company for performing his duties for internal security at Bihar long ago as his Company had already reached Bihar. The petitioner and few others had been permitted to be at Vav Camp though their Company had already gone to Bihar. Therefore petitioner was said to be in 'attachment' and as soon as the term of 'attachment' was over, he was required to be sent to Bihar where his Company was performing duties for internal security. As it is mentioned in para-6 of the affidavit in reply filed on behalf of Respondent No.2, in the year 1988-89 petitioner was sent for internal security in the State of Bihar and thereafter from State of Bihar petitioner was sent for 30 days attached to Vav Head Quarter and after completion of that period on 15/4/1989 at about 7.00 hours, the Rear Commander ordered the petitioner at about 11.30 hours to be ready to perform his duties it the State of Bihar. When the call of follow up was given petitioner was not found. On 15/4/1989 it was found that the

petitioner was wandering in civil clothes in village Vav. He was summoned and asked to be ready within 15 minutes to proceed to Patna (Bihar), and at that time petitioner refused and said that he would not go to Patna and went away. All the witnesses have deposed to that effect as stated herein above. It also deserves to be noted that the SRP Jawans in the Camp if they fall sick are to be admitted in hospital under the instructions and with the knowledge of their superiors. The factom of availability of ambulance van also mentioned in this affidavit-in-reply which has admittedly not been availed of by the petitioner. All these facts go to indicate that the petitioner defied the order of readiness and march towards Patna and afterwards in order to justify the said action got himself admitted in the hospital.

[16] From the case case papers it indicated that on 15/4/1989 petitioner was admitted in the hospital at 6.20 and was discharged from hospital at 5 p.m. on 17/4/1989. Reading this timings in juxtaposition with the testimony of the witness of the petitioner that he accompanied the petitioner to the hospital at 11.30 in the morning go to show that the testimony of the witness has rightly been disbelieved by the authority. As it is stated herein above not only the hospital record, the witnesses for the department have unequivocally stated that the petitioner did defy the order and when he was summoned to be ready for marching towards Patna (Bihar) he refused and went away from there. The Apex Court in case of MITHILESH SINGH V. UNION OF INDIA, reported in AIR 2003 SC, 1724, has held that, mere making an application for grant of leave was not sufficient and even if it was accepted that an application for grant of leave was made, same can not be construed to be an appropriate intimation for absenting from duty when a charge for absent without leave being examined by the authorities. The Apex Court in para-10 has observed as under:

> ?S10. We find from the factual position, which is undisputed that the appellant was posted at Tarantaran in Punjab, a terrorist affected area and was, at the relevant time, working in the Railway Protection Special Force. Any act of indiscipline of such an employee cannot be lightly taken. In Ashok Kumar Singh's case (supra), the employee was a police constable and it was held that act of indiscipline by such a person needs to be dealt with sternly. As noted by the Division Bench of the High Court, penalty of removal of service is statutorily prescribed. It is for the employee concerned to show that how penalty was disproportionate to the proved charges. No mitigating circumstance has been placed by the appellant to show, as to how the punishment could be characterised as disproportionate and/or shocking. On

the contrary as established in the discipline proceedings, the appellant left the arms and ammunition unguarded and not in any proper custody. This aggravated the aberrations. Therefore, the order of removal from service cannot be faulted. There is no reason to interfere with the orders of the Division Bench of the High Court. ?S

[17] Thus defiance by the petitioner can not be viewed lightly, nor the penalty could be termed to be disproportionate in absence of any mitigating circumstance.

[18] In another case of STATE OF U.P. AND OTHERS, V. ASHOK KUMAR SINGHAND ANOTHERS, reported in AIR 1996 S.C. 736, it is held that the punishment of removal from service was not found to be disproportionate when the police constable was held guilty of misconduct of remaining absent without leave.

[19] This brings this Court to examine the plea with regard to the authorities alleged failure in examining Mr. Bhagat, Civil Surgeon, who was cited to be the defence witness by the petitioner. It deserves to be noted that, it was the case of the petitioner that the Civil Surgeon Bhagat could be examined as witness who could throw light about timings of petitioner's admission in the hospital. Therefore it was first and foremost duty cast upon the petitioner to make good his assertion which he was making in his defence. Assuming for the sake of examining the submission that Mr. Bhagat, Civil Surgeon, being an independent person was not amenable to the request of the petitioner, then also the said could well be applicable to the inquiry officer who was holding departmental proceedings and in absence of specific power to summon witness as it is provided in the Public Servants (Inquiries) Act 1850 it would not have been possible for the concerned officer to summon private citizen who is under no obligation to remain present to attend the inquiry that would amount to undue encroachment upon the right of a citizen. Thus power to summon is therefore required to be provided in the concerned Rule governing the proceedings itself. But in absence of such power in a domestic inquiry the inquiry authority can not summon the private witness on his own. It deserves to be noted that by letter (Annexure-D) which is at page 33 the petition, the petitioner was given enough opportunity to fetch Shri. Bhagat, Civil Surgeon, in support of his case. However he could not avail for the best reasons known to him and therefore also the inquiry proceedings can not be vitiated. The revisional authorities observance with regard to non examination of Shri. Bhagat can not be of any avail to the petitioner in this petition under Article 226 of the Constitution of India.

[20] This brings to the next submission of the counsel for the petitioner's challenge to the very initiation of proceedings, especially when the concerned authorities had sanctioned the leave of the petitioner relying upon the medical certificates produced by the petitioner. Shri. Makwana, learned AGP has placed reliance upon the decision of this Court in case of M.N. PARMAR V. DY. COMMISSIONSER OF POLIE, BARODA CITY & ANR, reported in 2001 (4) GLR pg. 3543, wherein in a case where the unauthorised absence was condoned by the competent authority and leave extraordinary or leave without pay was granted. That delinquent was subjected to inquiry for the very purpose of remaining unauthorised absence which again was challenged before this Court by way of writ petition by the delinquent officer and this Court negatived the submission and rejected the petition. Mrs. Pahwa attempted to highlight the distinguishing features in case of M.N. Parmar (supra) on the ground that in the case before the Court the delinquent had in fact admitted his guilt of remaining unauthorisedly absent and the unauthorised absence was for long period of about 360 days. Therefore, the fact of that case can not be of any avail to the respondent in as much as in the present case the petitioner had in fact remained absent for about two months that too on a valid medical certificate as he was advised rest by the doctor. This Court is unable to agree with the submission of Mrs. Pahwa. The very reading of the charge itself would go to show that the charge was not for remaining absent for two months and not joining duty as for that period even the leave was sanctioned. The charge is that of defying the legitimate order of the superiors without any reason and may be for avoiding joining duty at Bihar where petitioner was required to join for performing his duty for internal security. Therefore, Mrs. Pahwa is not correct in her submission that the factom of sanctioning of leave shall militate against issuance of charge. Therefore the petition can not be said to be containing any merits so as to warrant interference under Article 226 of the Constitution of India.

[21] The medical certificates and diagnosis not mentioned in the certificate leave much room for appropriate conclusion to be drawn. This Court hasten to add that, this Court is not undertaking any exercise in this direction. Be that as it may; suffice it to say that the order of disciplinary authority, that of appellate authority and the revisional authority can not be said to be contrary to law in any manner, and as the same is absolutely just and proper the petition deserves to be dismissed as having no merits. Accordingly the same is dismissed. Rule discharged. No cost.