Union Of India & Ors vs Dwarka Prasad Tiwari on 12 October, 2006

Equivalent citations: 2006 AIR SCW 5185, 2006 (10) SCC 388, 2006 LAB. I. C. 4221, AIR 2007 SC (SUPP) 1903, (2007) 1 UPLBEC 218, (2007) 1 JAB LJ 102, (2007) 2 MAD LJ 278, (2006) 8 SCJ 30, (2006) 10 SCALE 233, (2006) 4 LAB LN 596, (2006) 7 SUPREME 758, (2007) 1 CURLR 18, MANU/SC/4513/2006

Author: Arijit Pasayat

Bench: Arijit Pasayat, Lokeshwar Singh Panta

```
           CASE NO.:
Appeal (civil)  4454 of 2006

PETITIONER:
Union of India & Ors

RESPONDENT:
Dwarka Prasad Tiwari

DATE OF JUDGMENT: 12/10/2006

BENCH:
ARIJIT PASAYAT & LOKESHWAR SINGH PANTA

JUDGMENT:
```

J U D G M E N T (Arising out of SLP) No. 23847 of 2005) With CA No. 4455 of 2006 (Arising out SLP(C) No. 15725 of 2006) ARIJIT PASAYAT, J.

Leave granted in both the Special Leave Petitions.

These two appeals are directed against a common judgment of the Madhya Pradesh High Court at Jabalpur allowing the writ petition filed by the respondent Dwarka Prasad who is the appellant in the appeal relating to SLP(C) No. 15725 of 2006. The writ petition was partially allowed by a learned Single Judge of the High Court holding that the punishment of dismissal from service imposed on respondent- Dwarka Prasad was too harsh and was required to be substituted by an appropriate lesser punishment. Accordingly the order of dismissal was set aside and reinstatement with continuity of service without any back wages was directed and it was further directed that from the date of judgment the respondent-Dwarka Prasad shall be entitled for full salary.

The background facts in a nutshell are as follows:

> Respondent-Dwarka Prasad was posted as a constable with Central Reserve Police Force (in short the 'CRPF') in F/74 Battalion, CRPF at Platoon Post, Jayanti Pura which was accommodated in a building on Batala Amritsar Road a sensitive and terrorist infested area. He was on sentry duty from 1000 hrs. to 1200 hrs. on 31.8.1989 on the roof of the building. He had been issued a 7.62 mm SLR and 40 rounds of ammunition. At about 1115 hrs, he fired one bullet without orders and without any sufficient reason. A Court of Inquiry was conducted and it was established that he alone was responsible for the firing in which he had sustained bullet injury in his abdomen. Accordingly a departmental inquiry in terms of Rule 27 of the Central Reserve Police Force Rules, 1955 (in short the 'Rules') was ordered alleging misconduct and negligence/remissness in discharge of his duty in his capacity as a member of the Force. The inquiry was conducted and the respondent-Dwarka Prasad was given opportunity to defend himself. The inquiry officer found the respondent guilty of charges framed against him. After consideration of the representation made by respondent-Dwarka Prasad, the Commandant dismissed him from the services with effect from 20.01.1990 under Rule 27(a)(i) of the Rules.

Against the order of dismissal respondent preferred an appeal to the Deputy Inspector General of Police (in short the 'DIGP'), CRPF. During pendency of the appeal, a writ petition was filed under Articles 226 and 227 of the Constitution of India, 1950 (in short the 'Constitution') which was numbered as M.P. No. 2978 of 1990. The High Court by its order dated 26.11.1990 dismissed the petition but direction was given for disposal of the appeal pending before the DIGP, CRPF who dismissed the appeal. A revision petition before Additional Director General (in short the 'ADG'), CRPF did not bring any relief.

A review petition was filed before the Director General (in short the 'DG'), CRPF who modified the punishment of dismissal to one of removal considering the respondent- Dwarka Prasad's young age and short length of service. Against the said order a writ petition bearing number M.P. No. 2150 of 1992 was filed under Articles 226 and 227 of the Constitution. The High Court by the impugned judgment held that the defence of the respondent-Dwarka Prasad was not properly considered by any departmental authority and the punishment awarded was shockingly disproportionate. Accordingly as noted above the punishment was set aside and direction for reinstatement with certain other benefits was given.

In support of the appeal, learned counsel for the Union of India and its functionaries submitted that the High Court has completely overlooked the fact that the respondent-Dwarka Prasad was a member of a disciplined Force. He had committed a serious misconduct and after taking into account the relevant factors, the departmental authority initially passed the order of dismissal, which by taking a compassionate view the DG on review modified to that of removal from service. The High Court did not indicate even any reason as to why it considered the punishment to be disproportionate or considered to be shockingly disproportionate. No reason was given to justify this conclusion. Mere reference to the decision of this Court in B.C. Chaturvedi v. Union of India and Others (1995(6) SCC

749) without indicating as to how the view expressed in paragraph 12 thereof had any application to the facts of the case.

It was, therefore, submitted that the order of the High Court should be set aside and the order passed by the DG should be restored. In the appeal filed by Dwarka Prasad the primary stand is that there was no misconduct involved and therefore, the High Court should have found him innocent and should have held that no punishment was warranted. The charges against respondent-Dwarka Prasad were as follows:

> "ARTICLE-I That the said No. 830762299 Ct. Dwarka Prasad Tiwari while functioning as sentry in F coy 76 Bn. CRPF at platoon post Jayantipura, on 31.01.1989 between 1000 hrs. to 1200 hrs he committed an act of misconduct in his capacity as member of the Force U/s. 11(1) of CRPF Act 1949 in that he fired one round from his service weapon (SLR) at his own without any permission from the competent authority and without any sufficient reason.

ARTICLE -II That during the aforesaid period and while functioning in the aforesaid office the said No. 8230762299 Ct. Dwarka Prasad Tiwari was guilty of neglect of duty and remissness in his capacity as member of the Force U/s. 1191) of CRPF Act, 1949 in that he fired one round from his weapon (SLR) and sustaining bullet injury in his abdomen."

Learned counsel for the Union of India and its functionary has referred to the statement made by respondent-Dwarka Prasad admitting his guilt and giving clean chit to one Hawaldar Mahavir Singh. Contrary to that statement, presently his stand is that it was the said Hawaldar-Mahavir Singh who was responsible for the shooting incident.

The scope of interference with quantum of punishment has been the subject-matter of various decisions of this Court. Such interference cannot be a routine matter.

Lord Greene said in 1948 in the famous Wednesbury case (1948 (1) KB 223) that when a statute gave discretion to an administrator to take a decision, the scope of judicial review would remain limited. He said that interference was not permissible unless one or the other of the following conditions was satisfied, namely the order was contrary to law, or relevant factors were not considered, or irrelevant factors were considered; or the decision was one which no reasonable person could have taken. These principles were consistently followed in the UK and in India to judge the validity of administrative action. It is equally well known that in 1983, Lord Diplock in Council for Civil Services Union v. Minister of Civil Service [(1983) 1 AC 768] (called the CCSU case) summarized the principles of judicial review of administrative action as based upon one or other of the following viz., illegality, procedural irregularity and irrationality. He, however, opined that "proportionality" was a "future possibility".

In Om Kumar and Ors. v. Union of India (2001 (2) SCC

386), this Court observed, inter-alia, as follows:

"The principle originated in Prussia in the nineteenth century and has since been adopted in Germany, France and other European countries. The European Court of Justice at Luxembourg and the European Court of Human Rights at Strasbourg have applied the principle while judging the validity of administrative action. But even long before that, the Indian Supreme Court has applied the principle of "proportionality" to legislative action since 1950, as stated in detail below.

By "proportionality", we mean the question whether, while regulating exercise of fundamental rights, the appropriate or least- restrictive choice of measures has been made by the legislature or the administrator so as to achieve the object of the legislation or the purpose of the administrative order, as the case may be. Under the principle, the court will see that the legislature and the administrative authority "maintain a proper balance between the adverse effects which the legislation or the administrative order may have on the rights, liberties or interests of persons keeping in mind the purpose which they were intended to serve". The legislature and the administrative authority are, however, given an area of discretion or a range of choices but as to whether the choice made infringes the rights excessively or not is for the court. That is what is meant by proportionality.

xxx xxx xxx xxx xxx The development of the principle of "strict scrutiny" or "proportionality" in administrative law in England is, however, recent. Administrative action was traditionally being tested on Wednesbury grounds. But in the last few years, administrative action affecting the freedom of expression or liberty has been declared invalid in several cases applying the principle of "strict scrutiny". In the case of these freedoms, Wednesbury principles are no longer applied. The courts in England could not expressly apply proportionality in the absence of the convention but tried to safeguard the rights zealously by treating the said rights as basic to the common law and the courts then applied the strict scrutiny test. In the Spycatcher case Attorney General v. Guardian Newspapers Ltd. (No.2) (1990) 1 AC 109 (at pp. 283-284), Lord Goff stated that there was no inconsistency between the convention and the common law. In Derbyshire County Council v. Times Newspapers Ltd. (1993) AC 534, Lord Keith treated freedom of expression as part of common law. Recently, in R. v. Secy. Of State for Home Deptt., ex p. Simms (1999) 3 All ER 400 (HL), the right of a prisoner to grant an interview to a journalist was upheld treating the right as part of the common law. Lord Hobhouse held that the policy of the administrator was disproportionate. The need for a more intense and anxious judicial scrutiny in administrative decisions which engage fundamental human rights was re-emphasised in in R. v. Lord Saville ex p (1999) 4 All ER 860 (CA), at pp.870,872) . In all these cases, the English Courts applied the "strict scrutiny" test rather than describe the test as one of "proportionality". But, in any event, in respect of these rights "Wednesbury" rule has ceased to apply.

However, the principle of "strict scrutiny"

or "proportionality" and primary review came to be explained in R. v. Secy. of State for the Home Deptt. ex p Brind (1991) 1 AC 696. That case related to directions given by the Home Secretary under the Broadcasting Act, 1981 requiring BBC and IBA to refrain from broadcasting certain matters through persons who represented organizations which were proscribed under legislation concerning the prevention of terrorism. The extent of prohibition was linked with the direct statement made by the members of the organizations. It did not however, for example, preclude the broadcasting by such persons through the medium of a film, provided there was a "voice-over" account, paraphrasing what they said. The applicant's claim was based directly on the European Convention of Human Rights. Lord Bridge noticed that the Convention rights were not still expressly engrafted into English law but stated that freedom of expression was basic to the Common law and that, even in the absence of the Convention, English Courts could go into the question (see p. 748-49).

> ".....whether the Secretary of State, in the exercise of his discretion, could reasonably impose the restriction he has imposed on the broadcasting organisations"

and that the courts were "not perfectly entitled to start from the premise that any restriction of the right to freedom of expression requires to be justified and nothing less than an important public interest will be sufficient to justify it".

Lord Templeman also said in the above case that the courts could go into the question whether a reasonable minister could reasonably have concluded that the interference with this freedom was justifiable. He said that "in terms of the Convention" any such interference must be both necessary and proportionate (ibid pp. 750-51).

In the famous passage, the seeds of the principle of primary and secondary review by courts were planted in the administrative law by Lord Bridge in the Brind case (1991) 1 AC

696. Where Convention rights were in question the courts could exercise a right of primary review. However, the courts would exercise a right of secondary review based only on Wednesbury principles in cases not affecting the rights under the Convention. Adverting to cases where fundamental freedoms were not invoked and where administrative action was questioned, it was said that the courts were then confined only to a secondary review while the primary decision would be with the administrator. Lord Bridge explained the primary and secondary review as follows:

> "The primary judgment as to whether the particular competing public interest justifying the particular restriction imposed falls to be made by the Secretary of State to whom Parliament has entrusted the discretion. But, we are entitled to exercise a secondary judgment by asking whether a reasonable Secretary of State, on the material before him, could reasonably make the primary judgment."

But where an administrative action is challenged as "arbitrary" under Article 14 on the basis of Royappa (1974) 4 SCC 3 (as in cases where punishments in disciplinary cases are challenged), the question will be whether the administrative order is "rational" or "reasonable" and the test then is the Wednesbury test. The courts would then be confined only to a secondary role and will only have

to see whether the administrator has done well in his primary role, whether he has acted illegally or has omitted relevant factors from consideration or has taken irrelevant factors into consideration or whether his view is one which no reasonable person could have taken. If his action does not satisfy these rules, it is to be treated as arbitrary. In G.B. Mahajan v. Jalgaon Municipal Council (1991) 3 SCC 91 at p. 111 Venkatachaliah, J. (as he then was) pointed out that "reasonableness" of the administrator under Article 14 in the context of administrative law has to be judged from the stand point of Wednesbury rules. In Tata Cellular v. Union of India (1994) 6 SCC 651 at pp. 679-80), Indian Express Newspapers Bombay (P) Ltd. v. Union of India (1985) 1 SCC 641 at p.691), Supreme Court Employees' Welfare Assn. V. Union of India (1989) 4 SCC 187 at p. 241) and U.P. Financial Corpn. V. Gem Cap(India) (P) Ltd. (1993) 2 SCC 299 at p. 307) while judging whether the administrative action is "arbitrary" under Article 14 (i.e. otherwise then being discriminatory), this Court has confined itself to a Wednesbury review always.

The principles explained in the last preceding paragraph in respect of Article 14 are now to be applied here where the question of "arbitrariness" of the order of punishment is questioned under Article 14.

xxx xxx xxx xxx xxx Thus, from the above principles and decided cases, it must be held that where an administrative decision relating to punishment in disciplinary cases is questioned as "arbitrary" under Article 14, the court is confined to Wednesbury principles as a secondary reviewing authority. The court will not apply proportionality as a primary reviewing court because no issue of fundamental freedoms nor of discrimination under Article 14 applies in such a context. 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 rare cases where there has been long delay in the time taken by the disciplinary proceedings and in the time taken in the courts, and such extreme or rare cases can the court substitute its own view as to the quantum of punishment."

In B.C. Chaturvedi case (supra) it was observed:

> "A review of the above legal position would establish that the disciplinary authority, and on appeal the appellate authority, being fact-finding authorities have exclusive power to consider the evidence with a view to maintain discipline. They are invested with the discretion to impose appropriate punishment keeping in view the magnitude or gravity of the misconduct. The High Court/Tribunal, while exercising the power of judicial review, cannot normally substitute its own conclusion on penalty and impose some other penalty. If the punishment imposed by the disciplinary authority or the appellate authority shocks the conscience of the High Court/Tribunal, it would appropriately mould the relief, either directing the disciplinary/appellate authority to reconsider the penalty imposed, or to shorten the litigation, it may itself, in exceptional and rare cases, impose appropriate punishment with cogent reasons in support thereof."

In Union of India and Anr. v. G. Ganayutham (1997 [7] SCC 463), this Court summed up the position relating to proportionality in paragraphs 31 and 32, which read as follows:

> "The current position of proportionality in administrative law in England and India can be summarized as follows:
>
> (1) To judge the validity of any administrative order or statutory discretion, normally the Wednesbury test is to be applied to find out if the decision was illegal or suffered from procedural improprieties or was one which no sensible decision-maker could, on the material before him and within the framework of the law, have arrived at.

The court would consider whether relevant matters had not been taken into account or whether irrelevant matters had been taken into account or whether the action was not bona fide. The court would also consider whether the decision was absurd or perverse. The court would not however go into the correctness of the choice made by the administrator amongst the various alternatives open to him. Nor could the court substitute its decision to that of the administrator. This is the Wednesbury (1948 1 KB 223) test.

(2) The court would not interfere with the administrator's decision unless it was illegal or suffered from procedural impropriety or was irrational in the sense that it was in outrageous defiance of logic or moral standards. The possibility of other tests, including proportionality being brought into English administrative law in future is not ruled out. These are the CCSU (1985 AC 374) principles.

(3)(a) As per Bugdaycay (1987 AC

514), Brind (1991 (1) AC 696) and Smith (1996 (1) All ER 257) as long as the Convention is not incorporated into English law, the English courts merely exercise a secondary judgment to find out if the decision-maker could have, on the material before him, arrived at the primary judgment in the manner he has done.

(3)(b) If the Convention is incorporated in England making available the principle of proportionality, then the English courts will render primary judgment on the validity of the administrative action and find out if the restriction is disproportionate or excessive or is not based upon a fair balancing of the fundamental freedom and the need for the restriction thereupon.

(4)(a) The position in our country, in administrative law, where no fundamental freedoms as aforesaid are involved, is that the courts/tribunals will only play a secondary role while the primary judgment as to reasonableness will remain with the executive or administrative authority. The secondary judgment of the court is to be based on Wednesbury and CCSU principles as stated by Lord Greene and Lord Diplock respectively to find if the executive or administrative authority has reasonably arrived at his decision as the primary authority.

(4)(b) Whether in the case of administrative or executive action affecting fundamental freedoms, the courts in our country will apply the principle of "proportionality" and assume a primary role, is left

open, to be decided in an appropriate case where such action is alleged to offend fundamental freedoms. It will be then necessary to decide whether the courts will have a primary role only if the freedoms under Articles 19, 21 etc. are involved and not for Article 14.

Finally, we come to the present case. It is not contended before us that any fundamental freedom is affected. We need not therefore go into the question of "proportionality". There is no contention that the punishment imposed is illegal or vitiated by procedural impropriety. As to "irrationality", there is no finding by the Tribunal that the decision is one which no sensible person who weighed the pros and cons could have arrived at nor is there a finding, based on material, that the punishment is in "outrageous" defiance of logic. Neither Wednesbury nor CCSU tests are satisfied. We have still to explain "Ranjit Thakur (1987 [4] SCC 611)".

The common thread running through in all these decisions is that the Court should not interfere with the administrator's decision unless it was illogical or suffers from procedural impropriety or was shocking to the conscience of the Court, in the sense that it was in defiance of logic or moral standards. In view of what has been stated in the Wednesbury's case (supra) the Court would not go into the correctness of the choice made by the administrator open to him and the Court should not substitute its decision to that of the administrator. The scope of judicial review is limited to the deficiency in decision-making process and not the decision.

To put differently 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 a 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.

The above position was recently reiterated in Union of India and Anr. v. K.G. Soni (2006 (6) Supreme 389) following Damoh Panna Sagar Rural Regional Bank and Others v. Munna Lal Jain (2005 (10) SCC 84).

The High Court, as rightly submitted by learned counsel for Union of India, has not indicated any reason for coming to the conclusion that the punishment was shockingly disproportionate. The High Court only stated that the defence of respondent-Dwarka Prasad was not duly considered. If that was really so, the High Court would have interfered on that ground but that has not been done. The High Court's order therefore reflects non application of mind. The impugned order of the High Court is set aside. The matter is remitted to the High Court to re-hear the writ petition restricted to the question of quantum of punishment. The appeal filed by respondent-Dwarka Prasad is without merit in view of the fact that his statement at different stages during the departmental proceedings indicates that he has accepted that he himself was responsible for the incident.

In ultimate result the appeal filed by Union of India is allowed to the extent indicated, while the appeal filed by Dwarka Prasad is dismissed. No costs.