BEFORE THE UTTARAKHAND PUBLIC SERVICES TRIBUNAL
AT DEHRADUN

Present: Hon'ble Mr. Justice J.C.S.Rawat

------ Chairman

Hon'ble Mr. D.K.Kotia

-------Vice Chairman (A)

CLAIM PETITION NO. 129/2009

Mahendra Singh S/o Sri Sita Ram R/o Birpur Dunda P.O. Dunda, District Uttarkashi, Uttarakhand.

……Petitioner

VERSUS

1. State of Uttarakhand through Secretary, Home Affairs, Dehradun Uttarakhand,
2. Additional Director General of Police (Adm.) P.H.Q., Dehradun..
3. Inspector General of Police, Garhwal Range, Dehradun, U.K.
4. Superintendent of Police, District Chamoli, U.K..

…….Respondents.

Present: Sri L.K.Maithani in brief of
Sri M.C.Pant, Ld. Counsel for the petitioner.
Sri Umesh Dhaundiyal, Ld. A P.O.
for the respondents.

JUDGMENT

DATED: AUGUST 04, 2014.

(Hon'ble Mr.Justice J.C.S. Rawat, Chairman)

1. The petitioner has filed this claim petition under Section 4 of U.P. Public Services Tribunal Act, 1976 as applicable to the State of Uttarakhand for seeking the following relief:-

"It is, therefore most respectfully prayed that this Hon'ble Tribunal may graciously be pleased to

(A) Issue order or direction setting aside the removal order from service dated 15.2.2008 along with the order dated 30.7.2008 and order dated 20.2.2009 along with its effect and operation along with all consequential benefits based on the impugned removal order after

calling entire record from the respondents declaring the same against the rules and law.

(B) Issue order or direction, directing to the respondents to restore the status of the petitioner in service, had it been the impugned order or termination was never in existence and along with all consequential benefits including back wages and seniority and promotions etc.

(C) Issue appropriate order or direction suitable in the nature of award damages and compensation to the petitioner for the malicious and malafide act of respondents, by which the petitioner is facing grave mental agony and financial hardship and the amount of the damages and compensation, which may be quantified by this Hon'ble Tribunal and further be directed to the respondents the amount to be recovered from the salary of the erring officer.

(D) Issue any other suitable direction or order as this Hon'ble Tribunal may deem fit in the circumstances of the case.

(E) Award costs of the claim petition to the petitioner."

2. The petitioner was appointed as Constable on 21.4.2002 and he had been posted in District Rudraprayag as such. The petitioner was posted on duty at Sub-Treasury, Lalcholi and during his posting, on 7.3.2007 the petitioner went to Rudraprayag District Headquarter to draw his salary but he did not return to his duties at Sub-Treasury, Lalcholi. When the petitioner remained absent unauthorizedly from 7.3.2007 to 17.5.2007, he was suspended on 17.5.2007 by the respondents. Departmental enquiry was also instituted against the petitioner for unauthorized absence from duties. The petitioner was served a charge sheet on 9.8.2007 and the inquiry officer conducted the departmental inquiry and collected the evidence against the petitioner and he submitted his report to the Superintendent of Police concerned in which the petitioner was held guilty for the unauthorized absence from duties since 7.3.2007 to 17.5.2007. During the course of inquiry, the petitioner did not participate in the inquiry; the inquiry proceeded in his absence. The said inquiry was transferred from Rudraprayag to S.P., Chamoli by the order of D.I.G., Garhwal Range vide order dated 3.11.2007 (Annexure-5 to the

W.S.). The S.P., Chamoli issued a show cause notice along with the enquiry report proposing him punishment of dismissal. The petitioner submitted his reply. After considering the reply of the petitioner as well as the report of the enquiry officer, the petitioner was held guilty by the appointing authority and awarded the punishment of dismissal from service.

3. The said order of dismissal has been challenged by the petitioner mainly on the ground that the appointing authority has neither approved nor signed the charge sheet, as such the entire proceedings are vitiated it being violative of rules. He further alleged that the charge sheet has been signed by the Deputy Superintendent of Police/ Inquiry officer and he has no right to sign the charge sheet under the rules. He further alleged that the petitioner has not been given an opportunity to cross-examine the witnesses produced by the respondents before the inquiry officer; the absence of the petitioner was not willful or deliberate, but it was due to sudden illness. The petitioner has further challenged the dismissal order on the ground that the dismissal order as well as the appellate order and the revisional order have been passed on surmises and conjunctures. The evidence of the witnesses was taken on record in absence of the petitioner and the petitioner was never given any copy of the evidence of the witnesses nor inquiry report. The punishment given by the appointing authority is too harsh and disproportionate to the misconduct committed by the petitioner. It was further alleged while passing the removal order, the appointing authority has not granted him the allowances which were admissible to him in accordance with law.
4. Respondents have contested the petition and refuted the allegations made in the claim petition. The respondents have alleged that the petitioner willfully abstained from the duties from 7.3.2007 to 17.5.2007 and he did not even inform the concerned Police Station or to the S.P. concerned where he alleges that he had fallen ill. It was further alleged that the inquiry initiated by the D. S.P. is well within his jurisdiction and it is not vitiated by any provisions of law. The petitioner received the charge sheet and he did not submit his reply against the charge sheet. He was given sufficient time to reply the said charge sheet but he failed. Thereafter the petitioner was given a notice for recording the evidence,

which was served upon him and the evidence was recorded by the inquiry officer but the petitioner did not appear before the inquiry officer on the date fixed, so it cannot be said that the inquiry was conducted behind the back of the petitioner. He had sufficient information to participate in the inquiry. It is further alleged in the W.S. that copy of each notice was served upon the petitioner, his signatures had been obtained on each and every notice, so the inquiry was conducted in accordance with law.

5. We have heard Learned counsel for the parties and perused the record.
6. Ld. Counsel for the petitioner contended that the charge sheet has been submitted by the inquiry officer, which is against the provisions of law. He further contended that the charge sheet should have been signed by the appointing authority and thereafter the appointing authority would have appointed the inquiry officer and thereafter the inquiry officer would have conducted the inquiry. Correct procedure has not been adopted and prejudice has been caused to the petitioner, as such entire proceedings are liable to be quashed. The second argument which was raised by the Ld. Counsel for the petitioner is that even if the petitioner had not participated in the inquiry, he should have been given the copies of the statement recorded by the inquiry officer so that the petitioner could have made the request of cross-examination of the witnesses. Thirdly, the Ld. Counsel for the petitioner contended that the inquiry officer has taken into consideration his previous conduct in his report and has submitted his recommendation to the appointing authority for the punishment. The appointing authority, after considering the report of the inquiry officer, has punished the petitioner by the impugned order. The previous conduct of the petitioner cannot be taken into consideration without framing of the charge of previous conduct and even giving him a notice at the time of issuing the show cause notice. In view of the above the punishment awarded by the punishing authority is violative of principles of natural justice. Fourthly, the petitioner has further contended that absence of the petitioner was not willful and he was ill during that period. He submitted his medical certificates before the punishing authority which have not been considered by the authority in its correct perspective.

7. Ld. A.P.O. refuted the contention and contended that the U.P. Police Officers of Subordinate Rank (Punishment & Appeal) Rules, 1991 (hereinafter referred to as 1991 Rules) empower the Dy.S.P. to hold the inquiry and issue the charge sheet. The charge sheet has been correctly signed by the Dy.S.P. and the inquiry has been conducted in accordance with rules. The absence of the petitioner was willful and deliberate and the petitioner had not adhered to the provisions of the Police Regulation in which it is provided that if any Police Officer/ Official falls ill, he can report the said fact either to the Police Station or to the S.P. concerned. The petitioner failed to adhere to the proposition of law as such his absence is unauthorized and willful. Ld. A.P.O. further contended that the petitioner was served the charge sheet and his signatures had been obtained about the receipt of the charge sheet on the charge sheet itself. Thereafter, a notice had been sent to the petitioner to appear before the inquiry officer on 5.9.2007 and copy thereof had been received to the petitioner personally in the notice itself. The statement of witnesses were recorded on the same date as the petitioner did not appear before the inquiry officer. Thereafter, the inquiry report was submitted to the appointing authority. At the last the respondents have prayed that this petition may be dismissed.
8. The main thrust of the arguments of the Ld. Counsel for the petitioner is that Dy.S.P. was not competent to issue the charge sheet against the petitioner, hence the entire proceedings are liable to be quashed. In this context we would like to mention certain provisions of the 1991 Rules. 1991 Rules provide major penalties and minor penalties. Rule 14 provides the procedure for conducting the departmental proceedings, which reads as under:-

"**14**. **Procedure for conducting departmental proceedings**:

(1) Subject to the provisions contained in these Rules, the departmental proceedings in the cases referred to in sub-rule (1) of Rule 5 against the police officers may be conducted in accordance with the procedure laid down in Appendix-1.

(2) Notwithstanding anything contained in sub-rule (1) punishments in cases referred to in sub-rule (2) of Rule 5 may be imposed after informing the police officer in writing of the action proposed to be taken against him and

of the imputations of act or omission on which it is proposed to be taken and giving him a reasonable opportunity of making such representation as he may wish to make against the proposal.

(3) The charged police officer shall not be represented by counsel in any proceedings instituted under these Rules."

9. Rule 14(1) of the said rules provides how the departmental inquiry would be initiated for the major penalties and procedure has been laid down in Appendix -1 of the said rules. The said appendix runs as follows:-

"**Appexdix-1**"

"Procedure relating to the conduct of departmental proceedings against police officer.

Upon institution of a formal enquiry such police officer against whom the enquiry has been instituted shall be informed in writing of the grounds on which it is proposed to take action shall be used in the form of a definite charge or charges as in Form I appended to these Rules which shall be communicated to the charged police officer and which shall be so clear and precise as to give sufficient indication to the charged police officer of the facts and circumstances against him. He shall be required, within a reasonable time, to put in, in a written statement of his defence and to state whether he desires to be heard in person. If he so desires, or if the Inquiry Officer so directs an oral enquiry shall be held in respect of such of the allegations as are not admitted. At that enquiry such oral evidence will be recorded as the Inquiry Officer considers necessary. The charged police officer shall be entitled to cross-examine the witnesses, to give evidence in person and to have such witnesses called as he may wish: provided that the Inquiry Officer may, for sufficient reasons to be recorded in writing, refuse to call a witness. The proceedings shall contain a sufficient record of the evidence and statement of the findings and the ground thereof. The Inquiry Officer may also separately from these proceedings make his own recommendation regarding the punishment to be imposed on the charged police officer."

When the above procedure has been followed, the power of punishment has been provided under Rule 7 of the said rules which provides as under:-

"7. **Power of punishment**-(1) The Government or any officer of police department not below the rank of the Deputy Inspector-General may award any of the punishments mentioned in rule 4 of any police officer.

(2) The superintendent of Police may award any of the punishments mentioned in sub clause (iii) of clause (b) of sub-rule (1) of Rule 4 on Inspectors and Sub-Inspectors.

(3) The Superintendent of Police may award any of the punishments mentioned in Rule 4 on such police officers as are below the rank of Sub-Inspectors.

(4) Subject to the provisions contained in these rules all Assistant Superintendents of Police and Deputy Superintendents of Police who have completed two years of service as Assistant Superintendents of Police and Deputy Superintendents of Police as the case may be, may exercise powers of Superintendent of Police except the power to impose major punishments under Rule-4.

(5) Notwithstanding anything contained in these rules Reserve Inspector, Inspector of Station Officer may award the punishment of drill and fatigue-duty to any constable under his charge for a period not exceeding three days, but he shall inform the Superintendent of Police concerned of his order immediately and in Anaya case within 24 hours of passing the order."

Perusal of above rules clearly reveals that there is no need to initiate the enquiry by the appointing authority himself. It is well settled principle of law that an authority subordinate to the appointing authority, may initiate the enquiry against the delinquent. It is also settled proposition of law, if rule provides a manner to conduct the enquiry, the manner which is provided under rules, has to be followed by the department. After the scrutiny of the entire law the Hon'ble Supreme Court in case of **Secretary of Ministry of Defence and others Vs. Prabhash Chandra Mirdha (2012)11 SCC 565, in Para 5, 6, 7** has held as under:-

"5. It is permissible for an authority, higher than appointing authority to initiate the proceedings and impose punishment, in case he is not the appellate authority so that the delinquent may not loose the right of appeal. In other case, delinquent has to prove as what prejudice has been caused to him.

6. In Inspector General of Police and Anr. v. Thavasiappan : AIR 1996 SC 1318, this Court reconsidered its earlier judgments on the issue and came to the conclusion that there is nothing in law which inhibits the authority subordinate to the appointing authority to initiate disciplinary proceedings or issue charge memo and it is certainly not necessary that charges should be framed by the authority competent to award the punishment or that the inquiry should be conducted by such an authority.

7. In Steel Authority of India and Anr. v. Dr. R.K. Diwakar and Ors.: AIR 1998 SC 2210; and State of U.P. and Anr. v. Chandrapal Singh and Anr.: AIR 2003 SC 4119, a similar view has been reiterated.

8. In Transport Commissioner, Madras - 5 v. A. Radha Krishna Moorthy (1995) 1 SCC 332, this Court held:

Insofar as initiation of enquiry by an officer subordinate to the appointing authority is concerned, it is well settled now that it is unobjectionable. The initiation can be by an officer subordinate to the appointing authority. Only the dismissal/removal shall not be by an authority subordinate to the appointing authority. Accordingly it is held that this was not a permissible ground for quashing the charges by the Tribunal."

From the perusal of the above proposition of law it is clear that it is not obligatory on the part of the appointing authority to initiate the enquiry against the delinquent. The subordinate to the appointing authority may initiate the enquiry, if the rules do not prohibit the authority to initiate the enquiry. We have analyzed different provisions of 1991 Rules; it is not provided that the enquiry cannot be initiated by a subordinate officer than the appointing authority.

10. Article 311 of the Constitution of India only mandates no person, who holds a civil post under Union or State Government, shall be dismissed or removed by an authority subordinate to that by which he was appointed. The above provisions of Constitution also reveals that there is no prohibition of initiating an enquiry by a subordinate officer.

11. In the case in hand the punishment has been awarded by the S.P., Chamoli and the enquiry was initiated by the Dy.S.P., who was also the inquiry officer of the delinquent. The question squarely arose before the Division Bench of Hon'ble Uttarakhand High Court in the matter of S**ecretary, Home Department & another Vs. Narendra Kumar & others 2012 (1) U.D. pg. 178** in which the Dy.S.P. initiated the enquiry and issued the charge sheet to the delinquent and punishment was awarded by the S.P., Chamoli. Main thrust of the arguments was that the Dy.S.P. has no right to initiate the enquiry and to issue the charge sheet. The

Hon'ble High Court after going through the provisions of Rule 14 (1) and Rule 7 of the 1991 Rules held in para 11 & 12 as under:-

"***11***. In the present case, the disciplinary proceedings was initiated by the issuance of the charge sheet under the signatures of the Deputy Superintendent of Police and admittedly, the order of dismissal was passed by the Superintendent of Police. Therefore, the order of dismissal was passed by the competent authority as provided under Rule 7(3), namely, by the Superintendent of Police.

12. The short question which has been raised and which arises for consideration is, whether the Deputy Superintendent of Police could initiate the proceedings for imposition of a major penalty. In our opinion, the answer lies in Rule 7(4), which clearly states that a Deputy Superintendent of Police, who has completed two years of service, can exercise the powers of the Superintendent of Police. Admittedly, the Superintendent of Police is competent to impose punishment as provided under Rule 7(3). A Deputy Superintendent of Police having more than two years of service becomes competent to exercise such powers and is, therefore, competent to issue a notice or initiate disciplinary proceedings or issue a charge sheet. However, such power is circumscribed. Where a minor penalty is to be made, the same can be imposed by the Deputy Superintendent of Police and, where a major penalty is to be made, the same has to be imposed by the competent authority, namely, the Superintendent of Police".

This case squarely covers the controversy which is before us.

12. In view of the above, we have no hesitation to hold that in the case in hand the Dy.S.P. was competent to issue the charge sheet to the delinquent. Ld. Counsel for the petitioner tried to impress upon us by citing the case of **Lalita Verma Vs. State & another in Writ petition No. 118(SB)/08** in which the Hon'ble Uttarakhand High Court has also held that the charge sheet should be given by the appointing authority and thereafter the enquiry officer should be appointed by the appointing authority after the receipt of the reply of the delinquent. We have gone through the entire judgment, we find that the said judgment has been applied in connection with the Uttaranchal Government Servant (Discipline & Appeal) Rules, 2003 and thereafter the State Government amended these rules in the year 2010. The present controversy is not within these rules which has been discussed in the above Lalita Verma

(supra) case. Rules, which have been dealt with in the letter, Division Bench of the Hon'ble Uttarakhand High Court squarely covers the controversy. Interpretation of the law depends upon the rules and different language used in the rules. So the interpretation given in the case of Narendra Kumar would be applicable and the ratio laid down in Lalita Verma Case is not applicable in view of the facts and circumstances of the case. We conclude that issuance of the charge sheet is correct and there is no illegality in it.

13. Second question which arises for consideration is that as to whether the petitioner was given sufficient opportunity to defend himself in the departmental proceedings. We have also summoned the original file from the department for the perusal of the case. The original file reveals that the charge sheet was issued to the petitioner and the said charge sheet has been received by him and his signatures had been obtained on the receipt of the charge sheet. It is admitted he had not submitted any reply to the charge sheet. Thereafter, a date was fixed for recording of the evidence by the inquiry officer. A notice was issued to the petitioner to appear before the enquiry officer to defend himself in the enquiry and the notice has been served upon the petitioner and the copy of which has been received to the petitioner on 29.8.2007; inspite of service, he did not appear before the inquiry officer and on the date fixed the inquiry officer recorded the statement of the witnesses in the absence of the petitioner. Thereafter, the inquiry officer submitted his report to the competent authority holding the petitioner guilty for the charges leveled against him. The petitioner did not participate in the proceedings, thus, he remained absent inspite of the notices. Thus, the proceedings can be held to be exparte against the delinquent. From the original record the said receipts and the signatures of receiving the notice were confronted by the Ld. A.P.O. to the Ld. Counsel for the petitioner, he could not demonstrate that service was not affected upon the petitioner. The S.P., Rudraprayag made a request to the D.I.G., Garhwal Range, Dehradun that he being P.P.S. Officer, is not competent to pass the suitable punishment order in the case, so the matter may be transferred to some other competent officer. The D.I.G. thereafter passed the order to the S.P., Chamoli to deal with the matter. After going through the entire

record the S.P., Chamoli issued a show cause notice to the petitioner and the notice was served upon the petitioner personally along with the findings of the enquiry report which has been endorsed by the petitioner in his own handwriting on 7.12.2007 on the show cause notice. Thereafter the petitioner submitted his reply to the show cause notice and the S.P., Chamoli passed the impugned order. The perusal of the entire record does not reveal that any irregularity has been committed either by the inquiry officer or by the appointing authority in holding the enquiry or in punishing the petitioner. Ld. Counsel tried to emphasize that the copy of the statement recorded by the inquiry officer was not given to him. There is no provisions that the copies of the statement would be provided to the petitioner. After completion of the enquiry, if the petitioner would have desired the copies, during the course of enquiry, he could have applied for the same and the inquiry officer could have ordered either for the inspection or issuance of the copies of the same. The copy of the inquiry report has been given to the petitioner and he had sufficient knowledge about the deposition of the said statement. In view of the above we do not find any force in the contention of the Ld. Counsel for the petitioner. The petitioner has also submitted his reply which is on the original record and reads as under:-

"निवेदन इस प्रकार है की मुझे आपके पत्र संख्या च्थ्1ध्2007 दिनांक 27/12/07 के कम संख्या में निम्न निवेदन करना है–

1. प्रार्थी दिनांक 10 अक्टूबर, 2002 का भर्ती है <u>प्रार्थी का स्वस्थ्य एवं मानसिक सन्तुलन सही नही होने के एवं घरेलू देवी देवताओं के प्रकोप के कारण ठीक नहीं था और बिना बताये घर चला जाता था मेरे माता पिता मुझे ड्यूटी पर छोड़ देते थे।</u>

   अब घरेलू देवी देवताओं के पूजना आदि करने के उपरान्त प्राथी एवम अस्पताल में इलाज कराया जिसके मेडिकल भेजे जा चुके हैं। और प्रार्थी का सन्तुलन व स्वास्थ्य ठीक है।

   प्रार्थी भविष्य में कोई गलती नही करेगा।"

He only stated that certain medical reports had been sent to the authorities regarding his ailment. It is also revealed from the original record that there are three medical certificates which have been filed and these pertains to December, 2007, after the conclusion of the enquiry. The enquiry was concluded on 21.09, 2007, and the medical certificates purport to have been countersigned in the month of December, 2007.

Thus, the petitioner has sufficient notice about the enquiry as well as the punishment, so we do not find any force in the contention of the Ld. Counsel for the petitioner.

14. Ld. Counsel for the petitioner has emphasized that the punishing authority has considered the past conduct of the petitioner for imposing the punishment for which the petitioner was entitled to a notice thereof and generally the charge sheet should have contained the list of previous punishment in the charges. It is settled proposition of law as enumerated in **Mohd. Yunus Khan Vs. State of U.P. & others 2010(7) 970, The Hon'ble Apex Court in para 33 &34** has held as under:-

> *33. The courts below and the statutory authorities failed to appreciate that if the disciplinary authority wants to consider the post conduct of the employee in imposing a punishment, the delinquent is entitled to notice thereof and generally the charge sheet should contain such an article or at least he should be informed of the same at the stage of the show cause notice, before imposing the punishment.*
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> *34. This Court in Union of India & others Vs. BIshamber Das Dogra, [26] (2009) 13 SCC 102, considered the earlier judgments of this Court in State of Assam Vs. Bimal Kumar Pandit, [27] AIR 1963 SC 1612; India Marine Service (P) Ltd. Vs. Their Workmen, [28], AIR 1963 SC 528; State of Mysore Vs. K Manche Gowda,[29] AIR 1964 SC 506; Colour-Chem Ltd. Vs. A.L. Alaspurkar &others,[30] AIR 1998 SC 948; Director General, RPF Vs. Ch. Sai Babu,[31] (2003) 4 SCC 331, Bharat Forge Co. Ltd. Vs. Uttam Manohar Nakate,[32] (2005) 2 SCC 489; and Govt. of A.P. & others Vs. Mohd Taher Ali,[33] (2007) 8 SCC 656 and came to the conclusion that it is desirable that the delinquent employee be informed by the disciplinary authority that his past conduct could be taken into consideration while imposing the punishment. However, in case of misconduct of a grave nature, even in the absence of statutory rules, the Authority may take into consideration the indisputable past conduct/ service record of the delinquent for "adding the weight to the decision of imposing the punishment if the fact of the case so required*."

The Hon'ble Apex Court after considering the entire law on the subject, concluded that it is desirable that the delinquent employee be informed by the disciplinary authority about his past conduct if it is

taken into consideration while imposing the punishment. In the above proposition of law, we would like to examine the facts of this case. It is correct that the inquiry officer has given a finding to the fact , he has narrated in Para 8 of the enquiry report , 'how a case has been disposed of against him by recording a misconduct; how many cases of misconduct are pending against him and he has recommended his recommendation to the appointing authority. The said copy of the report had also been given to the petitioner. In reply thereof the petitioner has submitted that he generally used to go to his house without informing the authorities.

15. When we go through the entire punishment order, we do not find any place that the appointing authority has considered the past conduct of the petitioner. Ld. Counsel for the petitioner could not demonstrate such averment in the order of punishment. Thus, it is clear that the appointing authority has not considered his past conduct while awarding the punishment. Even if the inquiry officer has written and the said fact did not find place in the punishment order while coming to the conclusion for awarding punishment by the authority, it is of no avail to the petitioner. Thus, we do not find any force in the arguments of Ld. Counsel for the petitioner.

16. Ld. Counsel for the petitioner tried to emphasize that in the absence of findings by the inquiry officer or by the disciplinary authority that the unauthorized absence was willful, the charge could not be treated to have been proved. Ld. Counsel for the petitioner relied upon the judgment of **K.D.Parmar Vs. Union of India, 2012(3) SCC 178**. At this juncture we would like to mention the judgment delivered by the Hon'ble Apex Court in the case of **Chennai Metropolitan Water Vs. T.T. Murali Babu 2014 (3) SLR 398** in which the Hon'ble Supreme Court has said while analyzing the judgment of K.D.Parmar (supra), it cannot be stated as an absolute proposition in the law that whenever there is a long unauthorized absence, it is obligatory on the part of disciplinary authority to record a finding that the said absence was willful even if the employee fails to show the compelling circumstances to remain absent. We would like to quote para 21,22,23, 24, 25 & 26 of the judgment which specifically deals with the said issue.:-

"21. Learned counsel for the respondent has commended us to the decision in Krushnakant B. Parmar v. Union of India and another(2012)3 SCC 178 to highlight that in the absence of a finding returned by the Inquiry Officer or determination by the disciplinary authority that the unauthorized absence was willful, the charge could not be treated to have been proved. To appreciate the said submission we have carefully perused the said authority. In the said case, the question arose whether unauthorized absence from duty did tantamount to failure of devotion to duty or behavior unbecoming of a Government servant inasmuch as the appellant therein was charge-sheeted for failure to maintain devotion to duty and his behavior was unbecoming of a Government servant. After adverting to the rule position the two-Judge Bench expressed thus: - â€œ16. In the case of the appellant referring to unauthorized absence the disciplinary authority alleged that he failed to maintain devotion to duty and his behavior was unbecoming of a government servant. The question whether unauthorized absence from duty amounts to failure of devotion to duty or behavior unbecoming of a government servant cannot be decided without deciding the question whether absence is willful or because of compelling circumstances.

17. If the absence is the result of compelling circumstances under which it was not possible to report or perform duty, such absence cannot be held to be willful. Absence from duty without any application or prior permission may amount to unauthorized absence, but it does not always mean willful. There may be different eventualities due to which an employee may abstain from duty, including compelling circumstances beyond his control like illness, accident, hospitalization, etc., but in such case the employee cannot be held guilty of failure of devotion to duty or behavior unbecoming of a government servant.

18. In a departmental proceeding, if allegation of unauthorized absence from duty is made, the disciplinary authority is required to prove that the absence is willful, in the absence of such finding, the absence will not amount to misconduct.

22. We have quoted in extenso as we are disposed to think that the Court has, while dealing with the charge of failure of devotion to duty or behavior unbecoming of a Government servant, expressed the aforestated view and further the learned Judges have also opined that there may be compelling circumstances which are beyond the control of an employee. That apart, the facts in the said case were different as the appellant on certain occasions was prevented to sign the attendance register and the absence was intermittent. Quite apart from that, it has been stated therein that it is obligatory on the part of the disciplinary authority to come to a conclusion that the absence is willful. On an apposite understanding of the judgment we are of the opinion that the view expressed in the said case has to be restricted to the facts of the said case regard being had to the rule position, the nature of the charge levelled against the employee and the material that had come on record during the enquiry. It cannot be stated as an absolute proposition in law that whenever there is a long unauthorized absence, it is obligatory on the part of the disciplinary authority to record a finding that the said absence is willful even if the employee fails to show the compelling circumstances to remain absent.

23. In this context, it is seemly to refer to certain other authorities relating to unauthorized absence and the view expressed by this Court. In State of Punjab v. Dr. P.L. Singla (2008) 8 SCC 469 the Court, dealing with unauthorized absence, has stated thus: - â€œUnauthorised absence (or overstaying leave), is an act of indiscipline. Whenever there is an

> unauthorized absence by an employee, two courses are open to the employer. The first is to condone the unauthorized absence by accepting the explanation and sanctioning leave for the period of the unauthorized absence in which event the misconduct stood condoned. The second is to treat the unauthorized absence as a misconduct, hold an enquiry and impose a punishment for the misconduct.

> 24. Again, while dealing with the concept of punishment the Court ruled as follows: - Where the employee who is unauthorisedly absent does not report back to duty and offer any satisfactory explanation, or where the explanation offered by the employee is not satisfactory, the employer will take recourse to disciplinary action in regard to the unauthorized absence. Such disciplinary proceedings may lead to imposition of punishment ranging from a major penalty like dismissal or removal from service to a minor penalty like withholding of increments without cumulative effect. The extent of penalty will depend upon the nature of service, the position held by the employee, the period of absence and the cause/explanation for the absence.

> 25. In Tushar D. Bhatt v. State of Gujarat and another (2009) 11 SCC 678, the appellant therein had remained unauthorisedly absent for a period of six months and further had also written threatening letters and conducted some other acts of misconduct. Eventually, the employee was visited with order of dismissal and the High Court had given the stamp of approval to the same. Commenting on the conduct of the appellant the Court stated that he was not justified in remaining unauthorisedly absent from official duty for more than six months because in the interest of discipline of any institution or organization such an approach and attitude of the employee cannot be countenanced.

> 26. Thus, the unauthorized absence by an employee, as a misconduct, cannot be put into a straight-jacket formula for imposition of punishment. It will depend upon many a factor as has been laid down in Dr. P.L. Singla

17. After going through the above, now we are of the view that it is not an absolute proposition that the appointing authority should record finding regarding willful default of the petitioner, it will depend upon each case and each fact of the case. In this case the petitioner remained absent from the duties without any leave and he could not prove that he was on duty during the course of absence but he has also admitted in vague words in reply to the show cause notice that he generally remained absent from duties, as we have discussed above. Thus, unauthorized absence and overstaying leave is an act of indiscipline. An employer has an option either to condone the unauthorized absence by accepting explanation and sanction leave for the period of unauthorized absence or the appointing authority may treat such absence as misconduct and hold an enquiry. The Inquiry officer as well as the appointing authority has taken the second recourse, which was available to the respondents.

18. In this regard a moot question arises as to whether the petitioner was ill during that period or not. It is pertinent to mention here that the petitioner did not participate during the enquiry and he had not submitted any medical certificate or his evidence before the inquiry officer that he was ill and as such he could not attend the duties. He has sent some medical certificates after the receipt of the enquiry and he has taken the ground that he was ill during that period and has sent the medical certificates. The appointing authority has considered his reply as well as the medical certificates which he had sent to the department. The appointing authority has held that the medical certificates pertain to the period w.e.f. 5.9.2007 to 10.12.2007 whereas the petitioner remained absent from 7.3.2007 to 17.5.2007 and thereafter he was suspended by the appointing authority. Thus, these medical certificates do not relate to the period for which the petitioner remained absent. He has not adduced any evidence in his support, the enquiry proceeded exparte against him. This Tribunal while assessing the order of the appointing authority, is not sitting as appellate Court, but as reviewing the matter on the side of judicial review. It is settled principle of law that judicial review is not akin to adjudication on merit by reappreciating the evidence as an appellate authority. The only consideration, the Tribunal has in its judicial review is to consider whether the conclusion is based on evidence and or whether the conclusion is based on no evidence. The adequacy or the reliability of the evidence is not the matter which can be permitted to be canvassed before the Court in these proceedings. The Hon'ble Apex Court in para 24 of **Nirmala J.Jhala Vs. State of Gujrat 2013(4) SCC 301** has held as under:-

" The decisions referred to hereinabove highlights clearly, the parameter of the Courtâ€™s power of judicial review of administrative action or decision. An order can be set-aside if it is based on extraneous grounds, or when there are no grounds at all for passing it or when the grounds are such that, no one can reasonably arrive at the opinion. The Court does not sit as a Court of Appeal but, it merely reviews the manner in which the decision was made. The Court will not normally exercise its power of judicial review unless it is found that formation of belief by the statutory authority suffers from malafides,

dishonest/corrupt practice. In other words, the authority must act in good faith. Neither the question as to whether there was sufficient evidence before the authority can be raised/examined, nor the question of re-appreciating the evidence to examine the correctness of the order under challenge. If there are sufficient grounds for passing an order, then even if one of them is found to be correct, and on its basis the order impugned can be passed, there is no occasion for the Court to interfere. The jurisdiction is circumscribed and confined to correct errors of law or procedural error, if any, resulting in manifest miscarriage of justice or violation of principles of natural justice. This apart, even when some defect is found in the decision- making process, the Court must exercise its discretionary power with great caution keeping in mind the larger public interest and only when it comes to the conclusion that overwhelming public interest requires interference, the Court should intervene."

19. Ld. Counsel for the petitioner also pointed out that the punishment awarded by the punishing authority was too harsh and did commensurate with the misconduct. Ld. A.P.O. refuted the contention and contended that the petitioner had been absenting himself from Treasury duties assigned to him. The duty assigned to him, was of very important nature. Treasury Guard has to keep vigil over the cash as well as valuable instruments in the Treasury. If the petitioner being the Watchman of the Treasury leaves the duty without any intimation to the respondents, it would be a graver misconduct and in any case the punishing authority has rightly dismissed the services of the petitioner. It is clearly established that the petitioner was posted on duty at Sub Treasury, Lalcholi and during his posting on 7.3.2007, the petitioner went to Rudraprayag Headquarter to draw his salary but he did not return to his duties at Sub Treasury, Lalcholi. The petitioner remained unauthorizedly absent from 7.3.2007 to 17.5.2007, the S.P. suspended the petitioner on the charge he had been absenting himself since 7.3.2007. While deciding this matter, we should bear in mind that the petitioner was a Police Constable and was serving in a disciplined force demanding strict adherence to the rules and procedure more than any other department. Having noticed the fact that the petitioner has absented himself from duties without leave, we have to appreciate the dismissal order in the light of the above fact.

We have also noticed that the petitioner has submitted his reply to the show cause notice issued by the punishing authority against the proposed punishment. The petitioner has clearly admitted in Annexure-4 to the C.A. that he generally used to leave duties from the department without proper intimation to the respondents as the petitioner had some influence of spiritual spirits. His father used to leave him on duties at the appointed place. In this factual scenario, we have to assess as to whether the punishment awarded to the petitioner is harsh or not. In the case of **B.C.Chaturvedi Vs. Union of India AIR 1996 SC 8484**, the moot question for consideration before the Hon'ble Supreme Court came for consideration as to whether the Tribunal can direct the authorities to consider the punishment with cogent reason in support thereof or to reconsider themselves to shorten the length of litigation. The Hon'ble apex court held in Para 18 as under:-

"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. It 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"

20. Now the question arises as to whether the punishment, which has been awarded to the petitioner is shocking to the conscience of the Court or not. It is also settled proposition of law that doctrine of proportionity is thus well recognized concept in judicial review in our judicial jurisprudence. The Court will not interfere in the punishment unless the punishing authority has passed such punishment which shocks to the conscience of the Court.

21. As we have pointed out that the petitioner is a member of uniformed force remaining absent from duties without any reasonable explanation, cannot be ignored and cannot be taken on a lighter side. We have seen whenever an action is taken, the usual plea taken, having been ill or some such false pretext on or some false medical certificate are produced in support of such plea. Had the matter not been a case of a Constable belonging to a civil Police remaining absent for few days, members of uniformed force cannot absent themselves on frivolous pleas having regard of the nature of duties enjoyed in these forces. Such indiscipline, if it goes unpunished, will greatly affect the discipline of the force. In such forces desertion is serious matter. The cases of this nature in whatever manner described, are case of desertion particularly there is one apprehension of the member of force, be it called upon to perform onerous duties in different terrain. We cannot take such matters lightly particularly it relates to a uniformed force of the State. A member of uniformed force, who overstays at leave or who absents himself for few days, must be able to give a satisfactory explanation. In the instant case as we have pointed out earlier, the reply submitted after show cause notice more or less has admitted the misconduct. His unauthorized absence shows his indisciplined manner of leaving duties from the duty place. The Hon'ble Supreme Court had occasion to deal such matter in case of **Union of India & others Vs. Ghulam Mohd. Bhat (2005)INSC 575** and held as under:-

"-This Court had occasion to deal with the cases of overstay by persons belonging to disciplined forces. In **State of U.P. v. Ashok Kumar Singh [1995] INSC 654; (1996 (1) SCC 302)** the employee was a police constable and it was held that an act of indiscipline by such a person needs to be dealt with sternly. It is for the employee concerned to show how that 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 characterized as disproportionate and/or shocking. (See Mithilesh Singh v. Union of India and Ors. (2003 (3) SCC 309). It has been categorically held that in a given case the order of dismissal from service cannot be faulted. In the instant case the period is more than 300 days and that too without any justifiable reason. That being so the order of

removal from service suffers from no infirmity. The High Court was not justified in interfering with the same. The order of the High Court is set aside. The appeal is allowed but under the circumstances there shall be no order as to costs."

Another aspect of the matter needs to be noted. The petitioner was a Constable posted in a Sub Treasury to maintain the guard duty of the Treasury where the valuables and the money had been kept. The petitioner being a Constable on the guard duty of the Sub Treasury; being at his official position, it was expected from him to maintain the discipline, act with responsibility, perform his duties with sincerity and serve the institution with honesty. This kind of conduct cannot be countenanced as it creates concavity in work culture and indiscipline in the organization. The Hon'ble Apex Court in **Government of India and Others Vs. George Philip 2013 SCC Pg. 1** has held as under:-

"In a case involving overstay of leave and absence from duty, granting six months time to join duty amounts to not only giving premium to indiscipline but is wholly subversive of the work culture in the organization. Article 51-A(j) of the Constitution lays down that it shall be the duty of every citizen to strive towards excellence in all spheres of individual and collective activity so that the nation constantly rises to higher levels of endeavour and achievement. This cannot be achieved unless the employees maintain discipline and devotion to duty. Courts should not pass such orders which instead of achieving the underlying spirit and objects of Part IV-A of the Constitution have the tendency to negate or destroy the same"

In the case of **Chennai Metropolitan Water Supply & Sewerage Board Vs.T.T.Murali (2014) INSC 83** the Junior Engineer was dismissed from the service on the ground that he remained absent for a long time without any sufficient cause. The said dismissal order was challenged before the High Court and the Hon'ble High Court held that the punishment awarded to the petitioner was too harsh and directed to reinstate the petitioner with continuity of service, but without backwages within a period of 4 weeks from the date of receipt of the order. Thereupon the matter came up before the Hon'ble Supreme Court in appeal. The Hon'ble Supreme Court set aside the judgment of the Hon'ble High Court and allowed the appeal and also held in Paragraphs 30,31, 32 & 33 as under:-

"30 After so stating the two-Judge Bench proceeded to say that one of the tests to be applied while dealing with the question of quantum of punishment is whether any reasonable employer would have imposed such punishment in like circumstances taking into consideration the major, magnitude and degree of misconduct and all other relevant circumstances after excluding irrelevant matters before imposing punishment. It is apt to note here that in the said case the respondent had remained unauthorizedly absent from duty for six months and admitted his guilt and explained the reasons for his absence by stating that he neither had any intention nor desire to disobey the order of superior authority or violated any of the rules or regulations but the reason was purely personal and beyond his control. Regard being had to the obtaining factual matrix, the Court interfered with the punishment on the ground of proportionality. The facts in the present case are quite different. As has been seen from the analysis made by the High Court, it has given emphasis on past misconduct of absence and first time desertion and thereafter proceeded to apply the doctrine of proportionality. The aforesaid approach is obviously incorrect. It is telltale that the respondent had remained absent for a considerable length of time. He had exhibited adamantine attitude in not responding to the communications from the employer while he was unauthorisedly absent. As it appears, he has chosen his way, possibly nurturing the idea that he can remain absent for any length of time, apply for grant of leave at any time and also knock at the doors of the court at his own will. Learned counsel for the respondent has endeavoured hard to impress upon us that he had not been a habitual absentee. We really fail to fathom the said submission when the respondent had remained absent for almost one year and seven months. The plea of absence of habitual absenteeism is absolutely unacceptable and, under the obtaining circumstances, does not commend acceptation. We are disposed to think that the respondent by remaining unauthorisedly absent for such a long period with inadequate reason had not only shown indiscipline but also made an attempt to get away with it. Such a conduct is not permissible and we are inclined to think that the High Court has erroneously placed reliance on the authorities where this Court had interfered with the punishment.

We have no shadow of doubt that the doctrine of proportionality does not get remotely attracted to such a case. The punishment is definitely not shockingly disproportionate.

31. Another aspect needs to be noted. The respondent was a Junior Engineer. Regard being had to his official position, it was expected of him to maintain discipline, act with responsibility, perform his duty with sincerity and serve the institution with honesty. This kind of conduct cannot be countenanced as it creates a concavity in the work culture and ushers in indiscipline in an organization. In this context, we may fruitfully quote a passage from Government of India and another v. George Philip[18]: - In a case involving overstay of leave and absence from duty, granting six months time to join duty amounts to not only giving premium to indiscipline but is wholly subversive of the work culture in the organization. Article 51-A(j) of the Constitution lays down that it shall be the duty of every citizen to strive towards excellence in all spheres of individual and collective activity so that the nation constantly rises to higher levels of endeavour and achievement. This cannot be achieved unless the employees maintain discipline and devotion to duty. Courts should not pass such orders which instead of achieving the underlying spirit and objects of Part IV-A of the Constitution have the tendency to negate or destroy the same.

32. We respectfully reiterate the said feeling and re-state with the hope that employees in any organization should adhere to discipline for not only achieving personal excellence but for collective good of an organization. When we say this, we may not be understood to have stated that the employers should be harsh to impose grave punishment on any misconduct. An amiable atmosphere in an organization develops the work culture and the employer and the employees are expected to remember the same as a precious value for systemic development.

33. Judged on the anvil of the aforesaid premises, the irresistible conclusion is that the interference by the High Court with the punishment is totally unwarranted and unsustainable, and further the High Court was wholly unjustified in entertaining the writ petition after a lapse of four years. The result of aforesaid analysis would entail overturning the judgments and orders passed by the learned single Judge and the Division Bench of the High Court and, accordingly, we so do

In view of the above discussion we do not find any force in the contention of the Ld. Counsel for the petitioner. The contention is devoid of merit.

22. In view of the above principle, the findings recorded by the appointing authority are not perverse and cannot be interfered and cannot be vitiated on this ground. No other point was pressed before us by the Ld. Counsel for the parties.

23. In view of the above, we do not find any force in the petition and petition is devoid of merit and is liable to be dismissed.

ORDER

The claim petition is hereby dismissed. The parties shall bear their own costs.

(D.K.KOTIA) **(JUSTICE J.C.S.RAWAT)**
VICE CHAIRMAN (A) CHAIRMAN

DATED: AUGUST 04, 2014
DEHRADUN
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