

(2014) 02 GAU CK 0037
In the Gauhati High Court
Case No : W.P. (C) No. 103 (K) of 2013

A. Obangmenla Jamir

APPELLANT

Vs

State of Nagaland and Others

RESPONDENT

Date of Decision : 06-02-2014

Acts Referred:

Constitution of India, 1950 — Article 226
Penal Code, 1860 (IPC) — Section 34, 408, 409, 467, 468

Citation : (2014) 3 GLD 186 : (2014) 2 GLT 266

Hon'ble Judges : Prasanta Kumar Saikia, J

Bench : Single Bench

Advocate : Taka Masa and Mr. Arenlong Longkumer, Advocate for the Appellant; K. Wotsa, Sr. G.A., Mr. A. Zhimomi, Mr. Imti Longjem, Mr. S.M. Ozukum, Mr. Joshua and Mr. Tokivi, Advocate for the Respondent

Judgement

Prasanta Kumar Saikia, J.—This proceeding has been initiated with the following prayer:- In the premises as stated above, it is the humble prayer of the petitioner that your Lordships may kindly admit this writ petition, call for the records and issue a Rule calling upon the respondents to show cause as to why a writ in the nature of a Certiorari/or Mandamus/or any other appropriate Writ or Order or direction be issued against the respondents. And after the cause or causes being heard, and after hearing the parties, be further pleased to make the Rule absolute and:

(A) Quash and set aside the impugned Final Order No. NSCB/HQ/ESTT/PERS dated 28.09.2007, issued by the Managing Director, the NSCB Ltd. (Annexure-M to the writ petition)

(B) Quash and set aside the impugned Letter No. NSCB/HQ/ESST/227/99/9586 dated 30.04.2013, issued by the General Manager (Admn & Vig) the NSCB Ltd. (Annexure-P to the writ petition)

(C) Direct the respondents to reinstate the petitioner in service with all

consequential benefits including back salaries.

Heard Mr. Taka Masa, learned counsel for the petitioner. Also heard Mr. Imti Longjem, learned counsel for the respondents. 2. The brief facts which have emerged from the writ petition and which are necessary for disposal of the present proceeding are that the petitioner was appointed as LDA on regular basis in the Nagaland State Co-operative Bank Limited, for short, the NSCB Ltd. vide order dated 02.11.1993. However, in connection with Dimapur East P.S. Case No 0084 u/s 408/409/467/468/477(A)/34, the petitioner was arrested by the Police Women Cell, Dimapur on 17.01.2004. On her arrest, she was put under suspension with immediate effect vide order dated 22.01.2004.

3. In due course, vide order dated 07.06.2004, an explanation was called for and such explanation was sought for by the Managing Director requiring her to show cause as to why action should not be taken against her on the allegation of her committing fraud and forgery while working as an employee of the NSCB Ltd., during her tenure in the Dimapur Main Branch causing huge loss to the Bank aforementioned as well as to its customers.

4. The petitioner, however, submitted her reply denying the allegations against her. Presumably, such explanation was found to be not satisfactory for which the respondent issued charge sheet dated 09.12.2004 upon her and same was also issued by the Managing Director under Rule 120(B) of the Staff Service Rules of NSCB Ltd. In the chargesheet, aforesaid, as many as 5 charges were leveled against her alleging that while working as above, she committed forgery, misappropriation and embezzlement of Bank money and money of the depositors.

5. The aforesaid charge sheet, according to the petitioner, did not disclose any misconduct having been committed by her during her tenure as above nor did it include the list of witnesses and list of document, which the respondents were going to utilize against her to substantiate the allegations aforementioned. Since the respondents did not furnish the list of witnesses and the list of documents along with the charge sheet, she was completely denied of the opportunity of defending the charges leveled against her.

6. Thereafter, the respondents by letter dated 16.06.2005, letter dated 27.08.2005, letter dated 12.01.2006 and letter dated 09.02.2006 issued summons to the petitioner requiring her to appear before the enquiry officer. In the summons aforesaid, she was further directed to give her written statement at least three days before the date of her appearance before the enquiry officer. Once again, such summons did not carry the list of prosecution witnesses although summons required her to submit, as stated above, the written statement at least three days ahead of her appearing before the enquiry officer.

7. In the meantime, the disciplinary committee conducted enquiry against her and thereafter issued show cause notice dated 01.06.2007 under Clause 121 (a)/(VI) of Service Rules of the Bank together with a report of enquiry officer directing the petitioner to reply within 30 days of issue of such notice as to why

she should not be dismissed from service. It has been stated that the petitioner was served with the aforesaid notice only on 30.06.2007.

8. As required, she, however, submitted reply on 01.07.2007 urging the respondents not to take any action against her till the final judgment is passed by the criminal Court. In that connection, it has been pointed out that since the petitioner received the show cause notice along with the report of enquiry office only on 30.06.2007, she hardly found any time on 01.07.2007 to make effective reply to the show cause notice dated 01.06.2007.

9. Thereafter, the Managing Director, who was the disciplinary authority too, by his letter dated 03.10.2007 communicated to the petitioner impugned final order dated 28.09.2007 whereby she was handed down the penalty in the form of dismissal from service in the Rule 121(a)(VI) of the Service Rules. It has also been stated therein that period of suspension was not treated as period on duty.

10. On 07.06.2012, the learned trial Court delivered the judgment in, GR Case No. 15/2004 corresponding to Dimapur RS Case No. 08/2004 whereby the learned trial Court acquitted the petitioner of charges u/s 408/409/477A/34 IPC. A copy of the judgment is attached with the writ petition as Annexure-N. Thereafter, the petitioner submitted an appeal before the appellate authority dated 26.11.2012.

11. However, such an appeal was rejected by the appellate authority vide letter dated 30.04.2012. Such an order passed by the appellate authority is unsustainable in law since on her acquittal, the order under which she stood dismissed from service becomes illegal and as such, in all fairness, the appellate authority ought to have taken notice of the same and ought to have set aside the order of her dismissal from service.

12. The petitioner again contends that normally the enquiry officer and disciplinary authority should not be one and same authority since it also, violates the principle that no one should be Judge of his/her own case. Therefore, it has repeatedly been held that enquiry officer and disciplinary authority must not be merged in one authority. However, in the case at hand, the enquiry officer became the disciplinary authority and such a state of affairs clearly demonstrates that in conducting enquiry against the petitioner, the respondent-authorities violated the cardinal principles of natural justice.

13. The petitioner also found fault with the authority concerned in not taking into account the order of acquittal, recorded in her favour. Since the petitioner was acquitted of offences aforementioned and since such acquittal was rendered as the Bank authority failed to make out a case against her, the order terminating her from service became illegal and as such the disciplinary authority is under an obligation to recall the order of dismissal and to reinstate her to the post, she was dismissed from. As it was not done by the disciplinary authority, this Court is to set aside the order under which she stood dismissed from service.

14. Contending that the departmental proceeding under scrutiny is to be rejected on yet another count, it has been pointed out by the learned counsel for the petitioner that the disciplinary authority issued the termination order with the approval of the Board of the Bank, the highest authority of the Bank. Since the order of her dismissal was passed with the approval of the Board of the Bank, she was not left with any independent authority to prefer an appeal against the order of the disciplinary authority and it again completely tramples down the very fundamental dictum of the principles of natural justice.

15. In support of his contentions, Mr. Taka Masa, learned counsel for the petitioner has referred me to the decisions of Hon''ble Supreme Court

(i) In the case of S.J.S. Business Enterprises (P) Ltd. Vs. State of Bihar and Others, .

(ii) in the case A.U. Kureshi Vs. High Court of Gujarat and Another, ,

(iii) In the case State of U.P. and Others Vs. Saroj Kumar Sinha, and

(iv) In the case of Mohd. Yunus Khan Vs. State of U.P. and Others, .

16. In State of Uttar Pradesh & Ors. (supra), Hon''ble Apex Court held that an enquiry officer is to act as a quasi judicial authority. He is not the representative of the department/disciplinary authority/Government The relevant part is reproduced below:--

28. An enquiry officer acting a quasi-judicial authority is in the position of an independent adjudicator. He is not supposed to be a representative of the department/disciplinary authority/Government. His function is to examine the evidence presented by the Department even in the absence of the delinquent official to see as to whether the unrebutted evidence is sufficient to hold that the charges are proved.

17. In Mohd. Yunus Khan (supra), it has been held that when the authority initiating the disciplinary action became a witness, accept the enquiry report and imposed punishment, it violates all the cardinal principle of natural justice which ultimately makes such a proceeding totally illegal and as such, unsustainable. Similar view has been rendered in A.U. Khureshi (supra).

18. The respondent No. 2 and 3 has filed common counter affidavit contesting the various claims, made by the petitioner in her petitioner under Article 226 of the Constitution of India. According to the answering respondents, sometime in the month of December 2003, misappropriation of huge amount of money was detected in the Dimapur Main Branch of the NSCB Ltd. The petitioner and one Smti K. Temsukala Aier were found to be the employees, involved in the commission of the aforesaid fraud and embezzlement of Bank money.

19. It is stated that during such time, the petitioner worked as clerk in Dimapur Branch of the NSCB Ltd., whereas said Smti. K. Temsukala worked as accountant in Dimapur Branch of such a Bank. On the detection of such fraud, a police case

was initiated against them, vide Dimapur East P.S. Case No. 0084 u/s 408/409/467/468/477(A)/34 IPC.

20. It has been stated that while Smti K. Temsukala Aier embezzled an amount to the tune of Rs. 84,69,216/-, the petitioner too embezzled Rs. 1,97,000/-. The banner in which they committed the illegality was stated in their counter affidavit. The relevant part is reproduced is below:--

1. Accepting cash from customers after issuing fake pay-in-slip FDRs and making fake entries in the customer pass book.

2. Opening of fake accounts in Saving Bank, recurring deposits, fixed deposits, account by accepting cash from customers without actually depositing the cash in the Bank.

21. In view of the aforesaid developments, those Bank employees were put under suspension and thereafter, the petitioner was served with Memorandum dated 07.08.2004, whereby two instances of fraudulent withdrawal were brought to her notice and she was asked to submit her explanation vide her letter dated 13.08.2004, she submitted that whatever was done by her was done under the instructions of her superior Smti. K. Temsukala Aier.

22. Thereafter, a detailed charge sheet dated 09.04.2004 was framed against her and it was served on her requiring her to submit written statement thereto. In response, the petitioner submitted her written statement wherein she denied the charges, leveled against her stating inter alia that she acted only on the instruction of her superior officer aforementioned. In due course, the enquiry officer submitted his report.

23. Vide letter. No. Nil dated 18.09.2006, the enquiry officer forwarded his report to the authority concerned. The report of the enquiry officer was considered and was accepted. On the acceptance of charge sheet, a show cause notice dated 01.06.2007 was served on the petitioner informing her that disciplinary authority had accepted the report of the enquiry officer and it proposed to inflict the punishment of terminating her from service and she was asked to reply within 30 days.

24. The petitioner received the enquiry report and show cause notice dated 01.06.2007 on 29.06.2007 as per acknowledgement slip. On the receipt of enquiry report, she submitted reply to the show cause notice stating that she acted on the instruction of her superior officer Smti. K. Temsukala Aier.

25. She further states therein that since a criminal case has already been initiated against her and other officers, the proposed action against her should be dropped. The reply of the petitioner was considered and thereafter the reply was rejected.

26. Consequently, letter dated 3.10.2007 (Annexure-L) to the writ petition and final order dated 28.09.2007 (Annexure-M) to the writ petition were issued upon

the petitioner. By the order dated 28.09.2007, the petitioner was terminated from service. By letter dated 03.10.2007, the petitioner was informed of her right to prefer statutory appeal in the terms of Rule 123 of Staff Service Rule of NSCB Ltd. But inspite of she being informed of her right to appeal, she did not prefer any appeal against her order of dismissal till date.

27. With regard to allegation that the enquiry officer became the disciplinary authority, it has been stated that the enquiry officer was subsequently appointed as Managing Director of the NSCB Ltd. By virtue of his appointment as Managing Director of the NSCB Ltd., he became the disciplinary authority as well.

28. But then, it has been stated that there was no illegality or irregularity in the enquiry officer becoming disciplinary authority since the Rules of the NSCB Ltd. do not prohibit an enquiry officer from becoming the disciplinary authority. That apart, law too does not prohibit the enquiry officer becoming disciplinary authority as long as the proceeding is conducted in a fair and transparent manner.

29. In regard to contention that she needs to be reinstated following her acquittal, it has been stated that the petitioner was acquitted only on benefit of doubt. In this connection, it has been pointed out that standard fixed for departmental enquiry and that of criminal case are quite different and as such, acquittal in a criminal charge ipso facto does not result in reinstatement of service when an employees who got dismissed from service following a departmental enquiry.

30. It is also the case of the respondents that at no point of time, the petitioner complaint of her being prejudiced for any infirmities in the conduct of inquiry against her. She raised such allegations years ate her dismissal from service, and that too, only after her acquittal from a criminal charge. Being so, in the present proceeding, she cannot be allowed to raise all those contentions which she never/ ever agitated in the departmental proceeding which resulted in her dismissal.

31. The further case of the respondents was that the petitioner was given the opportunity to question the legality or otherwise of the older in question by preferring an appeal against such an order. But she chose not to invoke such alternative remedy despite she being informed of her right to do so. Since the petitioner did not avail of the statutory alternative remedy, she cannot be allowed to invoke the extra-ordinary jurisdiction of this Court.

32. Besides, the present proceeding has been filed after five years of dismissal of the petitioner from service. No plausible explanation was advanced by the petitioner as to why she did not approach this Court in time alleging infirmities in the disciplinary proceeding aforesaid which she had highlighted in the present proceeding. Since there was long delay and since such delay remains totally unexplained, the present proceeding is liable to be dismissed on this count alone.

33. It has again been contended that the petitioner has suppressed some material facts while seeking relief from this Court of extraordinary jurisdiction. I

has been held again and again that suppression of material facts is fatal. On this count also, according to the answering respondents, the present proceeding is liable to be dismissed.

34. In support of his various contention, the learned counsel for the respondents has relied on the decisions of the Hon"ble Supreme Court in the case of Uttaranchal Forest Development Corpn. and Another Vs. Jabar Singh and Others, and the The Deputy Inspector General of Police and Another Vs. S. Samuthiram, as well as the decision of this Court in the case of Sahidur Rahaman and Another Vs. Hindustan Paper Corporation Ltd. and Others, .

35. I have considered the rival submissions having regard to the pleaded cases of the parties. On perusal of the record, I have found that the petitioner has highlighted several infirmities in the enquiry initiated against her in 2004 which culminated with her dismissal from service in 2007. In order to prove that there was serious violation of the Service Rules and the principles of natural justice, she contends that:--

(1) Show cause notice was served on her without list of witnesses and without list of documents as required under the Rule 123 of the Service Rule.

(2) The summons, served on her with charge sheet, did not include the list of witnesses.

(3) She was served with enquiry report and was given hardly one day"s to submit reply thereto.

(4) The enquiry officer became the disciplinary authority which is not permissible under the law.

36. However on perusal of the pleadings of the parties, it is found that before the enquiry officer, the petitioner never raised the allegation of either the violation of Rules in question or the principle of natural justice to contend that such violation, in feet, prevented her from presenting her case properly before the enquiry officer. Her only submission was that what she had done was done under the direction of her superior staff.

37. What is equally interesting is that she actively participated in the proceeding where the enquiry officer came to the conclusion "though there are only 5 (five) charges leveled against Smti A. Obangmenla Jamir, Clerk (U/S) it has been established also had some involvement as indicated in the charge sheet in the fraudulent drawals from the customer"s account." That being so, in my considered opinion, what she did not raise either before the enquiry officer or before the disciplinary authority cannot be allowed to be agitated in a proceeding which was initiated five years after her dismissal from service.

38. In view of above, I am of the opinion that the contention that in conducting the enquiry against her, the respondent authorities profoundly violated the principles of natural justice as well as the statutory rules governing the enquiry

in question are found to be without any substance, and consequently, the decisions, relied on by the petitioner on this score are found totally to the case at hand.

39. As stated above, we may note here that the petitioner did not dispute her doing something which is not in consonance with the duty, entrusted to her as being employee of the Bank in question. Her only submission was that what she had done was done under the direction of her superior staff meaning thereby that she admitted the wrong doing under the instruction of her superior. Since the petitioner, in substance, admitted the wrong doing, attributed to her, now she cannot be allowed to take a round to say that she was not given enough opportunity to defend the charges leveled against her.

40. Coming to the contention that her appeal was rejected, I have found that the petitioner had submitted a representation after her acquittal from the charges leveled against her. But such a representation by no stretch of imagination can be treated as an appeal against her order of dismissal. This is apparent from the facts that in the aforesaid representation, she did not make any complaint either against the procedures, adopted by the enquiry officer/disciplinary officer or against the order of dismissal.

41. Quite contrary to it, in that application, she wants her dismissal order to be recalled since the criminal Court, which was seized with the matter in question, found her not guilty of the offences, she was charged with. Such relations are clear proof of aforesaid representation not being an appeal as contemplated in Rule 123 of the Rule of the NSCB Ltd.

42. One may note here that the representation was filed before the Managing Director of the NSCB Ltd. after long five years of her dismissal from service. In spite of above, she did not make any prayer for condonation of delay. The absence of such a plea is emphatic testimony to the fact that the representation in question can never ever be treated as appeal within the meaning of Rule 123 of the Rule of the NSCB Ltd.

43. Furthermore, the fact that the representation, above, was addressed to the Managing Director of the NSCB Ltd., and not to the Board of Directors as required under the Rules, has again served to show that representation in question was a mere representation only. Had it been an appeal, it would have been addressed to the Board of the Bank and not to the Managing Director of the NSCB Ltd.

44. The learned counsel for the petitioner has pointed out that under the Rules, an appeal can be preferred only to the Board of the Bank, and not to the Director of the Board or members of the Board. Therefore ----- according to Mr. Taka Masa-- the petitioner was forced to address the so called representation to the Managing Director of the Bank. Situation being such, the addressing of the representation to the Managing Director of the Bank-----no way shows that the representation in question was not an appeal.

45. I have found such argument to be without any force. The discussion which I have already made hereinbefore clearly evinces that representation aforesaid is a representation only. Same needs no further reiteration. Suffice it say, by stretch of imagination, said representation can be said to an appeal as contemplated in Rule 123 of the Service Rules. Therefore, the above allegation too could not afford any relief to the petitioner of this proceeding.

46. The petitioner also contends that disciplinary authority accepted the report of enquiry officer with the approval of Board meaning thereby that her forum for appeal was closed forever. As stated above, she never preferred any appeal against her order of dismissal. Although she was informed of such a right. This coupled with the fact that she never raised such an allegation in appropriate proceeding in time, now, precluded her from raising the same in the present proceeding.

47. I have found that there is alternative remedy in the form of an appeal and such remedy was never availed of. Generally, the writ Court should not invoke its extra ordinary jurisdiction to question an administrative action if there is alternative remedy unless a special case is made out for invoking such jurisdiction despite there being alternative remedy.

48. In that connection, learned counsel for the respondent No. 2 and 3 have referred me to the decision of Hon"ble Supreme Court in the case of Uttaranchal Forest Development Corpn. and Another Vs. Jabar Singh and Others, .

49. On the other hand, the learned counsel for the petitioner has submitted that the availability of alternative remedy does not impinge the jurisdiction of the High Court to hear the matter if it is otherwise permissible. The availability of alternative remedy is only a factor to be considered whether or not High Court would invoke its extraordinary jurisdiction under Article 226. In that connection decision in S.J.S Business Enterprises (P) Ltd. (supra) is relied on.

50. On perusal of the materials on record in the light of rival submissions, I have found that in the present proceeding, the petitioner could not assign any special reason to require this Court to invoke its extraordinary, jurisdiction to entertain the present proceeding despite there being an alternative remedy available to her. Being so, in my considered opinion, on this count also, the present proceeding is liable to be dismissed.

51. I have found that present proceeding has been initiated with a delay of five years. Referring to the decision rendered by Apex Court in Uttaranchal Forest Development Corporation (supra), learned counsel for the respondents has submitted that such delay is fatal, more so, when the delay remains unexplained. On perusal of the materials on record, I have found there was delay in initiating this proceeding and such delay remains totally unexplained. On this count too, in my opinion the proceeding in question needs to be dismissed.

52. Coming to the contention that since she has been acquitted of offence of

forgery etc. the petitioner needs to be reinstated to the post wherefrom she was dismissed in 2007, I have found that such contention too cut no ice in demolishing the case of the respondents. This is because of the fact that the standard of proof in criminal case and that of in departmental proceeding are quite different and as such, an acquittal order will not automatically reinstate a Government employee to the post which he was dismissed from.

53. In support of above proposition of law, we may look into the decision of Hon'ble Supreme Court in the case of Deputy Inspector General of Police & Anr. (supra). The relevant part is reproduced below:--

26. As we have already indicated, in the absence of any provision in the service rules for reinstatement, if an employee is honourably acquitted by a criminal Court, no right is conferred on the employee to claim any benefit including reinstatement. Reason is that the standard of proof required for holding a person guilty by a criminal Court and the enquiry conducted by way of disciplinary proceeding is entirely different. In a criminal case, the onus of establishing the guilt of the accused is on the prosecution and if it fails to establish the guilt beyond reasonable doubt, the accused is assumed to be innocent, it is settled law that the strict burden of proof required to establish guilt in a criminal Court is not required in a disciplinary proceedings and preponderance of probabilities is sufficient.

54. Since the petitioner was acquitted of criminal charges--not honorably--but only on benefit of doubts, and since there is no provision in the Service Rule, governing the service of the petitioner, for reinstatement on acquittal, the petitioner as laid down in the Deputy Inspector General of Police & Anr. (supra) cannot be reinstated on her acquittal from criminal charges, more so, when she was acquitted of charges on benefit of doubt.

55. It is also the contention of the petitioner that the departmental proceeding in question was initiated with malafide intention which makes the termination order under challenge unsustainable in law and therefore, same is liable to be set aside. This contention was opposed to by learned counsel for the respondent No. 2 and 3 contending that there is absolutely nothing on record to show that the removal of the petitioner ever was accentuated by any malafide intention.

56. In that connection, he has drawn my attention to the decision of this Court rendered in the case of Sahidur Rahaman & Anr. (supra). In Sahidur Rahaman & Anr. (supra), this Court, amongst other things, held that findings of the disciplinary authority can be interfered with only when it is clearly shown that the findings are malafide or perverse.

57. I have considered the rival submissions on this score too having regard to the decision, relied on by the respondents and have found that the petitioner never complained of being prejudiced for conducting enquiry in question in alleged disregard of principle of natural justice or principle of Rather, she participated therein admitting her wrong doing of course with a rider that she

had done something, of course, not in accordance with the Rules and Procedure of the Bank only under the direction of her superior officer.

58. Our foregoing discussion has made it more than clear and it merits no further discussion. Being so, the allegation that enquiry against her was conducted with malafide intention is also found to be without any substance. Consequently such a claim too could provide no relief to the petitioner against the order terminating her from service.

59. In view of our foregoing discussion, I have found that the petitioner could not make out a case requiring this Court to interfere with the dismissal order under challenge. Resultantly, it is found that the case in hand has no merit and as such, same is dismissed, of course, without costs.