

(2001) 05 GAU CK 0018

In the Gauhati High Court

Case No : Writ Petition (C) No's. 1466 and 1905 of 2000

Bipulananda Pathak

APPELLANT

Vs

State of Assam and Others

RESPONDENT

Date of Decision : 11-05-2001

Acts Referred:

Assam Services (Discipline and Appeal) Rules, 1964 — Rule 7, 9
Constitution of India, 1950 — Article 14, 16, 226, 311
Criminal Procedure Code, 1898 (CrPC) — Section 551
Criminal Procedure Code, 1973 (CrPC) — Section 36

Citation : (2001) 2 GLT 100

Hon'ble Judges : A.K. Patnaik, J

Bench : Single Bench

Advocate : Mr. P.K. Goswami, Mr. R. Gogoi and Mr. Devashis Baruah, for the Appellant; Mr. B.C. Das, GA, Mr. A.K. Phookan, for the Respondent

Final Decision : Dismissed

Judgement

1. The petitioner has been working as a District Transport Officer under the Government of Assam since 1985. A show cause notice dated 29.3.1997 was issued by the Commissioner and Secretary to the Govt. of Assam, Transport Department to the petitioner to show cause under Rule 9 of the Assam Services (Discipline & Appeal) Rules, 1964 read with Article 311 of the Constitution of India as to why any of the penalties prescribed in Rule 7 of the said rules should be inflicted on him on the charges mentioned in the said show cause notice. Along with the said show cause notice a list of documents, a list of witnesses and statement of allegations on the basis of which the charges are proposed to be proved were also enclosed. By the said show cause notice, the petitioner was required to submit his written statement in defence. The petitioner submitted his written statement in defence to the Commissioner and Secretary to the Govt. of Assam, Transport Department in his letter dated 17th April, 1997. No enquiry into the charges against the petitioner was conducted thereafter. On 30.11.99 a Selection Committee met for recommending promotion to a post of Assistant

Commissioner and all eligible candidates including the petitioner were considered for such promotion. Since the disciplinary proceeding against the petitioner was pending, recommendation of the Selection Committee in respect of the petitioner was kept in sealed cover and the said recommendation was to be given effect to only upon conclusion of disciplinary proceeding. In the affidavit in opposition filed on behalf of respondents it has been stated that the Selection Committee placed Sri Pratap Sonowal at Sl. No. 1 and the writ petitioner at Sl. No. 2 for promotion to the vacancy in the post of Asstt. Commissioner. Sri Pratap Sonowal retired from service without being promoted. On 25.3.2000, the competent authority decided to hold a fresh selection to fill up the vacancy in the post of Assistant Commissioner.

2. Aggrieved, the petitioner filed writ petition under Article 226 of the Constitution in WP (C) No. 1466/2000 praying for quashing the show cause notice dated 29-3-97 issued by the Commissioner and Secretary to the Govt. of Assam Transport Department and the disciplinary proceeding initiated by the said show cause notice and for quashing the decision of the competent authority taken on 25.3.2000 to hold a fresh selection for promotion to the post of Assistant Commissioner of Transport. In the said writ petition, the petitioner also prayed for directing the respondents to consider the case of the petitioner for promotion to the post of Assistant Commissioner without adopting the sealed cover procedure. The petitioner also made an interim prayer in the said writ petition for directing the respondents not to hold any fresh selection for promotion to the post of Assistant Commissioner of Transport. On 29.3.2000 this court, while issuing rule in the said writ petition, passed an interim order that pending disposal of the writ petition, no promotion shall be made to the post of Assistant Commissioner, Transport, Govt. of Assam.

3. On 6.4.2000 a notification was issued by the Govt. of Assam, Transport Department constituting a Selection Committee for selection of candidates for promotion to the cadre of Assistant Commissioner, Transport Department. The petitioner filed writ petition under Article 226 of the Constitution in WP (C) No. 1905/ 2000 with a prayer to quash the said notification dated 6.4.2000. In the said writ petition, the petitioner also made an interim prayer not to give effect to the said notification dated 6.4.2000. On 12.4.2000 this court, while issuing rule in the said writ petition, passed an interim order that pending disposal of the writ petition, no selection shall be made for the post of Assistant Commissioner Transport by the Selection Committee constituted by the notification dated 6th April, 2000. On 24/26th April, 2000, Mr. B. M. Doley, Joint Commissioner, Transport was appointed as Enquiry Officer to enquire into the charges against the petitioner and on 3rd May, 2000 the said Enquiry Officer requested the petitioner to appear before him on 16.5.2000. On 19.6.2000 this court passed an interim order that in the meantime, enquiry, if any, contemplated against the petitioner will not be proceeded with. The two writ petitions were heard together on 21.11.2000, 5.12.2000 and 24.12.2000 respectively.

4. At the hearing, Mr. P.K. Goswami, learned counsel for the petitioner, submitted that the charges against the petitioner in the disciplinary proceeding are that on 9th and 10th December, 1996 the petitioner working as District Transport Officer, Kamrup went to conduct a checking of vehicles on National Highway with a team of Enforcement Inspectors and during the checking on 10.12.96 at Jaiguru near Amingaon some boys threatened and humiliated the team and forced about 7 Nos. of Coal loaded truck drivers to drive away the vehicles in presence of the petitioner and yet the petitioner did not lodge First Information Report with the police. Mr. Goswami submitted that the letter dated 12.12.96 of the petitioner to the Commissioner of Transport Assam which was one of the documents in the list of documents mentioned in the impugned show cause notice would show that the petitioner had apprised the Commissioner of Transport, Assam about the aforesaid incident on 10.12.1996 and also marked a copy of the said letter to the Superintendent of Police (City) Guwahati for favour of information and necessary action. According to Mr. Goswami, the Superintendent Police (city) Guwahati to whom the copy of the said letter dated 10.12.1996 was marked was empowered u/s 36 of the Code of Criminal Procedure, 1973 (the CrPC) to treat the information furnished to him by the petitioner in the said copy of the letter dated 10.12.96 as a First Information Report (FIR) and take action accordingly. In support of his submission. Mr. Goswami cited the decision of the Supreme Court in R.P. Kapur and Others Vs. Sardar Pratap Singh Kairon and Others, He argued that since the petitioner had lodged an F.I.R. with the Superintendent of Police(City) Guwahati, the charge that he did not lodge any F.I.R. is based on a non-existing fact and the initiation of disciplinary proceedings by the impugned show cause notice was vitiated by malice in law. He submitted that in Smt. S.R. Venkataraman Vs. Union of India (UOI) and Another, the Supreme Court has held that an administrative order which was based on reasons or facts that do not exist must be held to be infected with an abuse of power and quashed the order of premature retirement of the Government servant. Mr. Goswami also cited the decision of the Supreme Court in R.C. Sood Vs. High Court of Rajasthan, in which the Supreme Court quashed the entire disciplinary proceeding initiated by the High Court against R. C. Sood, a Judicial Officer," after holding that the view taken by the High Court was wholly arbitrary, unwarranted and violative of Articles 14 and 16 of the Constitution. Mr. Goswami further submitted that the written statement of defence in reply to the impugned show cause notice was submitted by the petitioner to the Commissioner and Secretary to the Govt. of Assam, Transport Department way back in April, 1997 and no enquiry was conducted thereafter for several years. The petitioner, therefore, understood that the disciplinary proceeding against the petitioner had been dropped. It is only when the recommendation for the promotion of the petitioner to the vacancy in the post of Assistant Commissioner was kept in a sealed cover by the Selection Committee in its meeting held on 30.11.99 that the petitioner came to learn that the disciplinary proceeding has not been dropped against the petitioner. Mr. Goswami vehemently argued that the delay in finalising the disciplinary proceeding against the petitioner and the subsequent decision of the Government

to re-open the disciplinary proceeding after about 3 years has deprived the petitioner his right to be considered for promotion to the post of Asstt. Commissioner, Transport and therefore has caused immense prejudice to the petitioner. He cited the decision of the Supreme Court in *State of Andhra Pradesh Vs. N. Radhakishan*, in which it has been held that the delay in completing the disciplinary proceeding caused of prejudice to the employee and vitiated the disciplinary proceeding. Finally, Mr. Goswami submitted that although the recommendation of the Selection Committee dated 30.11.99 was valid upto 30.11.2000, the petitioner had approached this court before 30.11.2000 and reliefs to the petitioner cannot be denied only on the ground that the said recommendation of the Selection Committee was valid only upto 30.11.2000. He cited the decisions of the Supreme Court in *State of U.P. Vs. Ram Sawrup Saroj*, and the decision of the this court in *Dhanhazarika v. State of Assam & Ors* 1999 (1) GLT 280.

5. Mr. B.C. Das, learned Senior Govt. Advocate appearing for the State of Assam, on the other hand, submitted that the charges against the petitioner in the impugned show cause notice are yet to be enquired into by the Enquiry Officer and the High Court in exercise of power of judicial review under Article 226 of the Constitution cannot go into the truth or correctness of the charges and should leave the charges to be enquired into by the Enquiry Officer or the disciplinary authority. In support of this submission, he cited the decisions of the Supreme Court in *Union of India (UOI) and Others Vs. Upendra Singh, Dy. Dy. Inspector General of Police Vs. K.S. Swaminathan*, and *State of Punjab and Others v. Ajit Singh*. Mr. Das further submitted that the letter dated 12.12.96 of the petitioner was addressed to the Commissioner of Transport, Assam and was a report submitted by the petitioner to his superior authority and was not an F.I.R. According to Mr. Das, the submission of Mr. Goswami that copy of the said letter dated 12.12.1996 sent to Superintendent of Police (City) Guwahati has to be treated an F.I.R. is not correct in law. Mr. Das argued that in the case of *State of AP v. N Radhakishan* (supra) cited by Mr. Goswami the Supreme Court found that the incident on the basis of which the disciplinary proceeding was initiated was of the year 1987 and the disciplinary proceeding was sought to be initiated in 1995 and there was no explanation from the State of A.P. for this delay and the Supreme Court held on these facts that the delay in conclusion of disciplinary proceeding had vitiated the disciplinary proceeding.

6. Mr. A.K. Phukan, learned counsel appearing for the Respondent No. 6 in WP(C) No. 1905/2000 while adopting the arguments of Mr. B.C. Das further submitted that Para - 2 of the judgment in the case of *State of A.P. v. N Radhakrishan* (supra) would show that a memo dated 31.7.95 had been served on N. Radhakishan just before the meeting of the Departmental Promotion Committee only to deprive him of his claim of promotion but in the present case the impugned show cause notice was issued in the year 1997 much prior to the meeting of the Selection Committee for considering the petitioner for promotion on 30.11.99. Mr. Phukan further submitted that the recommendation of the

Selection Committee in favour of the petitioner can no longer acted upon as the validity of the recommendation had expired on 30.11.2000. He cited the decision of the Supreme Court in *State of Bihar and others Vs. Md. Kalimuddin and others*, for the proposition that the High Court could not stop the lapse of a penal of selected candidates in exercise of its judicial discretion. Mr. Phukan vehemently argued that even though the petitioner was recommended for promotion to the post of Asstt Commissioner by the Selection Committee in its meeting held on 30.11.99, such recommendation does not confer any right on the petitioner to be appointed to the post of Asstt. Commissioner, Transport. He argued that it is always open for the Government not to act on the basis of the said recommendation and instead constitute a fresh Selection Committee for considering eligible officers for promotion to the post of Asstt. Commissioner. Mr. Phukan vehemently contended that in case such fresh selection is held, the Respondent No. 6 in WP (C) No. 1905/2000 will have a right to be considered for promotion to the post of Asstt. Commissioner, Transport. Hence, the writ petition should be dismissed and the interim order staying such fresh selection should be vacated.

7. It is not as if the court can never in exercise of its power of judicial review interfere with the initiation of a disciplinary proceeding by the disciplinary authority against an employee. In *R.C. Sood v. High Court of Rajasthan* (supra) cited by Mt. Gowami the High Court had initiated disciplinary proceeding against the petitioner R. C. Sood who was member of the Higher Judicial Service in the State of Rajasthan and was a senior District & Sessions Judge and the Supreme Court allowed the writ petition of the petitioner and quashed the entire disciplinary proceedings initiated by the High court against the said petitioner after holding that the disciplinary proceeding had been initiated by the High Court on a view which was wholly arbitrary, unwarranted and violative of Articles 14 and 16 of the Constitution. Even in the decision of the Supreme Court in *Union of India & others v. Upendra Singh* (Supra) cited by Mr. Das. the Supreme Court in Paragraph 6 of the judgment while holding that the Court or the Tribunal has no jurisdiction to go into the correctness or truthness of the charges in a disciplinary proceeding has observed that the Court or the Tribunal can interfere only if on the charges framed (read with imputation or particulars of the charges, if any) no misconduct or other irregularity alleged can be said to have been made out or the charges framed are contrary to any law. Similarly, in *Dy. Inspector General of Police v. K.S. Swaminathan* (supra) cited by Mr. Das the Supreme Court in Paragraph 4 of the judgment, while holding that the Court of the Tribunal could not justified at the time of framing of the charges to go into whether the charges are true, has held that at the stage of framing of the charges, the statement of facts and the charge sheet supplied are required to be looked into by the Court of Tribunal for the purpose of finding out as to whether the statement of facts and materials in support thereof supplied to the delinquent officer disclosed the alleged misconduct.

8. The question for consideration in this writ petition thus is whether the

impugned show cause notice dated 29.3.1997 containing the charges, the statement of allegations and the documents in support of the said charges disclose the alleged misconduct on the part of the petitioner. The misconduct alleged against the petitioner is indicated in Para-1 of the impugned show cause notice dated 29.3.97, which is quoted herein below :-

1. "That while you are DTO (Kamrup) W/Z one, Guwahatl and arranged to conduct a checking of vehicle on National Highway on 9th and 10th Dec/96 withateam of E.I.S. Accordingly the checking was conducted and in course of checking on 10.12.96 at Jaiguru near Amingaon some boys threatened and humiliated the team and forced about 7(seven) Nos. of Coal loaded truck drivers to drive away the vehicle in your presence. The team were intimidated on performing Govt. duty by the miscreants and you remained idle simply by asking the E.I.S. on duty to file FIR. It was your duty also to submit complaint to the Police Station and lodge FIR. Your such conduct is unbecoming of a Govt. officer of your status and rank and you have failed to leave up to the expectation.

You are, therefore, charged with negligence of duty, apathy and irresponsibility.

Lists of documents and witnesses proposed to be relied upon for proving these charges and allegations are also enclosed"

It will be clear from the aforesaid narration in the impugned show cause notice dated 29.7.97 that the petitioner has been charged for negligence of duty, apathy and irresponsibility for not having lodged an FIR in the Police Station with regard to the aforesaid incident which took place at the time of checking of vehicles on 10.12.96 at Jaiguru near Amingaon. But in the aforesaid narration of the charges it is stated that petitioner had asked the E.I.S. to file the F.I.R. It will also be clear from the impugned show cause notice dated 29.3.97 that the aforesaid charges against the petitioner were proposed to be proved by a list of documents and witnesses which were enclosed. One of the items mentioned in the list of documents was the letter dated 12.12.96 of the petitioner written to the Commissioner of Transport, Assam. In the said letter dated 12.12.96 the petitioner had clearly informed the Commissioner of Transport, Assam about the aforesaid incident which took place on 10.12.96 at the time of checking. A copy of the said letter dated 29.3.97 has been marked by the petitioner to the Superintendent of Police (City) Guwahati for favour of information and necessary action. Thus, the petitioner had Informed the Superintendent of Police (City) Guwahati about the aforesaid incident on 10th Dec" 96 and had also requested him to take necessary action. u/s 36 of the Code of Criminal Procedure, 1973, Police Officers superior in rank to an officer in charge of a police station may exercise the same powers, throughout the local area to which they are appointed, as may be exercised by such officer within the limits of his station. Interpreting the parametric provision in Section 551 of the Old CrPC, the Supreme Court has held in R.P. Kapur and Others v. Sardar Pratap Singh (supra) that the Additional Inspector General of Police to whom the complaint was sent could exercise the power of the officer in charge of the police station because he

was superior to the rank of officer in charge of police station. Thus the superintendent of Police (City) Guwahati could exercise power of the officer in charge of the police station on the basis of information sent to him in the copy of the letter dated 12.12.96 of the petitioner to the Commissioner of Transport, Assam. The petitioner in the District Transport Officer only had a duty to ensure that the incident which took place on 10.12.96 at the time of checking of the vehicles at Jaiguru near Amingaon were reported to the police for necessary action and he appears to have discharged such duty by first asking the E.I.S. team to lodge then FIR and when no such FIR was lodged by the EIS team by sending a copy of the letter dated 12.12.96 to the Superintendent of Police (City) Guwahati. It has not been alleged either in the charges or statement of allegations in the impugned show cause notice dated 29.3.97 that a copy of the said letter dated 12.12.96 of the petitioner to the Commissioner of Transport, Assam had not in fact been sent to the Superintendent of Police(City) Guwahati for information and necessary action. Rather, the said letter dated 12.12.96 of the petitioner to the Commissioner of Transport, Assam with a copy to the Superintendent of Police(City) Guwahati for favour of information and necessary action is one of the materials or documents on which the charges or allegations against the petitioner are proposed to be proved as indicated in the impugned show cause notice dated 29.3.97 itself. Thus, the charges the statement of allegations and the materials or documents in support thereof do not make out the alleged misconduct of negligence of duty, apathy and irresponsibility on the part of the petitioner not to inform the police for necessary action regarding the incident at the time checking of vehicles on 10.12.96.

9. It further appears that pursuant to the impugned show cause notice dated 29.3.97 the petitioner submitted his written statement dated 17th April, 1997 stating inter alia that he had informed the Commissioner of Transport, Assam about the aforesaid incident at the time of checking of vehicles on 10.12.96 in his letter dated 12th December" 96 and had endorsed a copy of the said letter to the Superintendent of Police(City) Guwahati on very same day. In the said written statement he had stated that the allegations against him that he did not lodge on FIR is absolutely false. File No. TMV 5/97 of the Transport Deptt., Govt. of Assam produced before the Court indicates that after receipt of the said explanation of the petitioner placed at Page 24 of the file, the Commissioner & Secretary, Transport in his note dated 10.6.97 to the Minister, Transport inter alia observed that it appears that the DTO(Petitioner) had lodged an FIR to the Superintendent of Police(City) Guwahati. He had also stated in the said note dated 10.6.97 that the 3(three) Enforcement Inspectors has also furnished their explanations. The Commissioner and Secretary suggested in the said note that explanations submitted by all the 4(four) officers did not justify action on the matter and the proceedings may be dropped with a caution to them to be careful in such matter in future. No enquiry was held into the charges for more than 21/2 years. On 7.4.2000, the Commissioner and Secretary, Transport on instruction from the Minister, Transport has re-examined the matter and has

observed that the petitioner has nor really lodged any F.I.R. In the said note dated 7.4.2000, the Commissioner and Secretary has not disputed the fact that a copy of the letter dated 12.12.96 of the petitioner to the Commissioner of Transport was marked to the Superintendent of Police(City) Guwahati but has taken in view that the contention of the petitioner that his report to the Commissioner with a copy of endorsement to the Superintendent of Poltce(City) Guwahati should be treated as FIR u/s 36 of the Code of Criminal Procedure was not tenable in law. The Minister after perusing the said note of the Commissioner & Secretary, Transport had taken a view that the explanation submitted is not satisfactory and it is essential to conduct enquiry and take the case to its logical conclusion. It has been held by the Supreme Court in State of A.P. v. N. Radhakrishan (supra) that in considering whether delay has vitiated the disciplinary proceeding the Court has to consider the nature of the charges, its complexity and on what account the delay has occurred, and if the delay is unexplained, prejudice to the delinquent employee is writ large. The charges against the petitioner are only that he had not lodged FIR and was therefore guilty of negligence of duty, apathy and irresponsibility. The said charge was neither very grave nor complex. No explanation whatsoever has been furnished before this Court as to why the matter was kept pending between 10.6.97 when the Commissioner & Secretary Transport submitted his note to the Minister, Transport and 7.4.2000 when the Commissioner & Secretary, Transport re-examined the matter and suggested tot he Minister Transport for conducting an enquiry. The aforesaid delay is, therefore, unexplained and the prejudice against the petitioner is writ large particularly when his promotion to the post of Assistant Commissioner, Transport has been held up on account of the aforesaid disciplinary proceeding. I am, therefore, of the view that the impugned show cause notice dated 29.3.97 issued by the Commissioner and Secretary, Transport Govt. of Assam and the disciplinary proceeding against the petitioner pursuant to the said impugned show cause notice are liable to be quashed.

10. There is no dispute over the well settled proposition of law explained by Mr. Phukan that a person who has been selected by the Section Committee for appointment to a post has no right to be appointed to the post. The selection made by the Selection Committee is at most a recommendation for consideration by the appointing authority. But in the instant case, although the petitioner has been selected for appointment to the post of Assistant Commissioner, Transport by the Selection Committee, such recommendation of the Selection Committee has been kept in a sealed cover and has not been placed before the appointing authority for consideration because the disciplinary proceeding against the petitioner was pending. Now that the disciplinary proceeding against the petitioner is being quashed by this judgment, the recommendation of the Selection Committee in its meeting dated 30.11.99 for promotion of the petitioner to the post of Assistant Commissioner, Transport has to be considered by the appointing authority in accordance with law.

11. Mr. Phukan is also right in his submission that no direction can be given by

the Court to the appointing authority to appoint a candidate placed in a panel if the panel has lapsed by the passage of the period for which the panel was to remain valid. I find that during the validity period of the said select list dated 30.11.99 the petitioner had filed WP(C) No. 1466/2000 on 28th March, 2000 and had also filed WP(C) No. 1905/2000 on 11th April, 2000 for a writ/direction to the State respondents to consider his case for promotion to the post of Asstt. Commissioner without adopting the sealed cover procedure and had also challenged the very initiation of disciplinary proceeding of the impugned show cause notice dated 29.3.97 on account of which the sealed cover procedure was followed by the Selection Committee. In *Purushottam v. Chairman, MSEB & another* (supra) the Supreme Court. found that the appellant in that case was duly selected and was entitled to be appointed to the post but for the illegal decision of the Screening Committee and held that the right of the appellant to be appointed against the post to which he has been selected cannot be taken away on the pretext that the panel of selected candidates had in the meantime expired. Similarly, in *State of U.P. v. Ramswarup Saroj* (supra) the Supreme Court has held that claim of a candidate included in the panel cannot be defeated merely because the currency of panel expired during pendency of litigation more so when a vacancy was available for appointment. In the instant case, the vacancy in the post of Assistant Commissioner, Transport for which the petitioner was recommended for promotion by the Selection Committee in its meeting held on 30.11.99 is still available and the petitioner had approached this Court in the writ petition during the validity period of the said recommendation claiming his right to be considered for promotion to the post of Assistant Commissioner, Transport on the basis of selection made by the Selection Committee on 30.11.99 contending that the disciplinary proceeding was illegal and the sealed cover procedure should not have been adopted. Once the Court. Quashes the disciplinary proceeding, directions can always be issued by the Court to the State respondents to consider his case for promotion on the basis of the recommendations of the Selection Committee made on 30.11.99.

For the aforesaid reasons, I quash the impugned show cause notice dated 29th March, 1997 issued to the petitioner by the Commissioner & Secretary to the Govt. of Assam Transport Department as well as the disciplinary proceeding pursuant to the impugned show cause notice and direct that the recommendation of the Selection Committee in its meeting held on 30.11.99 for promotion of the petitioner to the post of Assistant Commissioner Transport, will be considered by the Government of Assam Transport Department within a period of 2(two) months from the date of receipt of a certified copy of this Judgment from the petitioner by the Commissioner and Secretary, Transport Department, Govt. of Assam and until such consideration by the Government is made, no fresh selection to the post of Assistant Commissioner for which the petitioner was recommended will be made.

Considering the facts and circumstances of the case, the parties shall bear their own costs.