

(2009) 08 GAU CK 0080
In the Gauhati High Court
Case No : Writ Petition (C) No. 4331 of 2008

Biswa Saikia

APPELLANT

Vs

State of Assam and Others

RESPONDENT

Date of Decision : 18-08-2009

Acts Referred:

Assam Services (Discipline and Appeal) Rules, 1964 — Rule 26, 7, 9
Constitution of India, 1950 — Article 226, 311(2)

Citation : (2011) 1 GLT 80

Hon'ble Judges : C.R. Sharma, J

Bench : Single Bench

Advocate : N. Dutta and B. Chetri, for the Appellant; B.C. Choudhury, G.A., for the Respondent

Final Decision : Allowed

Judgement

C.R. Sarma, J.—The review order dated 13.6.2008 passed by the Deputy Inspector General of Police (AP), Assam, Ulubari, Guwahati demoting the Petitioner to the post of Constable from the post of Havildar and to recover cost of 640 rounds of 9 mm ball ammunition from the salary of the writ Petitioner has been challenged by this writ petition preferred under Article 226 of the Constitution of India.

2. The Petitioner's case, in brief, is as follows:

The Petitioner at the relevant time was serving as Havildar in the 16th Assam Police (IR) Bn., Guwahati. Alleging certain misconduct the Petitioner was removed from the service without holding any enquiry by invoking the jurisdiction conferred by Clause-3 of Article 311(2) of the Constitution.

3. Being aggrieved by such order of removal the Petitioner approached this Court by filing the writ petition being Civil Rule No. 837/1994. The said Civil Rule was disposed of on 24.5.09 (sic) and thereby the order of termination dated 5.1.94 was quashed. Consequent upon the said order, the Petitioner was reinstated in

the service w.e.f. 14.11.94. Thereafter following the said reinstatement a departmental proceeding was initiated vide charge memo dated 14.11.94. The charges brought against the Petitioner were inter-alia as follows:

When Havilder Biswa was serving as Armourer Havilder at APTC, Dergaon he was operating the stock register of ammunition of APTC, Dergaon and during his tenure,

(1) 210 rounds of 9 mm ball ammunition were issued vide IVR No. Kote/APTC/117/92 from APTS, Dergaon to CARS, Dergaon and the same quantity of ammunition were returned from CARS to APTC vide IVR No. CARS/Nil/92 dated 20.10.92, but he did not reflect the issue and return receipt of 210 rounds of ball ammunition in the stock register.

(2) 400 rounds of 9 mm ball ammunition were issued to CARS vide IVR No. Kote/APTC/AA, dated 24.05.90, but in the stock register the figure was tempered and made 900 in place of 400. In the duplicate copies of the issue voucher and return voucher figure was 400. Thus he had manipulated the ammunition number with the intention of pilfering 500 rounds of 9 mm ball ammunition.

(3) Another 140 rounds of 9 mm ball ammunition were found short during verification in his tenure.

4. During the pendency of the said proceeding the Petitioner along with others were considered for promotion to the post of Sub-Inspector and he was enlisted in the select list prepared by the Respondents. The Petitioner was placed at Serial No. 56 but in view of pendency of the Disciplinary proceeding; the recommendation for promotion was withheld. The enquiry against the Petitioner being dragged, the Petitioner again instituted a writ proceeding which was numbered as Civil Rule No. 1038/98. The said writ petition was disposed of on 18.9.1998 directing the Respondents authority to complete the departmental proceeding within a period of 3 months. In spite of the said specific order the Respondent authority failed to complete the proceeding within the prescribed period. Being aggrieved by the delay in disposal of the departmental proceeding, the Petitioner preferred another writ petition being WP(C) No. 5922/01. This writ petition was disposed of vide order dated 22.9.03 directing the Respondents authority to complete the departmental proceeding within a period of 2 months from the date of furnishing copy of the order. In the said order it was further provided, that in case of default, the departmental proceeding initiated against the Petitioner should stand quashed and the Respondents authority should issue orders promoting the Petitioner to the post of Sub-Inspector w.e.f. the date when his junior was promoted with all financial benefits.

5. Seeking a review/recall of the said order dated 22.9.03 passed in WP(C) No. 5922/ 01, the Respondent authority filed a Review Application which was registered and numbered as Review Petition No. 48/04. The said review petition was dismissed on 6.12.04. In the mean time the Enquiry Officer submitted the final enquiry report on 1.8.05 holding the Petitioner guilty. The disciplinary

authority, while accepting the report of the enquiry officer, passed an order imposing punishment of stoppage of one increment with cumulative effect and also recorded two black marks in the service record of the Petitioner.

6. Though the said order of penalty was passed on 1.8.05, the Petitioner did not challenge the same before the appropriate forum and thus accepted the finality of the findings recorded in the said departmental proceeding wherein it was held that the charges brought against the Petitioner stood proved.

7. The Petitioner filed a contempt petition being Contempt Case (C) No. 235/2004 contending, inter alia, that the Respondents willfully violated the order dated 22.9.03 passed by this Court by failing to complete the departmental proceeding against the Petitioner within the period of two months as directed vide order dated 22.9.2003 and to promote the Petitioner within the stipulated period as directed.

8. Notice being issued, the Director General of Police, as well as the Secretary, Home filed their respective affidavits in the said contempt proceeding, which was duly considered by this Court. The departmental proceeding file was also placed before the Court which received due attention of the Court.

9. Having heard the learned Counsels for both the parties and carefully perusing the materials available on record this Court vide order dated 27.3.08 passed in Contempt Case No. (Civil) No. 235/2004 was pleased to dismiss the contempt petition holding that the Respondents were not guilty of willful or deliberate violation of this Court's order dated 22.9.2003. While dismissing the contempt petition the Court observed that the punishment of stoppage of one increment with cumulative effect and recording of two black marks in the service record was grossly inadequate and as such the Chief Secretary would be under a legal obligation to take the decision whether the punishment imposed on the Petitioner should be reviewed and an appropriate punishment commensurate with the charges proved and established should be imposed on the Petitioner. The order was directed to be brought to the notice of the Chief Secretary.

10. In the light of the above, punishment imposed on the Petitioner was reviewed and by the impugned order dated 13.6.08, passed by the Deputy Inspector General of Police (AP) Petitioner was reverted to the rank of Constable for a period of 4 years w.e.f. the date of disposal of the Disciplinary proceeding i.e. 1.8.2005. Apart from this direction, order was also passed for recovery of over drawal amount, if any, from the salary/other dues of the Petitioner. It was also ordered that the cost of the 640 rounds of 9 mm ball ammunition shall be recovered from the salary of delinquent Biswa Saikia.

11. Being aggrieved by the said order of punishment, the Petitioner has come up with this writ petition challenging the legality and correctness of the impugned order on the ground that the impugned order was passed ex-parte without giving any opportunity to the Petitioner and thus violating all norms and procedures. The Petitioner further contended that the departmental proceeding was

concluded without the knowledge of the Petitioner and that the same amounted to violation of principle of natural justice. The Respondent No. 5 contested the Petitioner's plea by filing an affidavit in opposition. The deponent stated, that in the departmental proceeding initiated against the Petitioner show cause notice was issued, which was received by the delinquent, that the witnesses were examined in presence of the Petitioner, that he declined to produce any defense witness and that the punishment of stoppage of one increment and recording of two black marks was imposed considering the gravity of the offence committed by the Petitioner. It is also contended that even after expiry of the punishment period, the promotion of the Petitioner to the higher rank could not be considered due to pendency of the departmental proceeding against the Petitioner. The deponent further stated that in compliance of the High Court's order, the Government directed to review the order of punishment passed by the disciplinary authority on 1.8.05 and that the appellate authority reviewed the order by reverting the Petitioner to the rank of Constable w.e.f. 1.8.05 with further direction for recovery of the cost of arms and ammunitions etc. The deponent prayed for dismissal of the writ petition.

12. Having heard the learned Counsels for both the parties and on careful perusal of the materials placed before this Court, it is found that the order dated 1.8.05 passed by the disciplinary authority, imposing punishment of stoppage of increment and recording of two black marks was not challenged by the Petitioner before the appropriate authority and thus accepted the said punishment. Therefore, the said order of punishment dated 1.8.05 attained finality. The Petitioner is apparently aggrieved by the order dated 13.6.08 passed by the review authority. It is the Petitioner's case that the review order imposing higher penalty (major punishment) i.e. reduction to a lower grade was passed without giving the Petitioner an opportunity of being heard and thus the principle of natural justice was flouted causing prejudice to the Petitioner. The learned senior counsel, appearing on behalf of the Petitioner, drawing attention of this Court has submitted that this Court, while disposing of the contempt petition, nowhere directed the concerned authority to review the punishment without giving the Petitioner an opportunity of hearing. Referring to Rule 26 of the Assam Services Discipline and Appeal Rules, 1964 (hereinafter called the "Rules 1964"), the learned senior counsel has submitted that as per the proviso prescribed by the said Rule, the order imposing or enhancing any penalty could not be passed without giving the Government servant concerned a reasonable opportunity of making a representation against the penalty proposed. The proviso to Rule 26 aforesaid reads as follows:

Provided that no order imposing or enhancing any penalty shall be made unless the Government servant concerned has been given a reasonable opportunity of making a representation against the penalty proposed and where it is proposed to impose any of the penalties specified in Clauses (iv) to (vii) of Rule 7 or to enhance the penalty imposed by the order sought to be reviewed to any of the penalties specified in these clauses, no such penalty shall be imposed except

after an inquiry in the manner laid down in Rule 9 and except after consultation with the Commission where such consultation is necessary.

13. By the impugned order punishment of reduction to a lower grade i.e. from the rank of Havildar to the rank of Constable was imposed on the Petitioner. The said punishment, which is covered by Rule 7(iv) of the Rules, 1964, is a higher penalty than the penalty already imposed by the disciplinary authority on 1.8.2005 i.e. prior to the review order. There is nothing on record to show that the Petitioner was given an opportunity before awarding such higher punishment. Therefore, the said Rule as well as ends of natural justice demanded that before enhancing the penalty aforesaid the reviewing authority should have given an opportunity to the Petitioner. Admittedly in the present case no such opportunity was afforded to the Petitioner.

14. Mr. B. Choudhury, learned Standing Counsel appearing for the Respondents has submitted that the review of the punishment was made following the order dated 27.3.08 passed by this Court in Contempt Case (Civil) No. 235/2004 and as such there was no requirement of hearing or giving opportunity to the Petitioner before passing the impugned order. This Court in the contempt proceeding made the following observation:

Viewed more strictly, the imposition of such punishment has the effect of reducing the administration to mockery and a farce. However, as the aforesaid aspect of the matter is not directly an issue in the present proceeding but at the same time the same can be ignored by the Court only at the peril of public interest. I am of the view that this aspect of the matter should receive the attention of the Chief Secretary of the State and if he is so inclined by the authorities of the Central Government for initiation of a departmental proceeding against the officer who had passed the order dated 01.08.2005. Naturally the Chief Secretary would also be under a legal obligation to take a decision as to whether the punishment imposed on the Petitioner should be reviewed and an appropriate punishment commensurate with the charges proved and established should be imposed on the Petitioner. The Chief Secretary shall act in the matter with utmost expedition and the action taken report will be submitted to the Registrar General of this Court within a period of 30 days from today. The Registrar General will, in turn, place the matter before the Hon'ble Chief Justice.

15. By the said order this Court required the Chief Secretary to take a decision as to whether the punishment imposed on the Petitioner should be reviewed and an appropriate punishment commensurate with the charges proved and established should be imposed on the Petitioner. A careful perusal of the said order does not indicate that this Court had directed the Chief Secretary or the Government to review the order and impose higher penalty without giving opportunity to the Petitioner and without following due procedure of law. The direction was to take a decision as to whether the punishment imposed on the Petitioner should be reviewed and whether an appropriate punishment commensurate with the charges proved and established should be imposed on

the Petitioner. Therefore, the reviewing authority was under the obligation to review the order, if not decided, as per due procedure and giving reasonable opportunity of making a representation against the proposal of enhancing the penalty. Admittedly, no such procedure was followed in this case. The order was in fact passed keeping the Petitioner in dark about the proposal to enhance the penalty. Ends of justice demanded that reasonable opportunity should have been given to the Petitioner before arriving at the conclusion regarding the punishment. Failure to do so has caused the delinquent grave prejudice and injustice. The law of natural justice demands that no man should be put to suffer without first giving a fair chance of being heard. The Courts have been developing and extending the principles of natural justice so as to build up a kind of code of fair administrative procedure, to be obeyed by authorities of all kinds. The power vested on an authority is to be exercised fairly by duly following the procedure established by law. Failure to do so vitiates the action taken by such authority.

16. In the case of Mazharul Islam Hashmi Vs. State of U.P. and Another, it was observed that the ratio in the case of Md. Roshid Ahmed's case Mohd. Rashid Ahmad Vs. State of U.P. and Another, was that it was a fundamental rule of law that no decision must be taken which will effect the rights of any person, without first giving him an opportunity of putting forward his case. In the said case the main requirement of fair hearing as observed by the Apex Court earlier was reflected as follows:

- (i) person must know what he is to meet, and
- (ii) he must have an adequate opportunity of meeting that case.

17. In view of the above, failure of the reviewing authority in giving the Petitioner an opportunity of being heard, before enhancing the punishment aforesaid, amounted to gross violation of natural justice causing prejudice to the Petitioner. Therefore, the award of the penalty, violating the principle of natural justice and the principles of fair play was bad in law. Hence, the same is liable to be set aside by exercising the power of judicial review.

18. In view of the above discussion, I find sufficient merit in this writ petition requiring interference with the impugned order. Accordingly this writ petition is allowed and the impugned order dated 13.6.2008 is set aside.

19. However, the Respondent authority shall have the liberty to take up the review matter de novo, if so advised, after giving due opportunity to the Petitioner as per rules.