
(2010) 12 GAU CK 0014
In the Gauhati High Court
Case No : Writ Petition (C) No. 579 of 2010

Debashis Roy Choudhury

APPELLANT

Vs

State of Tripura and Others

RESPONDENT

Date of Decision : 21-12-2010

Acts Referred:

Central Civil Services (Classification, Control and Appeal) Rules, 1965 — Rule 11, 16, 27, 27(2)

Constitution of India, 1950 — Article 14, 309, 310, 311

Citation : (2011) 6 GLR 682

Hon'ble Judges : Utpalendu Bikas Saha, J

Bench : Single Bench

Advocate : S. Deb and Mr. S. Dutta, for the Appellant; A.S. Lodh, for the Respondent

Judgement

U.B. Saha, J.—The writ petitioner Shri Debashis Roy Choudhury has challenged the order No. F.PRS-523/CO-OP/82 (ACF)/11/496-98 dated 22.9.2010 (Annexure P-9 to the writ petition and the order No. F.PRS-523/COOP/82(ACF) dated 4.10.2010 (Annexure P-10 to the writ petition) respectively, whereby and where under the appellate authority in his findings stated; inter alia, that it does not call for any interference from the Appellate Authority (Principal Secretary, Cooperation Dept.) and as such the case is remitted to the Disciplinary Authority (Registrar of Co-operative Societies) for awarding proportionate punishment keeping in view the public interest/society's interest and consequent thereto the disciplinary authority after receipt of the findings of the appellate authority cancelled his earlier order dated 22.4.2010 and passed the impugned order dated 4.10.2010 wherein he enhanced the earlier punishment and awarded the following punishment:

(a) Under rule 11 (iii) of CCS (CC and A) Rules, 1965 the liable amount of Rs. 2,84,437 (Rupees two lakhs eighty-four thousand four hundred thirty-seven only) fixed as per audited accounts and reports of Khowai PMCS Ltd. For the year 1996-97 to 2001-02 is to be recovered along with the interest at the rate of Rs.

5% from the year of defalcation from the salary of Sri Debashis Roy Choudhury, Auditor (Coop), Ex-Manager of Khowai PMCS Ltd. By installments not exceeding 1/3rd of the salary of Sri Roy Choudhury.

(b) It is also ordered that Sri Debashis Roy Choudhury will not get promotion till the recovery of the liable amount.

(c) Further, the pay of Sri Debashis Roy Choudhury is to be fixed reducing 1 (one) increment of his time scale of pay.

(d) He will not get any financial benefit for the suspension period.

2. Heard Mr. S. Deb, learned senior counsel, assisted by Mr. S. Dutta, learned counsel for the petitioner and Ms. A.S. Lodh, learned Addl. Government Advocate appearing for the State respondents.

3. As agreed to by the learned counsel of both sides and considering the prayer of the petitioner in the writ petition, the instant writ petition is taken up for final disposal at the motion stage.

4. Brief facts, needed to be discussed, are as follows :

The petitioner was appointed as Auditor in the Department of Cooperation, Government of Tripura and his service is regulated by the provisions of articles 309, 310 and 311 of the Constitution of India as well as the provisions of Tripura Co-operative Societies Act and Rules made there under. While the petitioner was serving under the State, he was placed on deputation as Manager to the Khowai Primary Marketing Co-operative Societies Ltd. ("the KPMCS Ltd.") in April, 1996 and continued there till May, 2002. The petitioner was placed under suspension by the respondent No. 2 vide order dated 25/26.7.2003. However, the aforesaid order of suspension was revoked on 14.3.2007. Soon thereafter the respondent authority initiated a disciplinary proceeding against him. The charge leveled against him was that while he was functioning as Manager of KPMCS Ltd., he misappropriated Society's fund amounting to Rs. 2,62,437.54 as evident from the audit report for the years 1996-97 to 2001-02 and thereby he committed misconduct. The further charge against him was that he tampered a bank cheque of Rs. 12,000 and drew or amount of Rs. 32,000 as per the audit report for the years 1996-97 to 2001-02 and also concealed the fact and misappropriated Society, fund of Rs. 20,000. On an inquiry done by the inquiring officer appointed by the disciplinary authority, the petitioner was found guilty as the charges leveled against him were proved and on the basis of the inquiry report, the disciplinary authority, respondent No. 2 vide order dated 22.4.2010 awarded punishment to the petitioner, inter alia, that the petitioner is liable to pay Rs. 2,84,437.54 and the same shall be recovered from his salary by installments not exceeding 1/3 of his salary and further he will not be eligible for promotion to the next higher post till full recovery of the said liable amount. Being aggrieved by the said order of punishment, the petitioner preferred appeal to the appellate authority and the appellate authority vide his order dated 22.9.2010 (Annexure

P-9 to the writ petition) though made a finding that the order of the disciplinary authority does not call for any interference, but remitted the case for awarding proportionate punishment keeping in view the public interest/Society's interest. Upon remission by the appellate authority, the disciplinary authority, respondent No. 2 passed the order dated 4.10.2010 (Annexure P-10 to the writ petition) whereby and where under he awarded the punishment as stated supra, which is under challenge in the instant writ petition.

5. Mr. Deb while challenging the impugned orders raised his voice to the question of jurisdiction of the respondent No. 2 on the ground that while the petitioner was on deputation under KPMCS Ltd., respondent No. 4, the respondent No. 2 has no power to suspend the petitioner for the alleged mis-conduct committed by him while he was on deputation without the request of the borrowing authority, respondent No. 4. He submitted that even if for argument sake it is admitted that the respondent No. 2 has the power to suspend the petitioner but not conceding to, and initiate a disciplinary proceeding against him under CCS (CCA) Rules, 1965 then also the paid proceeding stood vitiated as the respondent No. 2 relied on an audit report submitted by a person who is not a "certified auditor". Moreso, the auditor himself also confessed in his cross-examination that he has no "Government Diploma in Cooperative Accounts or a Government diploma in co-operation and accountancy". Learned senior counsel contended that while the appellate authority in his findings stated that the order of the disciplinary authority, which is subsequently cancelled by the disciplinary authority, does not call for any interference, but at the same time remitted the disciplinary proceedings to the disciplinary authority, respondent No. 2 for awarding proportionate punishment meaning thereby the appellate authority considered that the punishment awarded by the disciplinary authority, respondent No. 2 was disproportionate and a lesser punishment should be awarded, but fact remains on remission, the disciplinary authority in the name of proportionate punishment enhanced the earlier punishment, which is not permissible under law as before awarding such punishment, no show cause notice was issued to the petitioner. He submitted that the petitioner sought for furnishing him the additional documents vide Annexure P-4 to the writ petition, but even though the inquiring authority ordered for supplying the same, but that were not supplied by the disciplinary authority. Learned senior counsel finally submitted that normally when the statutory power is vested in some administrative authorities, they try to support the administrative action without applying their independent mind as proscribed by the statute and also some time they do not follow the principles of natural justice. The reason behind this is that they try to protect the action of their subordinates for which itself the impugned orders are liable to be set aside and the respondents should be directed to treat the petitioner in duty and also to provide him all the financial benefits for the suspension period.

6. While resisting the submission of Mr. Deb. Ms. Lodh contended that the impugned order of punishment dated 4.10.2010 is an appealable order and the petitioner should have approached the appellate authority as there is a provision

for appeal under rule 27 of the CCS (CCA) Rules, 1965. She contended that the whole submission of Mr. Deb is nothing but an imaginary one. It is very easy to make allegation against the statutory authority while they are exercising their statutory power. She submitted that when the statute prescribes a particular mode and form then the court should not take the jurisdiction of that forum while exercising its writ jurisdiction and transform it as an appellate authority. The court can only interfere in a disciplinary proceeding matter when there is a procedural violation in decision-making process, but not in the decision. She also submitted that the order of the appellate authority dated 22.9.2010 (Annexure P-9 to the writ petition) whereby and where under the appellate authority remitted the disciplinary proceeding to the disciplinary authority while disposing of the appeal with an observation, inter alia, that it does not call for any interference from the appellate authority, is a just, fair and reasonable one. According to her Rule 27 of the CCS (CCA) Rules, 1965 authorises the appellate authority to confirm, enhance, reduce or set aside the order of punishment in the disciplinary proceedings and also at the same time to remit the case while confirming the order of the disciplinary authority. In support of her contention, she placed reliance on clause (c) of sub-rule (2) of rule 27 of the CCS (CCA) Rules 1965, which is as under :

27. Consideration of appeal. - (2) In the case of an appeal against an order imposing any of the penalties specified in Rule 11 or enhancing any penalty imposed under the said rules, the appellate authority shall consider -

(c) whether the penalty or the enhanced penalty imposed is adequate, inadequate or severe :

(i) confirming, enhancing, reducing, or setting aside the penalty; or

(ii) remitting the case to the authority which imposed or enhanced the penalty or to any other authority with such direction as it may deem fit in the circumstances of these cases.

7. In response to the submission of Ms. Lodh, Mr. Deb, learned senior counsel contended that there is no doubt that there is alternative remedy for preferring statutory appeal before the statutory authority, but a mere alternative remedy does not oust the writ court from exercising its jurisdiction in a proper case. More so, if the court sends the petitioner to the appellate authority then that would be caesor to caesor as the appellate authority has already expressed his opinion regarding the order of the disciplinary authority.

8. Having heard the learned counsel for the parties and on going through the pleadings of the petitioner as well as the impugned orders (Annexures P-9 and P-10 respectively to the writ petition) this court is of the considered opinion that when the appellate authority was of the opinion that the order of punishment passed by the disciplinary authority does not call for any interference by him, he should not have remitted the case again to the disciplinary authority for awarding a proportionate punishment. More so, the disciplinary authority also should not

enhance the punishment by a subsequent order dated 4.10.2010 as impugned herein without providing any opportunity like issuance of show cause to the petitioner as the said action of the disciplinary authority violated the right of the petitioner to make reply recording the decision and enhancement of punishment and as such it also violated the principles of reasonableness and natural justice and, thus, violated article 14 of the Constitution.

9. There is no doubt that the submission of Mr. Deb, inter alia, that normally when the statutory power is vested in some administrative authorities, they try to support the administrative action without applying their independent mind as prescribed by the statute and also some time they do not follow the principles of natural justice has some force, but it cannot be said that in all cases when the administrative authorities are exercising the statutory powers vested in them are acting contrary to the provisions of the statute and trying to protect the action of their subordinates who are exercising the original jurisdiction like initiation of the disciplinary proceedings and taking decision thereof, but at the same time it cannot also be ignored that in most of the cases where the administrative authorities are vested with the statutory power, they are not properly exercising their power as required by law as intended by the Legislature. It has to be kept in mind that when an administrative authority is exercising its statutory power, he no longer remains an administrative authority and a proceeding like disciplinary proceeding is a quasi-judicial proceeding and while deciding a quasi-judicial proceeding, the statutory administrative authority should have passed the order in accordance with law and he should not act on the basis of his personal knowledge.

10. In the instant case, it is a clear case of the petitioner that though the inquiring officer allowed him certain documents to defend his case, but those documents were not supplied to him by the disciplinary authority and for non-supply of those documents the petitioner was prejudiced.

11. Now, let us see whether there is any force of the submission of Ms. Lodh so far clause (c) of sub-rule (2) of rule 27 of the CCS (CCA) Rules 1965 is concerned.

12. It appears from sub-rule (2)(c) of rule 27 of the CCS (CCA) Rules 1965 that the appellate authority has the power either to confirm, enhance, reduce, set aside the penalty or remit the case again to the disciplinary authority which may impose or enhance the penalty or to any other authority with such direction as it may deem fit.

13. Proviso (iv) to clause (c) of sub-rule (2) of rule 27 of the CCS (CCA) Rules, 1965 provides that no order imposing an enhanced penalty shall be made in any other case unless the appellant has been given a reasonable opportunity, as far as may be in accordance with the provisions of rule 16, of making a representation against such enhanced penalty. In the instant case, the same is absent. However, this court is of the considered opinion that sending a writ petitioner to the

appellate authority is always not caesor to caesor and it cannot be also said that the appellate authority will not consider in true sense the case of the petitioner again after enhancement of the punishment by the disciplinary authority subject to that the petitioner can clarify the grounds properly before the appellate authority. There is also no doubt that alternative remedy like a statutory appeal cannot prohibit the writ court from exercising its jurisdiction as the disciplinary authority acted on an alleged audit report submitted by a non-certified auditor, but at the same time the writ court should also consider whether it would be proper for it to take away the jurisdiction vested in an appellate authority by the statute. According to this court, that would not be proper, rather it would be proper, for the writ court to impose self-restriction on it.

14. In the result, this writ petition is disposed of with a direction to the petitioner to prefer an appeal before the statutory appellate authority within a period of one month from today and the appellate authority while considering the appeal of the petitioner shall take note that the petitioner approached the writ court and challenged the order of the disciplinary authority dated 4.10.2010 as well as his order dated 22.9.2010 so far the point of limitation is concerned. As the impugned order dated 22.9.2010 passed by the appellate authority has been given effect to by the disciplinary authority while passing the second order of punishment as impugned, it is not necessary for this court to set aside the same. Moreso, this court has also made some observations so far the appellate order is concerned. So far the order of the disciplinary authority dated 4.10.2010, as impugned, is concerned, it would not be proper for this court to set aside the same when the court has given liberty to the petitioner to prefer appeal before the appellate authority as that would affect the independent mind of the appellate authority, but at the same time this court hope and trust that the appellate authority will act with his judicious mind and reasonableness and will also consider the points raised by the petitioner in this writ petition and the other points which will be raised at the time of appeal. If the petitioner prefers appeal, the same should be disposed of within a short period, preferably within three months from the date of filing the same. Till disposal of the appeal, the impugned order dated 4.10.2010 (Annexure P-16 to the writ petition) issued by the disciplinary authority shall remain stayed.

15. With the above observations and directions, this writ, petition is disposed of. No costs.