
(2011) 08 GAU CK 0032
In the Gauhati High Court
Case No : Writ Petition (Civil) No. 439 of 2001

Gagan Chandra Tripura

APPELLANT

Vs

State of Tripura & Ors.

RESPONDENT

Date of Decision : 03-08-2011

Acts Referred:

Citation : (2011) 4 GLT 772

Hon'ble Judges : U.B.Saha, J

Bench : Single Bench

Advocate : For the Petitioner: Mr.S.Deb, Sr.Advocate & Mr.S.Datta, Advocate
appeared for the Respondents: Mr.S.Chakraborty, Addl.GA, Advocates appearing
for Parties

Judgement

U. B. Saha, J.—By filing this writ petition under Article 226 of the Constitution of India the petitioner has prayed for quashing the impugned order of dismissal dated 5th December, 1998 (Annexure7 to the writ petition) passed by the Director of Welfare for Scheduled Tribes, Government of Tripura, respondent No.3 herein, as well as the order of the Appellate Authority dated 24th May, 2001 (Annexure8 to the writ petition) passed by the Commissioner cum Secretary, Government of Tripura, Department of Tribal Welfare, respondent No.2 herein, and also to direct the State respondents to treat the petitioner to be in service continuously and also provide the consequential service benefits.

2. Heard Mr. S. Deb, learned senior counsel assisted by Mr. S. Datta, learned counsel for the petitioner as well as Mr. S. Chakraborty, learned Addl. GA for the State.

3. The case of the petitioner, in brief, is that on completion of 23 years in service as Work Assistant (TW) he prayed for withdrawal of Rs.20,000/ from his GPF account and consequent thereto a sanction order was issued by the Additional Director of Welfare for Scheduled Tribes, Tripura vide his letter dated 08.05.1998 (Annexure1 to the writ petition) conveying the Accountant General, Tripura with copy to the Treasury officer, Agartala II as well as the petitioner and the Bill

Section. But subsequently, the Additional Director of Welfare for Scheduled Tribes, Tripura on 21 st May, 1998 cancelled the letter of communication dated 08.05.1998 wherein sanction order was issued and requested the Accountant General to send a duplicate copy of the Annual GPF Statement of the petitioner. Before withdrawal of the aforesaid amount of Rs.20,000/ which was initially sanctioned, on 27th June, 1998 the petitioner was placed under suspension in exercise of the powers conferred upon the Disciplinary Authority by subrule 1 of Rule 10 of the CCS (CCA) Rules, 1965.

4. On receipt of the aforesaid communication dated 27.06.1998 i.e. order of suspension, the petitioner submitted representation to the respondent No.3 on 03.7.1998 (Annexure4 to the writ petition) expressing his awkwardness and also requested for withdrawal of the suspension order. He further stated in his representation that the withdrawal of GPF was on sanction granted by the competent authority. Should however be there any excess amount drawn by him that would be repaid in monthly installments and prayed for compassionate consideration.

5. The aforesaid representation dated 03.07.1998 was followed by another representation dated 13.11.1998 (Annexure5 to the writ petition) wherein he stated that because of gale his house was flattened down and he was only in possession of a Xerox copy of his GPF Statement and on the basis of the said Xerox copy he prayed for withdrawal of Rs.20,000/ from his GPF account. Subsequently, he found that the records maintained by the Accountant General, Tripura of his GPF account was full of over writings and he also requested the authority to recover the excess drawn amount from his monthly salary @Rs. 1,000/ per month from the month of January, 1999 and @Rs.2,000/ per month from the month of January, 2000.

6. The authority without disposing his representations, as stated supra, drew up a proceeding against him vide memorandum dated 5th November, 1998 (Annexure6 to the writ petition) under Rule 14 of the CCS (CCA) Rules, 1965 incorporating allegation in the said memorandum that the petitioner made a deliberate attempt to withdraw Rs.20,000/ from his GPF A/c fraudulently by filing a prayer on 02.04.1998 along with a photo copy of his GPF Statement of 1996-1997.

7. Though the petitioner did not admit the charge leveled against him in the memorandum dated 5th November, 1998 but the authority considered his representation dated 13.11.1998 (Annexure5 to the writ petition) as his letter of admission and consequent thereto he was asked to appear before the disciplinary authority, respondent No.3 on 04.12.1998. Accordingly, he appeared before the authority and the respondent No.3 recorded his statement wherein he reiterated his earlier version, as stated in Annexures 4 and 5 and ultimately without going for any inquiry regarding the charges leveled against him the authority passed the impugned order of dismissal dated 05.12.1998 (Annexure7 to the writ petition) against which the petitioner preferred appeal before the appellate

authority (respondent No.2 herein) and the respondent No.2 without considering the fact in what circumstances a transaction can be termed as misappropriation or overdrawn, upheld the order of dismissal passed by the disciplinary authority.

8. Being aggrieved by the aforesaid order of dismissal as well as the order of the appellate authority, the petitioner preferred the instant writ petition.

9. The State respondents by way of filing counter affidavit tried to resist the prayer of the petitioner stating inter alia, that departmental proceeding was initiated against the petitioner and a memo of charges has been framed against him and the same was served inviting written statement to be submitted within 10 days after receipt of the memo of the charges and ultimately the petitioner vide his letter dated 13.11.1998 without denying the charges leveled against him admitted the same that he was also heard in person. It is also contended by the respondents in their counter affidavit that the petitioner nowhere denied the charges leveled against him rather he stated that due to his financial hardship he had to draw a large amount from his GPF account from time to time and prayer for recovery of the over drawn amount from his salary by suitable installments.

10. Mr. Deb while urging for setting aside the order of dismissal as well as the order of the appellate authority as impugned in the writ petition would contend that the authority concerned failed to consider the difference between misappropriation and overdrawn. According to Mr. Deb, an amount kept for a particular purpose by the Government and entrusted to an officer if drawn by the said officer and utilized for personal purpose then only the same can be treated as misappropriation. But in a case where money belonging to the petitioner is drawn on proper sanction from the authority, even in absence of requisite fund in that account, cannot be considered as misappropriation. In this case, at best it can be said that the petitioner has over drawn some amount which is not misconduct.

11. In the instant case, the respondents at no stage informed the petitioner that he has over drawn the money from his GPF account without proper sanction. Rather, charge leveled against the petitioner is that he made a deliberate attempt to withdraw Rs.20,000/from his GPF account fraudulently by filing an application along with a photo copy of his GPF statement of 1996/97 showing closing balance Rs. 1,16,729/ as on 31.03.1997 and omitting the minus sign before the closing balance of his original GPF A/C as issued by the Accountant General, Tripura.

12. He further contended that the letter dated 13.11.1998 written to the respondent No.3 was not a letter of admission of alleged misappropriation rather a letter for over drawn from the GPF account and the same should be adjusted by permitting him to contribute from his monthly salary @Rs. 1,000/ per month from the month of January, 1999 and @Rs.2,000/ per month from the month of January, 2000.

13. He further contended that in absence of an inquiry as required under Section 14 of the CCS (CCA) Rules the issuance of order of penalty itself is a violation of

the procedure prescribed and thus, the same is nullity in the eye of law. He also contended that the appellate authority failed to consider the proper aspect while upholding order of dismissal which was passed in violation of the prescription in the provisions of the CCS (CCA) Rules is also not tenable in the eye of law and is liable to be quashed.

14. He finally contended that though in the statement of imputation of misconduct and misbehaviour, the authority stated that the petitioner had drawn a total amount of Rs:1,36,911/ as advance/withdrawal from his GPF account on 22 occasions and that he was the dealing assistant of the GPF files in the office of the District Tribal Welfare officer, West Tripura for which he had the scope to draw advance/withdrawal from his GPF A/C several times by manipulating the figures of his annual GPF statement as issued by the Accountant General, Tripura and also that the petitioner removed the annual GPF statement of his account from the office files to save himself from his liability, is totally without any basis as none of those documents have been supplied to the petitioner to defend his case and due to which the principle of natural justice is also violated.

15. He again contended that even if this Court consider that the petitioner committed misconduct as alleged by the authority then also the punishment is a disproportionate one and it would be proper for this Court to either order for a minor punishment or to remit the same so that they can after providing opportunity to the petitioner pass necessary order.

16. Mr. Chakraborty submits that the power of the writ Court is very much limited so far a disciplinary proceeding is concerned and this Court being a writ Court has no power to reexamine or reappraise the evidence on record for simple reasons that in that case the exercise of power of this Court can be considered as the power of appellate authority not as a reviewing authority.

17. He further contended that the writ Court can interfere with the departmental proceeding when there are some procedural defects in the departmental proceeding like when the proceeding is initiated by the authority without jurisdiction or the finding of the inquiry authority is perverse and without any evidence but in the instant case neither the authority passed the order without any jurisdiction nor they failed to comply with the procedure as laid down in the CCS (CCA) Rules.

18. He also submits that discipline in the Government administration is sine qua non and when the authority in a disciplinary proceeding on the basis of the admission of the delinquent officer awarded the punishment then the Court cannot reexamine the said punishment unless the order of punishment has shocked the mind of the Court. In the instant case, it will be evident that in the list of documents there is a mention of 20 original prayers of the petitioner for advance/withdrawal from his GPF from 198889 to 199596 and also regarding photocopy of 22 bills showing drawal of advance/withdrawal for a total amount of Rs. 1,36,911/for the GPF account which he did not deny and also did not ask for

inspection. Rather by his application dated 13.11.1998 (Annexure R3 to the counter affidavit) admitted the position and prayed for contributing from his monthly salary @Rs. 1,000/ per month from the month of January, 1999 and @Rs.2,000/ per month from the month of January, 2000.

19. Having heard the learned counsel for the parties and on going through the records, it appears that the petitioner has earlier withdrawn certain amount from his GPF account as sanctioned by the authority from 1986-1995 and till 5th November, 1998 the petitioner was neither informed regarding his over drawal nor was he questioned. Rather a disciplinary proceeding was initiated against him for misappropriation of Government money. If an employee has withdrawn money from his GPF account without proper sanction that cannot be said to be misappropriation. If a person has drawn money from his GPF account either without any sanction or misleading the authority then only it can be said to be misappropriation.

20. It would be profitable to examine in what circumstances use of funds entrusted with a person can be considered as misappropriation and in what circumstances draw of an amount and use of the same can be considered as overdraft. In Black's Law Dictionary, 6th Edition, "misappropriation" means the unauthorized, improper or unlawful use of funds or other property for purpose other than that for which intended. "Overdraft" means to draw upon a person or a bank an amount in excess of the funds remaining to the drawer's credit with the drawee, or to an amount greater than what is due.

21. The AP High Court in the case of M.A. Narayana Setty Vs. Divisional Manager, LIC of India, 1990 (2) SLR (AP) 126, has stated that misappropriation has to be understood in its common dictionary meaning and thus understood it means utilizing the amounts for purposes other than for what they are meant.

22. In the instant case, the money which the petitioner has drawn since 1986-1995 with the sanction of the appropriate authority cannot be considered as unauthorized or unlawful use of funds, obviously he has drawn the amount in excess of the funds in his credit. Therefore, the same could be treated as overdraft and not as misappropriation.

23. In the instant case, admittedly the petitioner has withdrawn money from his GPF account when really there was no money available in his GPF account, misleading the authority. But fact remains that there is no charge framed for such misleading. Therefore, according to this Court the petitioner has over drawn from his GPF account but not misappropriated the Government money. Admittedly, in the instant case, the petitioner made a prayer before the disciplinary authority as well as the appellate authority that he should be allowed to deposit from his monthly salary @Rs. 1,000/ per month from the month of January, 1999 and @Rs.2,000/ per month from the month of January, 2000 in his GPF account so that overdraft can be adjusted.

24. Regarding proportionality of punishment the Apex Court discussed in Om

Kumar Vs. Union of India : (2001) 2 SCC 386 wherein it is stated:

"By "proportionality" we mean the question whether, while regulating exercise of fundamental rights, the appropriate or least restrictive choice of measures has been made by the legislature or the administrator so as to achieve the object of the legislation or the purpose of the administrative order, as the case may be. Under the principle, the Court will see that the legislature and the administrative authority "maintain a proper balance between the adverse effects which the legislation or the administrative order may have on the rights, liberties or interests of persons keeping in mind the purpose which they were intended to serve". It is also stated in the said judgment that the development of principle of "strict scrutiny" in Administrative law in England is, however, recent. Administrative Action was traditionally being tested on Wednesbury grounds. But in the last few years, administrative action affecting the freedom of expression or liberty has been declared invalid in several cases applying the principle of "strict scrutiny". In the case of these freedoms, Wednesbury principles are no longer applied.

25. In the case of V. Ramana Vs. APSRTC & Ors.: (2005) 7SC338, the Apex Court considered the aforesaid paragraphs of Om Kumar (supra) and also considered its earlier decision in the case of B.C. Chaturvedi Vs. Union of India : (1995) 6 SCC 749 and the case of Union of India Vs. Ganayutham : (1997) 7 SCC 463 and considering the aforesaid cases their lordships discussed about the meaning of proportionality and how to exercise them and how the doctrine of proportionality is to be applied. Paragraphs 9 and 10 of V. Ramana (supra) are quoted hereinunder :

"9. In B.C. Chaturvedi Vs. Union of India it was observed: (SCC p.762, para 18)

"18. A review of the above legal position would establish that the disciplinary authority, and on appeal the Appellate Authority, being factfinding authorities have exclusive power to consider the evidence with a view to maintain discipline. They are invested with the discretion to impose appropriate punishment keeping in view the magnitude or gravity of the misconduct. The High Court/Tribunal, while exercising the power of judicial review, cannot normally substitute its own conclusion on penalty and impose some other penalty. If the punishment imposed by the disciplinary authority or the Appellate Authority shocks the conscience of the High Court/Tribunal, it would appropriately mould the relief, either directing the disciplinary/Appellate Authority to reconsider the penalty imposed, or to shorten the litigation, it may itself, in exceptional and rare cases, impose appropriate punishment with cogent reasons in support thereof."

10. In Union of India Vs. G. Ganayutham, this Court summed up the position relating to proportionality in paras 31 and 32, which read as follows: (SCC pp. 47880).

"31. The current position of proportionality in administrative law in England and India can be summarized as follows :

(1) To judge the validity of any administrative order or statutory discretion, normally the Wednesbury test is to be applied to find out if the decision was illegal or suffered from procedural improprieties or was one which no sensible decisionmaker could, on the material before him and within the framework of the law, have arrived at. The Court would consider whether relevant matters had not been taken into account or whether irrelevant matters had been taken into account or whether the action was not bona fide. The Court would also consider whether the decision was absurd or perverse. The Court would not however go into the correctness of the choice made by the administrator amongst the various alternatives open to him. Nor could the Court substitute its decision to that of the administrator. This is the Wednesbury 4 test.

(2) The Court would not interfere with the administrator's decision unless it was illegal or suffered from procedural impropriety or was irrational in the sense that it was in outrageous defiance of logic or moral standards. The possibility of other tests, including proportionality being brought into English administrative law in future is not ruled out. These are the CCSU 5 principles.

(3)(a) As per Bugdaycay, Brind 11 and Smith as long as the Convention is not incorporated into English law, the English courts merely exercise a secondary judgment to find out if the decisionmaker could have, on the material before him, arrived at the primary judgment in the manner he has done.

(3)(b) If the Convention is incorporated in England making available the principle of proportionality, then the English Courts will render primary judgment on the validity of the administrative action and find out if the restriction is disproportionate or excessive or is not based upon a fair balancing of the fundamental freedom and the need for the restriction thereupon.

(4)(a) The position in our country, in administrative law, where no fundamental freedom as aforesaid are involved, is that the Courts/tribunals will only play a secondary role while the primary judgment as to reasonableness will remain with the executive or administrative authority. The secondary judgment of the Court is to be based on Wednesbury 4 and CCSU 5 principles as stated by Lord Greene and Lord Diplock respectively to find if the executive or administrative authority has reasonably arrived at his decision as the primary authority.

(4)(b) Whether in the case of administrative or executive action affecting fundamental freedoms, the Courts in our country will apply the principle of "proportionality" and assume a primary role, is left open, to be decided in an appropriate case where such action is alleged to offend fundamental freedoms. It will be then necessary to decide whether the Courts will have a primary role only if the freedoms under Articles 19, 21, etc. are involved and not for Article 14. 32. Finally, we come to the present case. It is not contended before us that any fundamental freedom is affected. We need not therefore go into the question of "proportionality". There is no contention that the punishment imposed is illegal or vitiated by procedural impropriety. As to "irrationality", there is no finding by

the Tribunal that the decision is one which no sensible person who weighed the pros and cons could have arrived at nor is there a finding, based on material, that the punishment is in "outrageous" defiance of logic. Neither Wednesbury nor CCSU tests are satisfied. We have still to explain "Ranjit Thakur." [Ranjit Thakur Vs. Union of India & Ors., (1987) 4 SCC 611].

26. There is no doubt it is one thing to say that order passed by the statutory authority is wholly arbitrary and thus violative of Article 14 of the Constitution and thus liable to be set aside, but is another thing to say that the discretionary jurisdiction exercised by such authority should not ordinarily be interfered with by a superior Court while exercising its power of judicial review unless one or the other ground upon which and on the basis whereof the power of judicial review can be exercised exists.

27. It is also settled by this time that a superior Court can interfere with the quantum of punishment only on the ground that the same is shockingly disproportionate and for which the Court has given no reasons. In the instant case, the petitioner admittedly appraised the authority the reasons for his withdrawal and was also ready to deposit the same by way of installments within his service period which the authority ought to have considered. But without considering the said aspect and disposing the representation by way of informing him that the authority is not ready to accept his proposal, treated the same as admission of his guilt which is nothing but unreasonable.

28. Though it appears from the record that subsequent to his representation the disciplinary authority, respondent No.3 recorded his statement wherein allegedly he reiterated his earlier stand particularly when in the appeal the petitioner stated that he was compelled to draw money from his GPF account to bear the expenses of his newly constructed house and for the educational expenses of his son who is studying outside the state, i.e. in Fishery College, Orissa and other son who is studying in C1XII and another son studying in C1VII, according to this Court, the appellate authority should have considered regarding the proportionality of the punishment. However, as this Court is exercising its power of judicial review, it would not be proper to express any opinion regarding the amount of over drawal but as the punishment awarded by the authority shocked the mind of the Court. This Court is of the view that the same cannot sustain and is liable to be quashed.

29. Accordingly, the order of his dismissal dated 5th December, 1998 (Annexure 7 to the writ petition) as well as the order of the Appellate Authority dated 24th May, 2001 (Annexure 8 to the writ petition) are hereby set aside and the matter is remitted back to the disciplinary authority to pass a detailed and reasoned order after proper inquiry in accordance with law within a period of six months from the date of receipt of the copy of this order after providing opportunity to the petitioner.

30. As the petitioner did not work for the period from the date of dismissal to till

date, it would not be proper for this Court to direct the authority for payment of arrears of salary for the aforesaid period. The matter is left with the authority concerned as power to grant back wages is to be exercised by the disciplinary authority while it will proceed with the inquiry proceedings.

31. In the result the writ petition is allowed and accordingly disposed of .

No order as to costs.