

(2018) 03 GAU CK 0104

In the Gauhati High Court

Case No : WP(C) 4510, 6311, 5949, 6005 of 2011, 707, 993, 4324, 3338 of 2012

HEMANTA KUMAR PATHAK

APPELLANT

Vs

THE UNION OF INDIA and ANR

RESPONDENT

Date of Decision : 21-03-2018

Acts Referred:

Central Civil Service (Classification Control and Appeal) Rules, 1965 — Rule 14
Central Reserve Police Force Rules, 1955 — Rule 27

Citation : (2018) 03 GAU CK 0104

Hon'ble Judges : ACHINTYA MALLA BUJOR BARUA

Bench : Single Bench

Final Decision : Disposed Of

Judgement

1. Heard Mr. A.K Roy, learned counsel for the petitioner also heard Mr. S.C Keyal, learned ASGI for the respondent authorities appearing in WP(C)

No.3338/2012, WP(C) No.4324/2012, WP(C) No.5949/2011, WP(C) No.6005/2011, Ms. B. Sarma, learned CGC appearing for the respondent

authorities in WP(C) No.6311/2011, Mr. S.K. Medhi, learned CGC appearing for the respondent authorities in WP(C) No.707/2012 and Mr. K.K.

Parasar, learned CGC appearing for the respondent authorities in WP(C) Nos. 4510/2011 and WP(C) No.993/2012. All the 08(eight) writ petitions

pertain to a disciplinary proceeding that was held against them resulting in the order of penalty of reduction of three increments with cumulative effect.

As the factual backgrounds as well as the legal issues are more or less same, albeit minor variance between the petitions, it is deemed appropriate that

all the eight writ petitions can be given a final consideration by a common judgment and order.

2. For the sake of brevity, the fact as found in WP(C) No.4510/2011 is being considered. A memorandum of charge dated 04.06.2009 was issued to

the writ petitioner Hemanta Kumar Pathak of the 33rd Battalion of SSB, Rangia under Rule-14 of the Central Civil Service (Classification Control and

Appeal) Rules, 1965 read with Rule-27 of the CRPF Rules, 1955. The said memorandum of charge was not acted upon.

3. But nevertheless, another memorandum of charge dated 04.07.2009 was issued under the same provision. Consequently, the memorandum of

charge dated 04.07.2009 is construed to be the memorandum of charge, by which the disciplinary proceeding was initiated against the petitioner.

4. The articles of charge accompanying the memorandum of charge contains three charges against the petitioner. The first charge is that on

06.05.2009, when the petitioner went for rescuing one of their colleagues namely Inspector (GD) HP Upreti had failed to control the mob that had

gathered in a peaceful manner and had displayed an offensive mood to the mob/villagers. The said article contains the name of five other constables

along with the petitioner Hemanta Kumar Pathak. It is taken note of that the other five constables includes Mahendra Choudhury being the writ

petitioner in WP(C) No.6005/2011, Kalamuddin Ansari being the writ petitioner in WP(C) No.5949/2011, Deepak Pathak being the writ petitioner in

WP(C) No.707/2012. The other names in the article of charge are not before the Court.

5. The second charge was that the petitioner and the other constables named above had fired live ammunition in the air during the rescue operation of

the aforesaid Inspector from the mob/villagers, which was an act of misconduct being the members of the disciplinary force.

6. The third charge was that the petitioner and the other constables named therein have involved in an immoral act and thereby defamed the

department and had brought a bad name to the SSB before the concerned villagers.

7. The petitioner had submitted his reply to the memorandum of charge and had taken a stand that they were told that the Company Commandant

Inspector Hari Prasad Upreti was abducted by some persons and therefore, the petitioners were required to proceed to bring him back. When they

went out, they found that the villagers were beating the said Inspector. But when the petitioners and the others had reached the spot, the crowd

became violent and started pelting stones and in spite of their best efforts, they could not bring the situation under control in a more peaceful manner.

As the crowd was getting more violent and were armed with dagger and other sharp weapons and were showing their intention to attack the petitioner

and others, certain firing had taken place at that point of time.

8. As regards the second charge, a stand was taken that as the crowd was not listening to the petitioner and others and some of the villagers had tried

to snatch their weapons, therefore, they had to act under the command of Sub Inspector Susindra Singh Rahi.

9. As regards the third charge, the petitioner and others thought that if they were not able to rescue the aforesaid person, who was taken away by the

villagers, it would bring disrepute to the force and therefore, they were compelled to act so.

10. Be that as it may, a departmental enquiry was held against the petitioner and the others by appointing one D.B Sonar, Deputy Commandant as the

Enquiry Officer.

11. In course of the enquiry, the statement of the prosecution witnesses were recorded on 14.07.2009 and the delinquent petitioners were allowed to

give their evidence as well as cross-examine the petitioner's witness.

12. Thereafter, by different communications of the enquiry officer, the writ petitioners/delinquents were asked to remain present before the enquiry

officer on 21.07.2009. It is understood that in course of the petitioners remaining present before the enquiry officer, their statements were recorded.

However on 02.08.2009 some further statements of the local villagers were also taken by the enquiry officer in course of the enquiry and, accordingly,

14 villagers were examined.

13. The communications from the enquiry officer are also available on the record requiring the delinquent petitioners to remain present in the enquiry

from 01.08.2009 up to 03.08.2009, which are in fact not disputed by the petitioners. Further the records also reveal that the statements of the 14

villagers taken on 02.08.2009 were served and received by the writ petitioners/delinquents.

14. In the aforesaid premises, the Enquiry officer had submitted his report dated 10.08.2009 in respect of the petitioner in WP(C) No.4510/2011,

WP(C) 5949/2011, WP(C) 6005/2011 and WP(C) 707/2012.

15. In respect of the petitioners in WP(C)No.3338/2012, WP(C)No.4324/2012, WP(C)No.6311/2011 and WP(C)No.993/2012 being

Mahesh Kumar Meena, Avinash Kumar, Sonu Choudhury and Sanjay Singh, the statement of the prosecution witnesses were taken on 22.07.2009

and thereafter, the statements of the delinquents were taken. But the statement of the villagers taken on 02.08.2009 are common to all the petitioners

and further the other four petitioners as indicated above were also served with the copies of the statements of the villagers. In the aforesaid premises,

a separate report of the enquiry officer also dated 12.09.2009 was submitted in respect of the other four witnesses in WP(C)No.3338/2012,

WP(C)No.4324/2012, WP(C)No.6311/2011 and WP(C)No.993/2012.

16. The petitioners by a show cause notice dated 18.08.2009 of the Commandant 33rd Battalion Rangia were served with a copy of the enquiry report

allowing them to submit a representation against the same, if so advised. Although an objection has been raised by Mr. AK Roy, learned counsel for

the petitioners that in respect of some of the writ petitioners the enquiry report was not enclosed although the show cause notice dated 18.08.2009

were served, but the same cannot be ascertained from the records, inasmuch as, the records indicate that the show cause notices were served on all

the petitioners. But as to whether, the show cause notices also included the enquiry report is indeterminable. But as the enquiry report was served on

some other petitioners except for the petitioner, Sonu Choudhury, therefore, this Court would not like to go into the said question as to whether the

show cause notice also included the enquiry report.

17. Be that as it may, by a separate orders dated 12.09.2009, the penalty of stoppage of increments for three years with cumulative effect were

imposed on all the petitioners. Against the order of stoppage of increment for three years with cumulative effect, some of the petitioners had also

preferred appeals before the Director General of SSB, which are stated to have been rejected.

18. Being aggrieved by the orders of imposing the penalty of stoppage of increment for three years with cumulative effect, the present writ petitions

have been preferred.

19. Mr. AK Roy, learned counsel for the petitioners by relying upon the judgment of this Court rendered in Hriday Das Vs. Union of India reported in

(2015) 4 GLT 1034 has submitted that as the presenting officer was not appointed in the enquiry proceeding, the entire proceeding is vitiated and is liable to be interfered with.

20. Mr. Roy makes a further submission that in the instant case after the statement of the villagers were taken on 02.08.2009, the petitioners were not given the opportunity to cross examine them and, therefore, there is a procedural aberration in conducting the enquiry. As the presenting officer was not appointed, Mr. Roy submits that there is a violation of Rule 14 of the Central Civil Services (Classification, Control & Appeal) Rules, 1965 and Rule 27 of the the Central Reserve Police Force Rules, 1955.

21. Mr. SC Keyal, learned ASGI appearing for the Union of India while leading the arguments on behalf of the respondents submits that the decision

of this Court in Hriday Das (supra) was based upon the earlier decision rendered in Mutum Shantikumar Singh Vs. Union of India & Ors, reported in

2005 (1) GLT 413. Against the said order, the respondent Union of India had preferred a writ appeal which was dismissed. Subsequent thereto, an

appeal has been preferred before the Honâ??ble Supreme Court which is still pending. Accordingly, it is the submission of Mr. SC Keyal, learned

ASGI that the proposition of law provided in Hriday Das (supra) has not attained its finality and, therefore, the same by itself should not be a reason to

declare the entire process to be vitiated for the reason that no presenting officer was appointed.

22. As regards the other submission of Mr. AK Roy, learned counsel for the petitioners that they were not given the opportunity to cross examine the

villager witnesses, who were examined on 02.08.2009, Mr. Keyal has submitted that the record reveals that the copies of the statements of the

villagers were duly served on the petitioners and they had received the same and further most of the petitioners had declined the opportunity given by

the enquiry officer to cross examine the said villagers.

23. On the aforesaid premises as narrated above, as well as the submissions made, the issues for determination would be as to whether the

disciplinary proceeding conducted against the petitioners are vitiated, inasmuch as, the presenting officer was not appointed in presenting the case of

the prosecution in the enquiry and further whether the enquiry proceeding has been vitiated inasmuch as, the petitioners were not given an opportunity

of cross examining the villager witnesses, who were examined on 02.08.2009.

24. In respect of the submission of Mr. AK Roy, learned counsel for the petitioners that the disciplinary proceeding is vitiated, inasmuch as, no presenting officer was appointed, it is noticed that the judgment and order of this Court in Hriday Das (supra) was rendered by relying upon the earlier judgment of this Court in Mutum Shantikumar Singhâ??s case wherein it was held that Rule 27 of the CRPF Rule of 1955 does not bar the competent authorities from appointing the presenting officer in a disciplinary proceeding for conducting the same in a fair manner in accordance with the principle of natural justice. This Court while examining the said question in Mutum Shantikumar Singhâ??s case had arrived at a conclusion that if the presenting officer is not appointed, the enquiry officer will have to examine the witnesses and exhibit the documents which by itself would be a violation of the principles of natural justice.

25. Accordingly, the judgment of this Court in Hriday Das was also apparently delivered on the premises that in the absence of the presenting officer being appointed, the procedure adopted by the enquiry officer has violated the Principles of Natural Justice. But be that as it may, Mr. SC Keyal, learned ASGI has also placed the subsequent development, inasmuch as, on the appeal being preferred by the Union of India against the judgment of this Court in Mutum Shantikumar Singhâ??s case both the learned Single Judge as well as the Division Bench, the Honâ??ble Supreme Court had been pleased to pass an interim order staying the said judgment. The effect of the interim order will be that the conclusion in Mutum Shantikumar Singhâ??s case that non-appointing of the presenting officer would vitiate the disciplinary proceeding can no longer be taken as the basis of declaring the proceeding to be vitiated.

26. Mr. SC Keyal, learned ASGI also raised the contention that in the instant case, the Departmental Head had provided the enquiry officer with the relevant materials and documents which he had acted upon and, therefore, it cannot be construed to be a case where the enquiry officer himself has acted as the presenting officer so as to invoke violation of the principles of natural justice.

27. Without going into the said aspect as to whether non-appointing of the presenting officer would violate the principles of natural justice, inasmuch

as, the said issue is subjudiced before the Honâ??ble Supreme Court, this Court for the present would go by the interim order of the Honâ??ble

Supreme Court staying the judgment in Mutum Shantikumar Singhâ??s case meaning thereby that the proposition of law that non-appointing of the

presenting officer vitiates the enquiry proceeding has also been stayed. For both the reasons, the submission made by Mr. Roy, learned counsel for the

petitioner that the order of penalty is required to be interfered as because the procedure adopted was vitiated due to non-appointing of the presenting

officer is found to be unacceptable.

28. As regards the other contention that the petitioners were not given an opportunity to cross examine the villager witnesses who were examined on

02.08.2009, it is found that the records reveal that the statement of the said witnesses were served upon the petitioner which were duly received by

them and further some of the petitioners had declined the opportunity to cross examine.

29. In the aforesaid premises, a presumption cannot be drawn that all the other petitioners were also not given the similar opportunity to examine the

witnesses and that such opportunity was given by the departmental authorities in a pick and choose manner.

30. At the same time, it is also taken note of that irrespective of the question as to whether any such opportunity to cross examine the villager

witnesses was given to all the petitioners involved in this batch of writ petitions, the conclusions arrived by the enquiring authority in respect of the

three articles of charges were not solely based on such statements of the villager witnesses.

31. In respect of the charge No.2 that certain rounds were fired from the weapons allotted to the petitioners, there are other evidences available

including the report on the weapons that some rounds were in fact fired from the weapons allotted to all the petitioners. As the charge No.2 pertains

only to the allegation that they had fired from their respective weapons, the finding on the said charges definitely is not based solely on the submission

of the villagers, and, therefore, even if some of the petitioners were not allowed to cross examine the villager witnesses, the conclusion in respect of

the second charge would not be vitiated.

32. In respect of charge No.3, it is the allegation against the petitioners that they

were involved in immoral activities. The materials on record indicate that on the given date, one Inspector namely, Hari Prasad Upreti had left the battalion area and had indulged in some illicit activity with a local woman. When he was caught by the villagers and was beaten up, the present petitioners upon knowing the fact that the said inspector was being beaten up had proceeded to the place of incident along with their weapons with an intention to rescue the said inspector. The allegation against the petitioners as evident from the material on record is that they had only gone out to rescue the inspector who was being beaten up for having illicit relationship with a village woman, therefore, the allegation of immoral activity against the petitioners themselves would be unacceptable.

33. In such view of the matter, although the enquiry report says that the third charge has been proved, it is not understood as to in what manner the petitioners had involved themselves in an immoral activity. Accordingly, the third charge against the petitioners is found to be unacceptable. Having said so what remains is the first charge which alleges that the petitioners while going on the rescue act of inspector Hari Prasad Upreti had used more force than that was required and that they could have conducted an act in a more restrained manner. As regards this charge, the evidentiary value of the villager witnesses taken on 02.08.2009 may have some relevance.

34. But at the same time, when the evidence on record is gone through, it is noticed that all that the statement of the villagers indicate is that the petitioners had indulged in live firing from their allotted weapons. The said evidence does not help the Court to arrive at any conclusion as to whether the situation was such as to whether the petitioners ought to have acted in a more restrained manner or it was sufficient enough to justify firing from their respective weapons. Accordingly, this Court is of the view that even if the statements of the villagers are taken into consideration, the same does not help in any manner to arrive at a conclusion that the petitioners could have acted in a more restrained and peaceful manner.

35. It being so, no prejudice can be attributed to the petitioners even if they were not given an opportunity to cross examine the village witnesses, who were examined on 02.08.2009.

36. In view of the above, the conclusion that this Court can arrive at is that the Charge No.1 that the petitioners could have acted in a more restrained

and peaceful manner at the best can be said to have not been wholly proved. In the aforesaid premises, as the conclusion of this Court is that the

Charge No.1 that the petitioners could have acted in a more restrained and peaceful manner has not been wholly proved, the Charge No.2 that the

petitioners had fired from their respective weapons had been proved and that the Charge No.3 that they had acted in an immoral manner is found to

be unsustainable and contrary to the allegations made against the petitioners.

37. What remains for the disciplinary authority is to impose a punishment based only upon the Charge No.2 and partially to the extent of Charge No.1.

As the punishment of withholding of three increments with cumulative effect had been passed by taking into account all the three charges, therefore, it

is deemed appropriate that as only one of the charges in whole and the other charge in part have been found to have been proved, therefore, it would

be appropriate for the disciplinary authority to revisit the quantum of punishment issued upon the petitioners. In doing so, the respondent authorities

shall consider as to what proper punishment would now required to be imposed on the petitioners considering the fact that the punishment of

withholding of three increments with cumulative effect was passed in respect of all the three charges and now that they are required to pass the

punishment only in respect of the second charge in whole and the first charge in part.

38. The aforesaid exercise be undertaken by the disciplinary authorities within a period of one month from the date of receipt of a certified copy of

this Judgment and Order and the fresh order that would be passed in compliance of this order shall prevail over the earlier order of punishment dated

12.09.2009. In terms of the above, all the writ petitions stand disposed of.