
(2010) 09 GAU CK 0018
In the Gauhati High Court
Case No : Writ Petition (C) No. 38 (K) of 2010

K. Zujamo Ovung

APPELLANT

Vs

State of Nagaland and Another

RESPONDENT

Date of Decision : 15-09-2010

Acts Referred:

Nagaland Government Service Conduct Rules, 1968 — Rule 4
Nagaland Services (Discipline and Appeal) Rules, 1967 — Rule 14, 20, 27, 7, 9(2)

Citation : (2011) 2 GLT 455

Hon'ble Judges : Hrishikesh Roy, J

Bench : Single Bench

Advocate : Takamasa and K. Lotan, for the Appellant; B.N. Sarma and Apok Pongener, for the Respondent

Final Decision : Allowed

Judgement

Hrishikesh Roy, J.—Heard Mr. Takamass, leaned Counsel appearing for the Petitioner. Also heard Mr. B.N. Sarma, learned senior advocate representing the Respondents.

2. The Petitioner who was appointed as an Armed Branch Sub-Inspector (ASBI) by order dated 13.7.2006 issued by the Director General of Police (DGP), Nagaland has approached this Court seeking direction for implementation of order dated 9.9.2009 (Annexure M) of the Home Commissioner, Nagaland, whereby the termination order against the Petitioner on 4.5.2009 (Annexure K) has been quashed and the appeal filed to challenge the termination has been allowed.

3. Before proceeding to consider the issue raised in the writ petition, the relevant facts leading to termination of the Petitioner may be recorded.

3.1 After the Petitioner was appointed as an ASBI on 13.7.2006, he was deputed for training in the Police Academy at Umsaw, Meghalnya and on an allegation of mis-behaviour with a fellow trainee and breaking of mess rules in the Academy,

he was released from the Academy on 4.12.2007.

3.2 Thereafter a disciplinary proceeding was drawn up against the Petitioner with a Memorandum of charge dated 25.3.2008 under the provisions of Rule 9(2) of the Nagaland Services (Discipline and Appeal) Rules, 1967 ("the Rules") on the following 2 articles of charge:

ARTICLE I

That Shri K. Zujamo Ovung of 10th NAP(IR) Bn., while undergoing 31st Basic Course at NEPA Umsaw, had failed to conform to the Mess rules that no trainee should use unparliamentarily words/abusive language in the Mess, spoil food items or consume intoxicating drinks and drugs in the Mess, That Shri K. Zujamo Ovung created a nuisance in the mess on 9.9.2007 by throwing plates and foods items under the influence of liquor, for which misconduct a warning letter was issued to him by the Director of NEPA, Umsaw.

By committing such a drastic act he has defamed the name of Nagaland Police Department and brought embarrassment to the Department.

He has, thus, failed to maintain absolute integrity and has committed an act which is unbecoming of a Government Servant.

Therefore, he has violated the Rule 4(1)(i) and (iii) of the Nagaland Government Service Conduct Rules, 1968.

ARTICLE II

That Shri K. Zujamo Ovung ABSI of 10th NAP (IR) Bn., while undergoing 31st Basic course at NEPA Umsaw failed to conform to the mess rules that no trainee should visit each other's room without bona fide purpose. That on 2.12.2007 Shri K. Zujamo Ovung had entered the room of a lady trainee and misbehaved with her for which act the academy was left with on other option but to send him back to his parent department at before completion of his training.

By committing such mis-behaviour he has failed to maintain absolute integrity and has committed an act which is unbecoming of a Government is Servant.

Therefore, he has violated the Rule 4(1)(i) and (iii) of the Nagaland Government Service Conduct Rule, 1968.

3.3 In the departmental inquiry conducted against the Petitioner, charge under article II was found to be proved whereas charge under Article I was not proved.

3.4 The Disciplinary Authority on consideration of the inquiry finding by his Memorandum dated 24.3.2009 proposed to inflict the penalty of dismissal against the Petitioner but on reconsideration of the matter, by order dated 4.5.2009 decision was taken to drop the disciplinary proceeding and instead terminate the Petitioner's service on the ground of unsuitability as he was purported to be on probation at that point of time.

3.5 The Petitioner being aggrieved by his termination of service, preferred an appeal under Rule 14 of the Rules before the Home Commissioner and by order dated 9.9.2009, the Home Commissioner acting as the appellate authority on the grounds and reasons recorded in his order allowed the, appeal holding held that the termination order is unsustainable in law. Accordingly the Appeal was allowed and the termination was interfered by the appellate authority.

3.6 As the representation (s) filed by the Petitioner seeking reinstatement in pursuant to the appellate authority's order were not heeded by the disciplinary authority and several months had gone by, the Petitioner filed the instant petition seeking direction for implementation of the order of the appellate authority.

4.1 Mr. Takamasa, learned Counsel appearing for the Petitioner has referred to the appeal provisions in the Rules and more particularly Schedule I thereto to point out that as the Petitioner was holding a non-gazetted post his appointing authority is the Head of Department and an appeal against the termination decision of the Head of the Department, i.e., DGP, would lie to the Secretary of the Home Department. Contending that the Home Commissioner can exercise the power of the appellate authority, the learned Counsel submits that the non-implementation of the appellate authority's order by the appointing authority is clearly unwarranted and court interference would be justified in such matter.

4.2 The learned Counsel further submits that if the appointing authority has any grievances against the order passed by the appellate authority, they should have sought a review of the said order from the same authority or from the Governor under the provisions of Rule 27 of the Rules and the appointing authority cannot on its own disregard the order passed by its superior and refuse to act on the order of the appellate authority passed on 9.9.2009.

5.1 Refuting the submissions of the Petitioner, Mr. B.N. Sarma, learned senior counsel submits that the appellate authority who could have considered the appeal against the Petitioner's termination order is not Home Commissioner but is the Secretary of the Department and since the consideration of the appeal has been made by the Home Commissioner, it is an incompetent order and the appointing authority is not obliged to give effect to such non est order.

5.2 The learned senior counsel refers to the Explanation to Rule 7 and the Sub-clauses of Rule 7(g) and submits that termination of service in this case is not a penalty within the meaning of the Rules and, therefore, no appeal would lie against the termination order dated 4.5.2009.

5.3 Mr. Sarma further submits that an appeal under Rule 20 is required to be routed through the Head of Office and cannot be submitted directly to the appellate authority and in the instant case since the Petitioner has by passed the head of the office, the appellate authority could not have considered the appeal on merit or have interfered with the termination order.

5.4 The learned Government counsel contends that when there is no legally valid

appellate order, the appointing authority is not obliged to implement such order. Mr. Sarma points out that intimation on the DGP's understanding on the nature of the appellate authority's order was communicated on 9.9.2010 to the Principal Secretary (Home), and since no return communication has been received from the higher Authority, the DGP must assume that his decision to not to act on the appellate authority's order has the approval of the Principal Secretary of the department.

6. On consideration of the stand taken by the Respondents and the communication dated 9.9.2010 of the DGP, it is clear that the DGP has refused to implement the order of the Home Commissioner by considering the same to be an "incompetent" order and on that basis has refused to reinstate the Petitioner, in view of the earlier order of termination recorded against the Petitioner by the DGP as the disciplinary authority.

7.1 Before considering the validity of the stand taken by the DGP, this Court needs to consider the specific submission of the learned senior counsel as to whether the termination of the Petitioner can't be considered as a penalty under the Explanation to Rule 7 which specifies, inter alia, that termination under the four sub-clauses under Clause (g) shall not amount to a penalty under the rules. To appreciate the point the provisions are extracted for ready reference:

7. Nature of Penalties: ...

Explanation: - The following shall not amount to a penalty within the meaning of this rule.

(g) Termination of the services-

(i) of a Government servant appointed on probation, during or at the end of the period of his probation, in accordance with the terms of his appointment or the Rules and orders governing such probation; or

(ii) of a Government servant employed under an agreement in accordance with the terms of such agreement;

(iii) of a Government servant whose terms of the appointment provides for the termination of service by either party giving notice for a specified period;

(iv) of a Government servant in whose case the appointment is expressly stated to be on temporary basis and to have been sanctioned until further orders and it is also provided that his services may be terminated at any time without notice.

Mr. Sarma's contention is that termination of service shall not amount to a penalty within the meaning of the Rules if termination is effected after due notice in terms of the appointment order and accordingly the order dated 4.5.2009 is not appealable.

7.2 But a bare look at the termination order shows that it was not a termination order under any of the sub-clauses of Rule 7(g). No notice of termination was

given to the Petitioner as is contemplated under Sub-clause (iii) of Rule 7(g) and under such circumstances, this Court is unable to accept the submission of the learned Counsel that under the explanation to Rule 7, the termination ordered against the Petitioner does not amount to a penalty and consequently it is not appealable under the rules.

8. As regards the competence of the Home Commissioner to consider the appeal, the rules provides that the Secretary of the Department is to exercise the power of the Appellate Authority. In the present case the Home Commissioner entertained the appeal and interfered with the termination order passed by the appointing authority. Therefore, it is apparent that the authority specified in the rules as the Appellate Authority hadn't passed the appellate order in favour of the Petitioner.

9. But even if it is held that Home Commissioner is not the specified appellate authority, the question that arise is whether the appointing authority, i.e., DGP could have deeded on his own to not to implement the Home Commissioner's order, without taking any steps to either have the order reviewed by the same authority or by a higher authority, as is provided under Rule 27 of the rules.

10. From the Communication by the DGP made on 9.9.2010 it becomes apparent that he hadn't considered it appropriate to seek the intervention of any higher authority like the Governor or ever, the Principal Secretary (Home) on the order passed by the Home Commissioner and the appointing authority thought that his understanding of the appellate order is enough for him to decide that he needn't implement the said order.

11. If the stand of the DGP that he could defy the order passed by the Homo Commissioner is accepted it would have far reaching administrative consequences, as it would mean that an authority who is subordinate to the Home Commissioner, is competent to defy an order of the higher authority on his understanding that the said order has been passed without jurisdiction. If this is permitted it will result chaos in functioning of the administration as subordinate authorities may decide on its own not to implement, higher authority's order without feeling the necessity of seeking review of a so called "incompetent" order of their superior officers.

12. If the Home Commissioner's order as the appellate authority interfering with the DGP's order was actually without jurisdiction, the implementing authority in my view, ought to have sought a review of the said order either from the game authority or from any of the higher authority specified in the rules and the implementing authority could not have taken a suo motu decision that he is not liable to implement the order of his higher authority.

13. It may also be recorded in this context that in his communication to the Principal Secretary (Home) made on 9.3.2010, the DGP did not seek the intervention of the higher authority but simply informed about the decision taken by him to not to implement the order passed by the Home Commissioner and to

retain the already quashed order earlier passed by the DGP.

14. The manner in which the DGP who is supposed to set an example for others has taken a decision to not to implement the order of a superior authority i.e., Home Commissioner, this Court is constrained to hold that such a course of action was not permissible to an implementing officer. If he had any grievance or difficulties in implementing the order of the Appellate Authority for any of the reasons mentioned in his letter dated 9.3.2010, he ought to have sought a review of the order in accordance with law and could not have refused to implement the order, on his understanding that the Appellate order should not be implemented.

15. For the forgoing reasons this writ petition deserves to be allowed and it is ordered accordingly. The Respondent No. 2 is directed to forthwith implement the order of the Home Commissioner passed on 9.9.2009. However, this direction will not preclude the implementing authority to seek review of the said order. In according with law. But it is made clear that since order in favour of the Petitioner was passed over a year ago, the implementation of the said order shouldn't be delayed on the ground that review is being sought of the order dated 9.9.2009.

16. The writ petition stands allowed accordingly with the above directions without any order on cost.