

(2015) 04 GAU CK 0023

In the Gauhati High Court

Case No : Writ Petition (C) Nos. 3968 and 3972/11

Khagendra Nath Das

APPELLANT

Vs

The State of Assam and Others

RESPONDENT

Date of Decision : 02-04-2015

Acts Referred:

Constitution of India, 1950 — Article 14, 16

Citation : (2015) 2 GLT 956

Hon'ble Judges : Tinlianhang Vaiphei, J

Bench : Single Bench

Advocate : I. Choudhury and M.K. Khatoniar, for the Appellant; U.K. Goswami, SC, Advocates for the Respondent

Final Decision : Allowed

Judgement

Tinlianhang Vaiphei, J.—Both the writ petitions, being inter-connected, were heard together and are now being disposed of by this common judgment. As a matter of fact, the WP(C) No. 3972 of 2011 is the offshoot of WP(C) No. 3968 of 2011.

2. To start with, the petitioner belonged to the Assam Education Service, had used to serve as Inspector of Schools, HDC, Hailakandi from 1996 to 1998 and then as Deputy Director (Secondary) Education from 14-11-2003. While he was serving in that capacity, he received the show cause dated 18-8-2006 charging him with transferring and posting permanently twelve teaching/non-teaching staff of venture schools without following the extant rules and procedure. He replied to the show cause by denying all the allegations made against him. Apparently, not satisfied with his explanation, he was placed under suspension vide the notification dated 22-9-2005. According to the petitioner, the findings recorded in the suspension are ex facie stigmatic and betrayed the pre-conceived mind of the disciplinary authority. This was followed by another show cause notice dated 9-11-2005, which revealed that out of the allegations pertaining the twelve employees involved in the first show cause dated 18-8-2005, only three

remained, but two new allegations concerning one Babul Neog and Achit Kumar Nath were added.

3. The petitioner was, however, reinstated to service within one month thereafter by posting him as Deputy Director in the Office of the Director of Secondary Education, Assam vide the notification dated 15-12-2005. He again filed his reply to the show cause dated 9-11-2005 denying each of the allegations and justifying his actions. However, after inordinate and unexplained delay, Shri S. Ali, Joint Secretary, Education (Secondary) Department, Govt. of Assam, was finally appointed as the enquiry officer. Subsequently, the enquiry officer was replaced by Shri M. Rahman, Deputy Secretary to the Government of Assam, Education (Secondary) Department, who, according to the petitioner, is biased and vindictive towards him. Though the inquiry was conducted and concluded, he was never informed about the fate of the enquiry. Ultimately, he received the order dated 11-2-2010 initiating a fresh enquiry in respect of the same set of charges by appointing Shri H.K. Baidya, Joint Secretary to the Government of Assam, Education (Elementary) Department as the Enquiry Officer. From the order dated 11-2-2010, he came to know that the enquiry report submitted by the said M. Rahman was ignored by the disciplinary authority and that his enquiry report was never furnished to him. The fresh enquiry was thereafter held with few sittings without observing due procedure. After maintaining silence for a few months, the impugned order of penalty of censure was imposed upon the petitioner. The pay and allowances during the period of his suspension were also restricted to the subsistence allowances already paid to him. He then took the matter in appeal before the Governor of Assam under Rule 15 of the Assam Services (Discipline and Appeal) Rules, 1964. The appeal has not been disposed of till now. Aggrieved by this, he filed the first writ petition. In the meantime, the respondent authorities started the promotion process for promotion to the posts of Joint Director in the Education (Elementary) Department and promoted the respondents No. 4, 5, 6 and 7 of WP(C) No. 3972/11, who are admittedly junior to him, to the posts of Joint Director on the recommendation of the Selection Board held on 11-1-2010. The petitioner was not promoted due to the ongoing departmental enquiry against him. His case was, however, kept under sealed cover procedure. Even after the completion of the departmental enquiry, the petitioner could not be considered for the promotion as he was ultimately awarded a penalty of censure by the disciplinary authority. The departmental enquiry was initiated and concluded in accordance with rules after giving reasonable opportunity of hearing to him. There is no mala fide exercise of power, and the writ petition is liable to be dismissed. These are the sum and substance of the contentions of the respondent authorities.

4. Unfolding his submissions, Mr. I. Choudury, the learned counsel for the petitioner, argues that there was an inordinate delay in initiating the enquiry against the petitioner inasmuch as the allegations were based on the incidents allegedly occurring between 20-5-1992 to 26-8-1998, for which departmental enquiry was initiated only in 2005: such delay has rendered the enquiry vitiated.

He contends that the orders dated 11-2-2010 and dated 29-1-2011 disclosed that the first enquiry officer had submitted his report, but a copy thereof was never supplied to him, which is highly prejudicial to him, more so, when the report exonerated him from the charges. Moreover, submits the learned counsel, the respondent authorities never supplied the second enquiry report upon which the impugned order was passed: such omission has caused substantial prejudice to him and is contrary to the law enunciated by the Apex Court in *Managing Director, ECIL, Hyderabad, Vs. Karunakar, etc. etc.*, AIR 1994 SC 1074 : (1993) 6 JT 1 : (1994) 1 LLJ 162 : (1993) 3 SCALE 952 : (1993) 4 SCC 727 : (1993) 2 SCR 576 Supp : (1993) 3 SLJ 193 . He further submits that the second enquiry initiated against him on the same set of charges betrays mala fides and is impermissible in law. On merit, it is the contention of the learned counsel for the petitioner, that the findings in the enquiry report as accepted by the disciplinary authority are based on no evidence: such perverse findings rather betray non-application of mind. He, therefore, submits that the impugned departmental enquiry suffers from procedural improprieties as well as illegality warranting the interference of this Court to prevent gross injustice upon the petitioner. Mr. U.K. Goswamy, the learned standing counsel for the Education (Secondary) Department, Assam supports the impugned departmental enquiry and submits that no interference is called for.

5. After hearing the learned counsel appearing for the rival parties and on perusing the materials on record as well as the pleadings of the parties, the first point for consideration is whether the second enquiry based on the same set of facts is sustainable in law or not. I have gone through the original enquiry file placed before me by the learned standing counsel, and perusal of the notings therein has revealed that the enquiry officer of the first departmental enquiry could not prove the charges levelled against the petitioner. However, apparently swayed by the fact that the charges against the petitioner were of serious nature, the second enquiry was ordered. The law in this field is now well-settled, and is reiterated by the Apex Court in *Vijay Shankar Pandey Vs. Union of India (UOI)*, AIR 2015 SC 326 . This is what it said:

"24. Be that as it may, the question is whether the disciplinary authority could have resorted to such a practice of abandoning the enquiry already undertaken and resort to appointment of a fresh enquiring authority (multi-member)? The issue is not really whether the enquiring authority should be a single member or a multi-member body, but whether a second inquiry such as the one under challenge is permissible. A Constitution Bench of this Court in *K.R. Deb Vs. The Collector of Central Excise, Shillong*, AIR 1971 SC 1447 : (1971) 1 LLJ 427 : (1971) 2 SCC 102 : (1971) SCR 375 Supp , examined the question in the context of Rule 15(1) of the Central Civil Services (Classification, Control and Appeal) Rules, 1957. It was a case where an enquiry was ordered against a Sub-Inspector, Central Excise (the appellant before this Court). The enquiry officer held that the charge was not proved. Thereafter the disciplinary authority appointed another enquiry officer "to conduct a supplementary open inquiry".

Such supplementary inquiry was conducted and a report that there was "no conclusive proof to "establish the charge" was made. Not satisfied, the disciplinary authority thought it fit that "another enquiry officer should be appointed to inquire afresh into the charge".

25. The Court in K.R. Deb (supra) held that: (SCC p. 105, paras 12-13)

"12. It seems to us that Rule 15, on the face of it, really provides for one inquiry but it may be possible if in a particular case there has been no proper enquiry because some serious defect has crept into the inquiry or some important witnesses were not available at the time of the inquiry or were not examined for some other reason, the disciplinary authority may ask the enquiry officer to record further evidence. But there is no provision in Rule 15 for completely setting aside previous inquiries on the ground that the report of the inquiring officer or officers does not appeal to the disciplinary authority. The disciplinary authority has enough powers to reconsider the evidence itself and come to its own conclusion under Rule 9.

13. In our view the Rules do not contemplate an action such as was taken by the Collector on 13-2-1962. It seems to us that the Collector, instead of taking responsibility himself, was determined to get some officer to report against the appellant. The procedure adopted was not only not warranted by the Rules but was harassing to the appellant."

(emphasis supplied)

26. It can be seen from the above that the normal rule is that there can be only one enquiry. This Court has also recognised the possibility of a further enquiry in certain circumstances enumerated therein. The decision however makes it clear that the fact that the report submitted by the enquiring authority is not acceptable to the disciplinary authority, is not a ground for completely setting aside the enquiry report and ordering a second enquiry.

6. In the instant case also, the departmental enquiry file disclosed that the first enquiry, which exonerated the petitioner of the charges, had been abandoned without furnishing a copy of the enquiry report. What is evident from the file is that the first enquiry had to be abandoned as the charges could not be proved against him, but having regard to the fact that the charges were of serious nature, so fresh enquiry had to be conducted against him. In my opinion, the reason given by the respondent authority for holding fresh enquiry, namely, the charges against him were of serious nature, cannot satisfy the parameters laid down by the Apex Court in K.R. Deb (supra) as followed in Vijay Shanker Pandey (supra). It is not the case of the disciplinary authority that some serious defect has crept into the enquiry or some important witnesses were not available at the time of the inquiry or were not examined for some other reason. On the contrary, the inference is irresistible and the conclusion inescapable that the second enquiry has been ordered as the report of the enquiry officer did not appeal to him, which is not sustainable in law.

7. The next question to be considered is what will be the net effect of holding the second enquiry against the petitioner to be vitiated? To recapitulate, the pendency of the said departmental enquiry warranted the respondent authorities to adopt sealed cover procedure in respect of the petitioner. However, when the departmental enquiry ended in awarding a penalty of censure upon the petitioner, until and unless the penalty is not annulled, the sealed cover need not be opened at all: he can only be considered for future promotion. However, in the instant case, when the departmental enquiry against the petitioner culminating with a penalty of censure is found to be illegal and is liable to be quashed, he is deemed to have been exonerated of the charges. The law with respect to the concept of "sealed cover procedure" has been explained by the Apex Court in *State of M.P. Vs. J.S. Bansal and Another*, (1998) 2 AD 235 : AIR 1998 SC 1015 : (1998) 1 JT 514 : (1998) 1 SCALE 478 : (1998) 3 SCC 714 : (1998) SCC(L&S) 937 : (1998) 1 SCR 734 : (1998) AIRSCW 787 : (1998) 2 Supreme 148 , relied on in *Smt. Sudha Shrivastava Vs. Comptroller and Auditor General of India*, AIR 1996 SC 571 : (1995) 9 JT 358 : (1995) 6 SCALE 449 : (1996) 1 SCC 63 : (1995) 4 SCR 797 Supp : (1997) AIRSCW 2117 : (1997) 4 Supreme 571 in the following manner:

"13. Undoubtedly, an employee has a right of being considered for promotion but he cannot claim promotion as of right. Right to be considered for promotion is obviously different and distinct from right of promotion. Even if disciplinary proceedings are initiated against an employee and those proceedings are pending on the date on which names of other employees are considered for promotion to the next higher post, the delinquent employee, if he is similarly circumstanced as other employees and is also eligible, has a right to be considered for promotion to the next higher post along with other employees. His name cannot be omitted from consideration merely because of the pendency of the departmental proceedings. An employee cannot be denied this right at the interlocutory stage of the departmental proceedings as he is still to be found guilty on the basis of the evidence which might be produced against him during those proceedings. Till the charges are established, his right to be considered cannot be defeated as he is not under the cloud of having been found guilty but is only suspected to be guilty. Mere suspicion is not a substitute for proof. Consideration for promotion along with other eligible candidates is done so as to give effect to the fundamental right available even to a delinquent employee under Articles 14 and 16 of the Constitution. Once the name is considered for promotion, the recommendations of the Departmental Promotion Committee are required to be kept in a "Sealed Cover" obviously for the reason that if the employee is ultimately found to be not guilty and the charges set out against him are found as "not established", he may be promoted immediately to the next higher post."

8. As already noticed, the officers junior to the petitioner were promoted to the post of Joint Director on the recommendation of the Selection Board on 11-1-2010. However, due to the pendency of the said departmental enquiry, his

case has been kept under sealed cover procedure. The contention of the respondent authorities is that the sealed cover could not be or need not be opened as he was awarded a minor penalty of censure. In my opinion, once the penalty awarded to the petitioner is found to be illegal, he is deemed to be exonerated of the charges. In such circumstances, the respondent authorities are required to open the sealed cover containing the recommendation of the Selection Committee, and give effect to the recommendation. The next question, which falls for consideration is whether the petitioner is entitled to back wages i.e. the higher pay scale following his retrospective promotion, from the date of his promotion. The issue came up for consideration before a three-Judge Bench of the Apex Court in *Union of India Vs. K.V. Jankiraman, etc.*, AIR 1991 SC 2010 : (1991) 63 FLR 767 : (1991) 3 JT 527 : (1991) 2 LLJ 570 : (1991) 2 SCALE 423 : (1991) 4 SCC 109 : (1991) 3 SCR 790 , and was decided as under:

"24. It was further contended on their behalf that the normal rule is "no work no pay". Hence a person cannot be allowed to draw the benefits of a post the duties of which he has not discharged. To allow him to do so is against the elementary rule that a person is to be paid only for the work he has done and not for the work he has not done. As against this, it was pointed out on behalf of the concerned employees, that on many occasions even frivolous proceedings are instituted at the instance of interested persons, sometimes with a specific object of denying the promotion due, and the employee concerned is made to suffer both mental agony and privations which are multiplied when he is also placed under suspension. When, therefore, at the end of such sufferings, he comes out with a clean bill, he has to be restored to all the benefits from which he was kept away unjustly.

25. We are not much impressed by the contentions advanced on behalf of the authorities. The normal rule of "no work no pay" is not applicable to cases such as the present one where the employee although he is willing to work is kept away from work by the authorities for no fault of his. This is not a case where the employee remains away from work for his own reasons, although the work is offered to him. It is for this reason that F.R. 17(1) will also be inapplicable to such cases.

26. We are, therefore, broadly in agreement with the finding of the Tribunal that when an employee is completely exonerated meaning thereby that he is not found blameworthy in the least and is not visited with the penalty even of censure, he has to be given the benefit of the salary of the higher post along with the other benefits from the date on which he would have normally been promoted but for the disciplinary/criminal proceedings. However, there may be cases where the proceedings, whether disciplinary or criminal, are, for example, delayed at the instance of the employee or the clearance in the disciplinary proceedings or acquittal in the criminal proceedings is with benefit of doubt or on account of non-availability of evidence due to the acts attributable to the employee etc. In such circumstances, the concerned authorities must be vested

with the power to decide whether the employee at all deserves any salary for the intervening period and if he does, the extent to which he deserves it. Life being complex, it is not possible to anticipate and enumerate exhaustively all the circumstances under which such consideration may become necessary. To ignore, however, such circumstances when they exist and lay down an inflexible rule that in every case when an employee is exonerated in disciplinary/criminal proceedings he should be entitled to all salary for the intervening period is to undermine discipline in the administration and jeopardise public interests. We are, therefore, unable to agree with the Tribunal that to deny the salary to an employee would in all circumstances be illegal. While, therefore, we do not approve of the said last sentence in the first sub-paragraph after clause (iii) of paragraph 3 of the said Memorandum, viz., "but no arrears of pay shall be payable to him for the period of notional promotion preceding the date of actual promotion", we direct that in place of the said sentence the following sentence be read in the Memorandum:

"However, whether the officer concerned will be entitled to any arrears of pay for the period of notional promotion preceding the date of actual promotion, and if so to what extent, will be decided by the concerned authority by taking into consideration all the facts and circumstances of the disciplinary proceeding/criminal prosecution. Where the authority denies arrears of salary or part of it, it will record its reasons for doing so."

9. For what has been stated in the foregoing, both writ petitions succeed. The impugned departmental enquiries and the resultant penalty of censure awarded upon the petitioner are, therefore, quashed. The respondent authorities shall now open the sealed cover containing the recommendation of the Selection Committee, and if the petitioner is found to be recommended for promotion to the post of Joint Director, shall promote him to that post with effect from 15-5-2010, if necessary, by quashing the promotion of the respondent No. 4 to 7, who are admittedly junior to him. As for the back wages from the date of his notional promotion to the date of his retirement, the respondent authorities shall consider whether he is entitled to back wages from the date of his notional promotion to the date of his retirement, and, if so, to what extent by taking into account all the attendant facts and circumstances of the disciplinary proceeding. If they decide to deny such back wages, they shall pass a reasoned order. The exercise shall be completed within a period of three months from the date of receipt of this judgment.