
(2008) 08 GAU CK 0043

In the Gauhati High Court

Case No : Writ Petition (Civil) No. 76 of 2007

Lalnunthara Pautu

APPELLANT

Vs

State of Mizoram and Ors.

RESPONDENT

Date of Decision : 13-08-2008

Acts Referred:

Citation : (2009) 6 GLR 541

Hon'ble Judges : Mutum B.K.Singh, J

Bench : Single Bench

Advocate : C.Lalramzauva, Dinari T.Azyu, Haulianthanga, J.Lalfakawma, A.R.Malhotra, Advocates appearing for Parties

Judgement

1. The Office order dated 9th March, 2006 issued by the respondent No. 3, reinstating the petitioner in service with immediate effect and declaring the period from 8.2.1993 till the date of joining of the petitioner would be treated as not on duty for all purposes except for pensionary benefits and his pay and allowances would be fixed as on 8.2.1993 without giving notional increment of pay, is under challenge in this writ petition. The petitioner is aggrieved with the second part of the said order.

2. Facts, in short, are that the petitioner while serving as Peon at Tuidam Agriculture Circle Office, was served with a Memorandum of Charges alleging that the petitioner was absent w.e.f. 12.8.1992 till the 3rd week of October, 1992 without permission of the authority and during the said period, he wrote complaint against the A.E.O., Tuidam in the name of one Thanthuama. The petitioner thus, violated rule 3(ii) and (iii) of CCS Conduct Rules, 1964. The petitioner submitted a written statement of defence denying the charges levelled against him. Thereafter, no Departmental enquiry was conducted against the petitioner as per prescribed procedure by law but the respondent No. 3 issued an order on 8.2.1993, imposing the penalty of removal of the petitioner from service with immediate effect purportedly on the assumption that the petitioner admitted the charges levelled against him. Against the said order of removal, the

petitioner made representations to the Minister Incharge, Agriculture, and also filed a statutory review petition to the respondent No. 1, Having considered the review petition, the respondent No. 2, in exercise of power conferred on him under rule 27 CCS (CCA) Rules, 1965, set aside the order of removal of the petitioner and directed/requested the respondent No. 3 to take up further action accordingly. The respondent No. 2 further informed the respondent No. 3 that the period from 8.2.1993 to the date of joining of the petitioner shall not be treated as on duty and his pay and allowances should be fixed as on 8.2.1993 without giving notional increment of pay. Consequently, the respondent No. 3 issued the impugned order dated 9th March, 2006.

3. Heard Mr. A.R. Malhotra, learned counsel appearing for the petitioner and Mrs. Dinari, learned Asst. Government Advocate for the Staterespondents.

4. That, the learned counsel appearing for the petitioner submits that since the order of removal of the petitioner from service dated 8.2.1993 having been set aside by the appellate authority, the second part of the impugned order so far as it relates to the order of nonconsideration of the period from 8.2.1993 till the date of joining of the petitioner as on duty and fixation of pay and allowances as on 8.2.1993 without notional increment of pay, is contrary to the provisions of rule 54 of Fundamental Rules. The learned Asst. Government Advocate, on the contrary, submits that the petitioner had admitted the charges levelled against him and on the basis of his undertaking that he would not claim for arrear pay and allowances in case of his reinstatement in service, the Government decided to reinstate him in service. According to the learned Asst. Government Advocate, in view of the said undertaking, the petitioner is not entitled to the pay and allowances for the period from 8.2.1993 to the date of his joining.

5. Upon hearing the submissions of the learned counsels appearing for the parties, it appears that the point involved for determination in the case in hand is whether the petitioner, on his reinstatement in service, is entitled to the pay and allowances for the period of dismissal from service under the provisions of rule 54 of the Fundamental Rules. Time and again, it has been held in a catena of decisions that when a Government servant who was dismissed from service, is reinstated in service after fully exonerating from the charges levelled against him, such Government servant shall be entitled to the full back wages under subrule (2) read with subrule (6) of rule 54 of the Fundamental Rules. Subrule (4) deals with the cases which are not covered by subrule (2) of rule 54 of the Fundamental Rules. Subrule (4) of rule 54 of the Fundamental Rules provides that where the order of dismissal, removal or compulsory retirement from service is set aside by the appellate or reviewing authority solely on the ground of noncompliance with the requirements of clause (1) or clause (2) of article 311 of the Constitution and no further inquiry is proposed to be held, the Government servant shall, subject to the provisions of subrules (5) and (7), be paid such amount (not being the whole) of the pay and allowances to which he would have been entitled, had he not been dismissed, removed or compulsorily retired or

suspended prior to such dismissal, removal or compulsory retirement, as the case may be, as the competent authority may determine, after giving, notice to the Government servant of the quantum proposed and after considering the representation, if any, submitted by him in that connection within such period (which in no case shall exceed sixty days from the date on which the notice has been served) as may be specified in the notice. Article 311(2) of the Constitution of India, provides that no Government servant shall be dismissed or removed or reduced in rank except after inquiry in which the Government servant has been informed of the charges against him and given a reasonable opportunity of being heard in respect of those charges.

6. Admittedly, in the case in hand, no inquiry in accordance with the prescribed procedure by law was held in respect of the charges levelled against the petitioner. It is evident from the letter dated 24th October, 2005 (Annexure 7 to the writ petition) as well as from the pleadings that the appellate authority set aside the order of removal dated 8.2.1993 on the ground that the procedure laid down in CCS (CCA) Rules, 1965 had not been complied with in respect of the proceeding against the petitioner. Corollary is that, the order of removal of the petitioner from service was issued in violation of the provision of clause 2 of article 311 of the Constitution of India. It is clear that the reinstatement of the petitioner in service was not done after fully exonerating from the charges levelled against him. The appellate authority set aside the order of removal on the ground of noncompliance of the prescribed procedure of law in the proceeding, i.e., on technical ground and no proposal has been made for holding further inquiry. Thus, the provision of subrule (2) of rule 54 of the Fundamental Rules is not applicable to the petitioner.

7. That, the factual position being as stated above, it is the authority concerned to determine, after/setting aside the order of removal dated 8.2.1993 and reinstating the petitioner in service, ;bhe amount of pay

and allowances to be paid to the petitioner for the period w.e.f. the date of his removal from service till the date of reinstatement, in accordance with the provision of subrule (4) read with subrules (5) and (7) of rule 54 of the Fundamental Rules. Subrule (4) of rule 54 of the Fundamental Rules further provides that such determination of the amount to be paid to the Government servant shall be done after giving notice to the Government servant of the quantum proposed and after considering the representation so submitted by the Government servant. It shows that when a Government servant is reinstated in service after setting aside the order of dismissal/removal, he shall be paid such amount of pay and allowances as determined by the authority concerned. On the contrary, the entire pay and allowances of the Government servant who has been reinstated in service cannot be wholly deprived of for any reason whatsoever.

8. That, in *Lalherliana v. State of Mizoram and Ors.*, 2005 (3) GLT 234, this court held as follows :

"13..... after setting aside the order of termination on technical ground, the authority is at liberty to determine the amount of the pay and allowances to be paid to the writ petitioner after setting aside the order of termination and reinstating him in service but the said power can only be exercised after giving a notice to the writ petitioner of the quantum of pay and allowances proposed to be paid and after considering the representation, if any, to be submitted by the writ petitioner pursuant to the said notice. However, the said order under subrule 4 of rule 54 of the Fundamental Rules is subject to the provisions of subrules 5 and 7 of rule 54. The competent authority may also pass an order as to how the period of absence from duty to be treated for any specified purpose and in case the Government servant so desire, such authority may direct that the period of absence of duty preceding his termination from service shall be converted into leave of any kind due and admissible to the employee concerned. Subrule 5 of the rule 54 also provides that in a case falling under subrule 4, the period of absence from the duty preceding that the termination from service shall not be treated as a period spent on duty, unless the competent authority passes a specific order as stated above."

9. That, in the instant case, the petitioner was removed from service vide order dated 8.2.1993 and reinstated in service vide order dated 9th March, 2006, declaring that the period from the date of his removal from service till the date of joining would be treated as not on duty for all purposes except for pensionary benefits. No mention has been made specifically in the order of reinstatement that the pay and allowances for the said period shall not be paid to the petitioner. The learned counsel appearing for the petitioner submits that since the said period has been treated as not on duty, the petitioner has not been paid the pay and allowances of the said period. A combined reading of the reinstatement order dated 9th March, 2006 and the letter dated 19th September, 2007 (Annexure12A), clearly reveal that the pay and allowances of the petitioner for the period of his removal has not been paid. It appears that the authority concerned (respondent No. 3) issued the Annexure12A stating that the petitioner had undertaken not to claim any pay for the period of his removal vide his letter dated 23.9.2005 (AnnexureIII to the counteraffidavit). The learned counsel appearing for the petitioner submits that the said undertaking has no binding effect as the same was obtained under duress and coercion. Be that as it may, it may be pointed out that such type of undertaking is contrary to the provision of law as there is no provision under the law for execution of such undertaking in the case of reinstatement of a Government servant. It is the statutory right conferred on the petitioner to receive the backpay and allowances as determined by the authority concerned in accordance with the provision of rule 54 of the Fundamental Rules. Thus, the backpay and allowances of the petitioner cannot be deprived of on the basis of such unenforceable undertaking [Union of India and Ors. v. Man Bahadur Chetri and Ors., 2008 (1) GLT 1].

10. That, for the reasons given hereinabove, I am of the considered view that

the impugned order dated 9th March, 2006 to the extent that the period from 8.3.1993 till the joining of the petitioner will be treated as not on duty for all purposes except for pensionary benefits, was passed not in consonance with the provision of subrule (4) of rule 54 of the Fundamental Rules and, accordingly, the same is set aside.

11. Consequently, having regard to the facts and circumstances of the case, the respondents are directed to issue notice to the petitioner intimating him the quantum of pay and allowances proposed to be paid as required under subrule (4) of rule 54 of the Fundamental Rules for the period with effect from the date of dismissal till the date of reinstatement, subject to the provisions of subrules (5) and (7) of rule 54 of the Fundamental Rules. The respondents, after considering the representation to be submitted by the petitioner, pursuant to the notice issued to him, shall determine the quantum of pay and allowances to be paid to the petitioner for the period of his removal and the entire exercise shall be completed within a period of 6(six) months from the date of receipt of the copy of this order. It is further directed that the respondents, after determining the amount to be paid to the petitioner as stated above, shall fix the pay and allowances of the petitioner admissible to him as on the date of his reinstatement in service.

12. With the above observations and directions, this writ petition is disposed of, however, no order as to costs.