
(2009) 07 GAU CK 0039
In the Gauhati High Court

Maibam Ibohal Singh

APPELLANT

Vs

State of Manipur and Others

RESPONDENT

Date of Decision : 09-07-2009

Acts Referred:

Constitution of India, 1950 — Article 14, 311(2)

Citation : (2009) 6 GLR 507

Hon'ble Judges : Maibam B.K. Singh, J;A.C. Upadhyay, J

Bench : Division Bench

Final Decision : Allowed

Judgement

Maibam B.K. Singh, J.—Heard Mr. Kh. Tarunkumar Singh, Learned Counsel appearing on behalf of the appellant and Mr. Th. Ibohal, learned Government Advocate appearing on behalf of the State respondents.

2. Uncontroverted facts leading to the filing of this appeal are as follows:

The appellant, who was serving as a havildar, and three riflemen of 9th Bn. MR were suspended vide order No. B2/2/99-9MR/1675, dated 27.11.1999 issued by the Commandant, 9th Bn. MR, Taphou, in contemplation of a departmental enquiry as against them. As per the memorandum, dated 11.12.1999, issued by the Commandant, 9th Bn. MR, Taphou, the enquiry was proposed to be held under Rule No. 66 of the Assam Police Manual in respect of the charge to the effect that the appellant and the said three riflemen of 9th Bn. MR. Taphou, committed grave misconduct and dereliction of duty on 4.11.1999 at Veisiichu (Chilao village side) at about noon by surrendering and not using their arms and ammunitions in a cowardly and irresponsible manner when they were confronted by some unknown UG elements thereby resulting to the loss of four .303 rifles and 200 rounds of .303 BDR ammunitions. The appellant submitted his written statement of defence denying the charge and requesting, inter alia, for allowing him to be heard in person at the time of hearing of the said enquiry. The enquiry was proceeded by Shri N. Sudhirchandra Singh, Addl. Superintendent of Police,

Kangpokpi. On the basis of the materials before him, the Enquiry Officer concluded that the charge as against the delinquent officials was found to have been proved beyond any shadow of doubt. The appellant submitted his representation on 10.1.2001 against the findings of the Enquiry Officer to the Commandant, 9th Bn. MR, Taphou. The Commandant, 9th Bn. MR, Taphou, after having considered the report of Enquiry Officer and the representation submitted by the appellant, agreed with the above said findings of the enquiry officer. The appellant and the said three riflemen were dismissed from their services, vide order dated 15.1.2001. A writ petition being WP(C) No. 1397 of 2002 was filed by the appellant challenging the said dismissal order dated 15.1.2001 but the said case was disposed of with a direction to the appellant to file a statutory appeal before the appropriate appellate authority, who was also directed to entertain the appeal by condoning the delay. Accordingly, the appellant filed the appeal and it was rejected by the appellate authority, vide order No. H-7/OPS/PHQ/2001/(Pt), dated 7.4.2003, issued by the Dy. Inspector General of Police (OPS), Manipur, Imphal. Thereafter, the appellant filed WP(C) No. 1304 of 2003 challenging the dismissal order dated 15.1.2001 passed by the disciplinary authority as well as the appellate order dated 7.4.2003 passed by the appellate authority on various grounds. A Single Bench of this Court dismissed the writ petition, vide order dated 22.5.2008, holding that there was no justifiable reason to interfere with the findings of the disciplinary authority and the appellate authority. On the basis of the relevant departmental enquiry report, the learned Single Judge concluded that the writ petitioner-appellant was given opportunity to appoint a defence assistant but he declined the offer, that the writ petitioner-appellant cross-examined one Shri K. Janglung Kabui, Inspector of Police and that he was also given opportunity to inspect documents. According to the learned Single Judge, there was no denial of any kind of opportunity contemplated under the law to the writ petitioner-appellant and the impugned dismissal order does not suffer from any procedural irregularity. Relying on the decisions of the Hon'ble Apex Court in *Bharat Petroleum Corporation Ltd. Vs. Maharashtra General. Kamgar Union and Ors*, and *The Management of National Seeds Corporation Ltd. v. K.V. Rama Reddy* (2006) 7 Supreme 571, and also invoking the maxim "*expressum facit cessare taciturn*", the learned Single Judge held that in the absence of any provision under the relevant Assam Police Manual for appointment of a defence assistant to a charged official, there was no statutory requirement to appoint the defence assistant as claimed by the writ petitioner-appellant in the case and that the petitioner was not having any right for appointment of any defence assistant.

3. This writ appeal has been filed challenging the legality of the said order of the learned Single Judge dated 22.5.2008 mainly on the ground that the said enquiry was proceeded illegally and in violation of the principles of natural justice and as such, the impugned dismissal order passed on the basis of the findings in the said enquiry and the impugned order of the appellate authority upholding the said dismissal order ought to have been interfered with by the learned Single

Judge. Further, according to the Learned Counsel of the appellant, one of the riflemen, namely, Md. Muhamuddin, who was involved along with the appellant and others in the same occurrence of snatching of arms and ammunitions and against whom and others including the appellant, a joint enquiry was made and the impugned dismissal order was passed basing on the findings in the said joint enquiry, challenged the impugned dismissal order by filing a writ petition and the said case filed by Md. Muhamuddin and many other cases involving similar issue were disposed of by a Single Bench of this Court vide common order dated 25.9.2002 with a direction to reinstate those incumbents to their respective posts with 50% back wages. Furthermore, according to the Learned Counsel of the writ petitioner-appellant, appeals filed against the said common order dated 25.9.2002 were also dismissed by a Division Bench of this Court vide common order dated 18.4.2005. According to the Learned Counsel of the writ petitioner-appellant, since in many previous cases involving similar issues, this Court has set aside the relevant similar dismissal order on the ground that neither defence assistant nor presenting officer was appointed in the enquiries leading to the passing of the said dismissal order, the same result is to follow in respect of the case of the writ petitioner-appellant. The Learned Counsel of the writ petitioner-appellant submits that in the enquiry in respect of the writ petitioner-appellant also, neither defence assistant nor presenting officer was appointed and as such, the impugned dismissal order passed on the basis of the findings of the said enquiry is liable to be set aside. The Learned Counsel of the writ petitioner-appellant further submits that in respect of the said Md. Muhamuddin and many others similarly situated persons, the Hon"ble Apex Court has directed the concerned authorities for initiating fresh enquiries in respect of the concerned charges fairly and in compliance with the principles of natural justice within four months from the date of the order and failing which, the concerned authorities have been directed to reinstate the concerned delinquent employees to their respective services with all the consequential benefits and as such, the writ petitioner-appellant is also entitled to the same relief.

4. On the other hand, the learned Government Advocate submits that having regard to the decisions of the Hon"ble Apex Court cited in the impugned judgment and order of the learned Single Judge and in the absence of any specific provision under the Assam Police Manual for appointment of a defence assistant to a charged official, the writ petitioner-appellant was not having any right for such appointment and non-appointment of a defence assistant on behalf of the writ petitioner-appellant shall not have the effect of vitiating the disciplinary proceeding in question. Further, according to the learned Government Advocate, since the appointment and non-appointment of a defence assistant is subject to the provisions of statutory rules, the principle of natural justice has no scope to play in the instant case. The learned Government Advocate submits that the issue of non-appointment of presenting officer in respect of the said disciplinary proceeding against the appellant was never raised before the learned Single Judge and as such, the appellant is not to be permitted to raise the said

issue for the first time in his appeal.

5. Indisputably, a disciplinary proceeding is a quasi-judicial proceeding. The enquiry officer performs a quasi-judicial function. The provisions of the Evidence Act may not be applicable in a disciplinary proceeding but the principles of natural justice are. The object underlying the principles of natural justice is to prevent miscarriage of justice and secure fair play in action. It is well settled that the principles of natural justice do not supplant statutory principle. They operate only in areas not covered by any law validly made. *A.K. Kraipak and Others Vs. Union of India (UOI) and Others*, If a statutory provision either specifically or by necessary implication excludes the application of any rule of natural justice, then the court cannot ignore the mandate of the Legislature or the statutory authority and read into the concerned provision the principles of natural justice. It is well settled that the answer to the question whether or not the application of natural justice in a given case has been excluded by statute, wholly or in part, depends upon the language and basic scheme of the provision conferring the power, the nature of the power, the purpose for which it is conferred and the effect of exercise of that power. In this connection, one may refer to the decisions of the Hon"ble Apex Court in the *Union of India (UOI) Vs. Col. J.N. Sinha and Another*, and *Bar Council of India Vs. High Court of Kerala*, It is also to be noted that mere silence of a statute however does not have the exclusionary effect except where it flows from necessary implication.

6. There is no dispute that the relevant Rules 66 of the Assam Police Manual nowhere provides for appointment of a defence assistant to a charged official. In this situation, having regards to the decisions of the Hon"ble Apex Court in *Bharat Petroleum Corporation Ltd. Vs. Maharashtra General. Kamgar Union and Ors*, and the *Management of National Seeds Corporation Ltd. v. K.V. Rama Reddy* (2006) 7 Supreme 571 which are referred in the impugned judgment and order of the learned Single Judge, we may conclude that the writ petitioner-appellant was not having any right of representation by a defence assistant in the said disciplinary proceeding leading to his dismissal from service. Further, there is no any express provision in the Assam Police Manual prohibiting the enquiry officer from giving opportunity to a charged official for appointing a defence assistant in all situations. There is also no provision in the said Assam Police Manual from which the said prohibition flows by way of necessary implication. Since there is no express or implied prohibition in the Assam Police Manual in respect of giving of opportunity to a charged official for appointment of a defence assistant, there is no sufficient and valid basis for application of the maxim "expressum facit cessare tacitum". This maxim means what is expressed makes what is silent cease. In other words, the maxim means where there is expressed mention of one thing, then anything not mentioned is excluded. This maxim has been described as a useful servant but a dangerous master. The Hon"ble Apex Court in *Union of India and Another Vs. Tulsiram Patel and Others*, held that audi alteram partem rule of natural justice having been expressly excluded by the second proviso to Article 311(2), there was no scope for reintroducing it by a side door

to proceed once again the same enquiry which the constitutional provision has expressly prohibited. In our present case, in the Assam Police Manual, there is no any express prohibition regarding giving of opportunity to a charged official for appointment of his defence assistant. In our considered opinion, if facts and circumstances are such that unless the charged official is given a reasonable opportunity to appoint his defence assistant, injustice is most likely to come, then, despite absence of any express provision in the relevant rule giving a right to the charged official to be represented by a defence assistant, in order to prevent miscarriage of justice and secure fair play in action, the concerned enquiry officer is supposed to give a reasonable opportunity to the charged official for appointment of his defence assistant. By doing so, the enquiry officer is supplementing and not supplanting the relevant statutory rules with principles of natural justice. On the other hand, in the said situation in which the enquiry officer is supposed to give the said reasonable opportunity to appoint a defence assistant in order to prevent miscarriage of justice and secure fair play in action, if the enquiry officer does not act in the manner cited above, his inaction will be considered as unjust, unfair and unreasonable and as such, discriminatory and thereby, violating the provisions of Article 14 of the Constitution of India. The observant of the principles of natural justice is the pragmatic requirement of fair play in action. *Rajasthan State Road Transport Corporation and Another Vs. Bal Mukund Bairwa*, . Thus, in our opinion, even if the writ petitioner-appellant was not having any right to claim for representation by a defence assistant in the disciplinary proceeding, the enquiry officer was not absolved of his duty to proceed with the said proceeding fairly, justly and reasonably. If the interest of justice demanded, the enquiry officer should have provided reasonable opportunity to the writ petitioner-appellant to appoint his defence assistant.

7. On perusal of the relevant records of the disciplinary proceeding, we find that 11 witnesses were examined on behalf of the department. None of them except one Shri K. Janglung Kabul, Inspector/MPTS, is found to have been cross-examined. From the records, it is not clear on whose behalf and by whom the cross-examination was done. Though the learned Single Judge came to a finding that the writ petitioner-appellant cross-examined the said Janglung Kabui, there is nothing in the record to show that it was the writ petitioner-appellant who cross-examined the said witness. As per the record, the joint enquiry was proceeded as against four persons including the writ petitioner-appellant and in the absence of anything in the record, it is not possible to conclude that the cross-examination was done on behalf of the writ petitioner appellant alone by himself or on behalf of any other delinquent officials.

8. The finding of the learned Single Judge that the writ petitioner-appellant cross-examined one of the witness is perverse. The writ petitioner-appellant was only a himself at the relevant time and he, being in the lower rung of Manipur rifles, was not expected to have knowledge of the relevant rules of the departmental enquiry and also about the proper steps required to be taken for his defence. The fact of non-cross-examination of the witnesses, whose statements were recorded

to substantiate the charge as against the writ petitioner-appellant, clearly shows that despite his denial of the charge against him, the writ petitioner-appellant was not knowing the effect or consequence of not cross-examining the said witnesses. In our opinion, the writ petitioner-appellant was immensely prejudiced in his defence as a result of not appointing a defence assistant for his defence. Considering the seriousness of the charge, the fact of the writ petitioner-appellant being a member of the lower rung of the service at the relevant time and the fact of the enquiry being proceeded by a superior officer, in the interest of justice and fairness, the petitioner ought to have been given a reasonable opportunity to appoint his defence assistant. In this connection, mere asking to the writ petitioner-appellant if he wanted to be heard personally or if he would engaged a defence Counsel was not sufficient as held by this Court earlier on 28.9.2007 in a similar case being WP(C) No. 1412 of 2002 following others similar decisions of this Court.

9. In the present case, there is no dispute that no presenting officer was also appointed. This fact is confirmed from the relevant records of the disciplinary proceeding produced by the learned Government Advocate. It is well settled that an enquiry officer, while sitting as a Judge, cannot be also sitting as a prosecutor to examine the witnesses by himself. The enquiry officer cannot assume the role of a judge and also the prosecutor. Even if the relevant service rules is silent about the appointment of a presenting officer, absence of a presenting officer will make the enquiry totally vitiated as the enquiry officer cannot be allowed to assume the role of a judge as well as a prosecutor. In this connection, one may refer to various decisions of this Court such as *Dr. Rajya Mallu Buzar Barua v. Assam Administrative Tribunal and Ors.* 1983 (1) GLR (NOC) 71; *Chelfrumog v. State of Tripura and Ors.* 2002 (2) GLR 604; *Vaharulisham (CT) v. Union of India and Ors.* 2001 (1) GLT 621 and *State of Manipur and Ors. v. Chongtham Homendro Singh* 2005 (3) GLT 154. The Hon'ble Apex Court also in *Kumuan Mandal Vikas Nigam Ltd. v. Girija Shankar Pant and Ors.* (2001) 1 SCC 182, held to the same effect.

10. Though this point of non-appointment of presenting officer has been raised for the first time in this appeal, for this point of law, examination of evidence or investigation of facts is not required. Since the said point is not a disputed question of fact, the objection raised by the learned Government Advocate for not considering the said point is not sustainable in the eye of law. In *Rajeswari Amma and another Vs. Joseph and another*, the Hon'ble Apex Court held that new plea regarding question of law could be raised for the first time before the Supreme Court. It has been brought to our notice that a Division Bench of this Court also in *WA No. 58 of 2007* held on 19.11.2008 to the effect that the question of law regarding illegality or otherwise of a disciplinary proceeding in the absence of a presenting officer and also regarding violation of the law of fair play in the absence of presenting officer in a departmental enquiry could be raised in appeal. There is no acceptable reason as to why this plea of non-appointment of a presenting officer in respect of the said departmental enquiry

against the writ petitioner-appellant should not be considered by this Court in this appeal.

11. In the present case, the findings in the departmental enquiry were made on the basis of the statements of witnesses almost all of whom were never cross-examined. Though it would have been fair and just on the part of the enquiry officer to have given a reasonable opportunity to the writ petitioner-appellant to appoint a defence assistant for his defence, no such opportunity was given. No presenting officer was appointed by the authority in connection with the enquiry. In our opinion, the proceeding of the said enquiry as against the writ petitioner-appellant was not proceeded fairly inasmuch as the same was made in violation of the principles of natural justice. The impugned dismissal order passed on the basis of the findings in the said enquiry is not sustainable in the eye of law. On perusal of the impugned order of the appellate authority dated 7.4.2003, we have ascertained that the appellate authority considered neither any of the ground of the appeal nor any of the point required to be considered under Rule 66(vi) of the Assam Police Manual Part-III. Thus, the impugned order of the appellate authority, dated 7.4.2003, was passed without application of his mind by the appellate authority. In the light of the decision of the Hon"ble Apex Court in Narinder Mohan Arya Vs. United India Insurance Co. Ltd. and Others, wherein the hon"ble Apex Court held about the need of passing the appellate order after due application of mind by the concerned authority, the impugned order of the appellate authority, dated 7.4.2003 is not also sustainable in the eyes of law.

12. In the result, the impugned dismissal order dated 15.1.2001 and the impugned appellate order dated 7.4.2003 are hereby quashed. This appeal is allowed. The impugned judgment and order passed by the learned Single Judge on 22.5.2008, not interfering with the impugned dismissal order as well as the impugned appellate order is hereby interfered with and it is hereby set aside. Since the impugned appellate order upholding the impugned dismissal order, has not been quashed on the ground that the charge against the writ petitioner-appellant has not been made out but on the finding that the proceedings have not been proceeded fairly complying with the principles of natural justice, nothing prevents the concerned authority from initiating a fresh enquiry against the writ petitioner-appellant in respect of the charge fairly and in compliance with the principles of natural justice within a reasonable time which is not to be more than four months from today. As done in respect of other similarly situated persons, if fresh departmental enquiry is held against the writ petitioner-appellant, he shall be treated as under suspension from the date of first suspension. If no such enquiry is initiated within the period prescribed, the writ petitioner-appellant is to be reinstated to his service with all the consequential benefits. This appeal is allowed. No order as to costs.