
(2016) 07 MAN CK 0002
In the Manipur High Court
Case No : Writ Petition No. 780 of 2012

Md. Rijao Haque	Vs	APPELLANT
State of Manipur		RESPONDENT

Date of Decision : 05-07-2016

Acts Referred:

Assam Police Manual — Rule 66(IX)
Police Act, 1861 — Section 7

Citation : (2016) LIC 3137

Hon'ble Judges : R.R. Prasad, A.C.J. and S. Serto, J.

Bench : Division Bench

Advocate : Mr. Phungyo Zinkhei, Advocate, for the Appellant; Mr. R.S. Reishang, Sr. G.A, for the Respondent

Final Decision : Dismissed

Judgement

R.R. Prasad A.C.J.—This writ petition is directed against the order dated 01.06.2001 passed by the Commandant, 9th Bn., Manipur Rifles, Government of Manipur whereby and where under the petitioner on being found guilty for the charge, was dismissed from service.

2. The petitioner while working as Rifleman was put on Departmental Proceeding on the charge that while he was attached with 2 M.R. for undergoing basic training he absented himself from the place of training from 12.05.1995 to 27.06.1995 without any leave or permission from the competent authority.

3. The Memorandum of charges along with the documents and also the list of witnesses were served upon the petitioner who, on receiving the same, submitted written statement wherein he admitted the charge. However he was put to departmental proceeding for which an Enquiry Officer was appointed. The Enquiry Officer, having examined the witnesses produced by the department, gave opportunity to the petitioner to adduce evidence but the petitioner did not choose to lead any evidence. However, he submitted certain medical certificates showing his illness during the period of absence. Thereupon, the Enquiry Officer

having appreciated the evidences adduced found the charge being proved. While holding so the inquiry officer also took into account the documents submitted by the delinquent but found that it has nothing to do with the charge of leaving the place without any permission.

4. Accordingly, the Inquiry Officer submitted report to the Disciplinary Authority who got the inquiry report served upon the delinquent calling upon him to file representation but in spite of receipt of the inquiry report, the delinquent did not submit any representation and thereby the disciplinary authority after having regard to the evidence adduced passed an order dated 01.06.2001 dismissing the petitioner from service. This order was passed in the year 2001 but the petitioner did file appeal in 2010 which on account of being filed much after six months was not entertained in terms of Rule 66 (IX) Part III of Assam Police Manual. Thereupon, in the year 2012 this writ application has been filed.

5. Mr. Phungyo Zinkhei, learned counsel appearing for the petitioner submits that during the Departmental Proceeding presenting officer had not been appointed as a result of which the inquiry officer himself played the role of Presenting Officer in order to prove the charge and as such procedure adopted was in complete violation of principle of natural justice as one cannot play the role of Judge as well as prosecutor. At the same time defence assistance was also not provided and as such the petitioner did not get opportunity to defend himself properly and thereby the proceeding was conducted in complete violation of principal of natural justice and hence the order of dismissal is fit to be set aside. Further, submission which was advanced is that even if the appeal was filed in the year 2010, the appellate authority should have entertained it as it was the statutory right of the petition to prefer appeal and have an order on it.

6. As against this, Mr. R.S. Reishang, learned Sr. G.A. submits that admittedly the disciplinary authority did pass order in the year 2001 but only in the year 2010 the appeal was preferred and thereby it was not entertained, keeping in view the provision as contained in Rule 66 (IX) Part III of Assam Police Manual specifically stipulating therein that appeal preferred after 6 (six) months of the order has not required to be entertained and if the appellate authority did not entertain it, thus the question of appellate authority coming with the reason does not arise and on this ground alone this writ application is fit to be dismissed. Further, it was submitted that even if the Presenting Officer or the Defence Assistant was not appointed during proceeding it will not vitiate the proceeding in absence of any prejudice being shown by the delinquent.

7. From the submission advanced on behalf of the parties, it does appear that the Departmental Proceeding was initiated against the petitioner on the charge of being absent for 201 (two hundred and one) days without any leave or permission from the competent authority. That charge on being established the inquiry officer found the petitioner guilty. The petitioner having been found guilty of the charge was served with the inquiry report so that he may file representation before the disciplinary authority but the petitioner did not file any

representation before the disciplinary authority who upon finding charge being proved passed the order of dismissal. It is true that neither Presenting Officer nor Defence Assistant was appointed but the question does arise as to whether on account of non appointment of Presenting Officer and Defence Assistant, the proceeding would vitiate or it will not have any bearing if the delinquent fails to establish the prejudice being caused to him on account of that.

8. In this regard, we may straightway refer to a decision rendered in a case of State Bank of India at Patiala & Ors. v. S.K. Sharma (1996) 3 SCC 364 wherein their Lordships have been pleased to enunciate the principles and circumstances where the delinquent needs to prove the case of prejudice and where he needs not to do it. In this regard, we may refer to para 33 of the decision rendered in the aforesaid case which reads as follows :

"33. We may summaries the principles emerging from the above discussion. (These are by no means intended to be exhaustive and are evolved keeping in view the context of disciplinary enquiries and orders of punishment imposed by an employer upon the employee):

(1) An order passed imposing a punishment on an employee consequent upon a disciplinary/departmental enquiry in violation of the rules/regulations/ statutory provisions governing such enquiries should not be set aside automatically. The Court or the Tribunal should enquire whether (a) the provision violated is of a substantive nature or (b) whether it is procedural in character.

(2) A substantive provision has normally to be complied with as explained hereinbefore and the theory of substantial compliance of the test of prejudice would not be applicable in such a case.

(3) In case of violation of a procedural provision, the position is this: procedural provisions are generally meant for affording a reasonable and adequate opportunity to the delinquent officer/ employee. They are, generally speaking, conceived in his interest. Violation of any and every procedural provision cannot be said to automatically vitiate the enquiry held or order passed. Except cases falling under-"no notice", "no opportunity" and "no hearing" categories, the complaint of violation of procedural provision should be examined from the point of view of prejudice, viz. whether such violation has prejudiced the delinquent officer employee in defending himself properly and effectively. If it is found that he has been so prejudiced, appropriate orders have to be made to repair and remedy the prejudice including setting aside the enquiry and/ or the order of punishment. If no prejudice is established to have resulted therefrom, it is obvious, no interference is called for. In this connection, it may be remembered that there may be certain procedural provisions which are of a fundamental character, whose violation is by itself proof of prejudice in such cases. As explained in the body of the judgment, take a case where there is a provision expressly providing that after the evidence of the employer/ government is over, the employee shall be given an opportunity to lead defence in his evidence, in a

case, the enquiry officer does not give that opportunity in spite of the delinquent officer/employee asking for it. The prejudice is self-evident. No proof of prejudice, i.e., whether the person has received a fair hearing considering all things. Now, this very aspect can also be looked at from the point of view of directory and mandatory provisions, if one is so inclined. The principle stated under (4) herein below is only another way of looking at the same aspect as is dealt with herein and not a different or distinct principle.

(4)(a) In the case of a procedural provision which is not of a mandatory character, the complaint of violation has to be examined from the standpoint of substantial compliance. Be that as it may, the order passed in violation of such a provision can be set aside only where such violation has occasioned prejudice to the delinquent employee.

(b) in the case of violation of a procedural provision, which is of a mandatory character, it has to be ascertained whether the provision is conceived in the interest of the persons proceeded against or in public interest. If it is found to be the former, then it must be seen whether the delinquent officer has waived the said requirement either expressly or by his conduct. If he is found to have waived it, then the order of punishment cannot be set aside on the ground of the said violation. If, on the other hand, it is found that the delinquent officer/employee has not waived it or that the provision could not be waived by him, then the Court or Tribunal should make appropriate directions (include the setting aside of the order of punishment), keeping in mind the appropriate adopted by the Constitution Bench in B. Karunakar. The ultimate test is always the same, viz., test of prejudice or the test of fair hearing, as it may be called.

(5) Where the enquiry is not governed by any rules/ regulations/ statutory provisions and the only obligation is to observe the principles of natural justice or, for that matter, wherever such principles are held to be implied by the very nature and impact of the order/action-the Court or the Tribunal should make a distinction between a total violation of natural justice (rule of audi alteram partem) and violation of a facet of the said rule, as explained in the body of the judgment. In other words, a distinction must be made between "no opportunity" and no adequate opportunity, i.e., between "no notice"/ "no hearing" and "no fair hearing", (a) In the case of former, the order passed would undoubtedly be invalid (one may call it "void" or a nullity if one chooses to). In such cases, normally, liberty will be reserved for the Authority to take proceedings afresh according to law, i.e., in accordance with the said rule (audi alteram partem). (b) But in the later cases, the effect of violation (of a facet of the rule of audi alteram partem) has to be examined from the standpoint of prejudice; in other words, what the Court or Tribunal has to see is whether in the totality of the circumstances, the delinquent officer/ employee did or did not have a fair hearing and the orders to be made shall depend upon the answer to the said query. (It is made clear that this principle (No. 5) does not apply in the case of rule against bias, the test in which behalf are laid down elsewhere.)

(6) While applying the rule of audi alteram partem (the primary principle of natural justice) the Court/ tribunal/authority must always bear in the ultimate and overriding objective underlying the said rule, viz., to ensure a fair hearing and to ensure that there is no failure of justice. It is this objective which should guide them in applying the rule to varying situations that arise before them.

(7) There may be situations where the interests of State or public interest may call for a curtailing of the rule of audi alteram partem. In such situations, the court may have to balance public/ State interest with the requirement of natural justice and arrive at an appropriate decision."

9. In view of the law laid down by the Hon'ble Supreme Court, the impugned order cannot be said to have suffered from illegality on account of presenting officer or defence assistant being not appointed as the petitioners failed completely to establish the prejudice caused to him on account of that. Coming to the other aspect of the matter, it be stated that order of dismissal was passed in the year 2001 whereas appeal was preferred in the year 2010 which was not entertained under the provision as contained in Rule 66 (IX) Part III of Assam Police Mannual. However, in the year 2012 the appeal was preferred we do not find any reasonable/logical explanation for such delay. Thus, the delay remains unexplained. In that event the writ application is also liable to be dismissed on this ground of delay in view of the decisions rendered in the case of Uttaranchal Forest Development Corpn.& Anr. v. Jabar Singh & Ors reported in (2007)2 SCC 112 and also in the case of A. Obangmenla Jamir v. State of Nagaland & Ors. (2014) 2 GLT 266. Thus, we do find that the application also suffers from laches and delay. Accordingly, the application, being devoid of any merit, is hereby dismissed.