
(2009) 02 GAU CK 0075
In the Gauhati High Court
Case No : Writ Petition (C) No. 7787 of 2004

Nirmal Ch. Saikia

APPELLANT

Vs

State of Assam and Others

RESPONDENT

Date of Decision : 19-02-2009

Acts Referred:

Citation : (2009) 2 GLT 726

Hon'ble Judges : Hrishikesh Roy, J

Bench : Single Bench

Advocate : B.D. Goswami, S. Borthakur and D. Roy, for the Appellant; B.C. Saikia, for the Respondent

Judgement

Hrishikesh Roy, J.—Heard Mr. B.D. Goswami, learned Counsel for the Petitioner. Also heard Mr. B.C. Saikia, learned Govt. Advocate who represents the Respondents.

2. The Petitioner, who has retired on 30.6.04 as an Armed Branch Sub Inspector, is before this Court to challenge the penalty inflicted on him on 16.4.04 in pursuant to a disciplinary proceeding conducted against him.

The Petitioner is also seeking benefit of promotion to the post of Armed Branch Sub Inspector granted to him in the year 2002, which was kept in abeyance on 2.9.2002, because of the pendency of the disciplinary proceeding and the criminal case. Consequential retirement benefits by reckoning that he retired from the rank of Inspector are also claimed in the instant petition.

3. The Petitioner joined the Armed Police as a constable on 11.9.64 and after being promoted through various ranks, at the relevant time he was posted as Armed Branch Sub Inspector and was posted as a Platoon Commander with the 8th A.P. Bn. with Head Quarter at Abhayapuri. While being so posted as Platoon Commander, in order to avail the 10 days leave granted to him w.e.f. 1.3.96, the Petitioner handed over charge of the Platoon and the arms and ammunition and other articulated under his care to another Armed Branch Sub Inspector Jalaluddin

Sheikh, who was ordered to shoulder the responsibilities of Platoon Commander, during the leave period of the Petitioner.

The arms and ammunitions of the Platoon were handed over and was formally received by Sub Inspector Jalaluddin Sheikh on 1.3.96 and as token of receipt of the arms and ammunitions signature was also appended by the Receiving Officer on 1.3.96 in the charge Handing Over Document.

4. 13 days after the Petitioner went on leave, it was discovered on 13.3.96 that a 9 mm pistol with 20 rounds of ammunition were missing from the room where the arms were kept and accordingly a show cause notice dated 18.5.96 with the following statement of allegation was issued against the Petitioner, as apart of disciplinary proceeding drawn up against him:

While ABSI Nirmal Saikia, U/S was P.C. of pln No. 10 located at Bn. Hq (DGP's reserve) of this unit, he handed over charge of the platoon including the arms and ammunitions issued to him and the platoon personnel to ABSI Jalaluddin Seikh in paper as per handing over and taking over record of the charge without physical handing over to ABSI he left Bn. Hq to avail leave granted to him vide O.O. No. 183 dtd. 28.2.96 w.e.f. 1.3.96 Am.

Again he as P.C. of platoon No. 10 kept the arms and ammunitions issued to him and the personnel of No. 10 platoon inside a room which was unspecified as kote of the magazine without authority of the competent authority and he did not take proper care and caution for the security of the govt. arms and ammunitions and kept the key of the lock of the room with the guard commander. For such gross negligence of duty and negligence conduct in respect of dealing with arms and ammunitions and 9 MM pistol bearing No. FN-T-334986 with 20 rounds of 9 MM ammunitions issued to him were stolen from the said room.

He is therefore charged with gross negligence and dereliction of duty and negligent conduct in respect of dealing with arms and ammunitions and as such he is becoming unfit to remain in the police force.

5. The Petitioner in his reply dated 29.5.96 to the show cause notice claimed that as per the order dated 28.2.96, since ABSI Jalaluddin Sheikh was ordered to take over charge, formal handing over charge of the Platoon, with all arms and ammunitions was given by the Petitioner and ABSI Jalaluddin Sheikh took over charge of all arms and ammunitions after proper verification on 1.3.96 and the Petitioner cannot be faulted for the loss of the pistol and the magazine, which were lost while the Petitioner was on leave and was away from his place of duty. The Petitioner in his reply also stated that the arms and ammunitions were kept in the same room, designated as magazine room in the Bn. Head Quarter. The Petitioner also pointed out that he was away from the Bn. Head Quarter w.e.f. 1.3.96 after handing over formal charge, and it was glaring to note that the fact of missing pistol was purportedly discovered only on 13.6.96 and it was claimed that the lapse in such a situation, has to be of the In-charge Platoon Commander and not of the Petitioner.

6. The reply furnished by the Petitioner was not accepted and one R.K. Handique was appointed as the Enquiry Officer to enquire into the charges. He gave his finding on 30.10.99 but for reasons not known, the finding given by the first Enquiry Officer was not accepted and a second enquiry was ordered to be conducted by one M.M. Boro who was the 2nd In-charge Officer, of the concerned Unit.

7. The findings of either the first enquiry and also of the second enquiry, were not made available to the Petitioner and only from the impugned order dated 26.4.04 issued by the Commandant, 8th A.P. Bn., the findings of the 2nd enquiry could be gathered by him.

8. It may also be recorded that the Govt. Advocate has not produced either of the two enquiry reports and even the Court had to gather the findings of the second enquiry from the order dated 26.4.04 of the Commandant.

9. According to the recording made by the Commandant, the second enquiry found that it is proved against the Petitioner that the Petitioner had not physically handed over his pistol and ammunition to ABSI Jalaluddin Sheikh during the handing over and taking over charge of the Platoon and it was done only on paper and accordingly it was also further recorded to have been found that the pistol and the 20 rounds of ammunitions were lost from the possession of the Petitioner, for his negligence without depositing it in the magazine Kote and to cover up his fault, the Petitioner intentionally acted otherwise. Accordingly, charge of gross negligence was found to have been proved against the Petitioner and the said finding was accepted by the Disciplinary Authority.

10. On the basis of the aforesaid findings, the value of the lost pistol and 20 rounds of ammunition were ordered to be recovered from the Petitioner and additional penalty of stoppage of service increments with retrospective effect was also inflicted upon him.

11. The Petitioner appealed against punishment order dated 26.4.04 without any success and eventually he retired from service on 30.6.04. It is submitted that after receiving provisional pension for a period of only one year after retirement, the Petitioner has not been paid his regular pension or other pension benefits.

12. Mr. B.D. Goswami, learned Counsel on behalf of the Petitioner contends that the impugned punishment inflicted on the Petitioner should be held to be unfair inasmuch as, there has been gross unfairness in conducting the disciplinary proceeding and the enquiry against the Petitioner.

To support the unfairness allegations, the learned Counsel submits that the departmental authorities indicated no reason as to why the findings of the first enquiry dated 31.10.99 conducted by the Enquiry Officer R.K. Handique was not accepted by the disciplinary authority and why a second enquiry had to be ordered against the Petitioner.

13. Secondly, it is argued that non-furnishing of either of the two enquiry reports

have also caused serious prejudice to the Petitioner inasmuch as, he has been deprived of a fair opportunity to project his case.

14. Mr. Goswami also points out that no charge of not handing over the pistol and ammunition have been levelled, whereas punishment has been inflicted upon the Petitioner on the purported finding of the Enquiry Officer that the pistol and the magazine were not actually handed over by the Petitioner.

15. The learned Counsel submits that this finding of the Enquiry Officer recorded by the disciplinary authority cannot be acted upon, since it is not the case of the Disciplinary Authority that ABSI Jalaluddin Sheikh had denied receipt of the pistol and other weapons and magazine on 1.3.96, when the Petitioner went on leave of 10 days, to attend a family function.

16. The learned Counsel also submits that the ABSI Jalaluddin who acknowledged receipt of the concerned arms and magazine from the Petitioner, was never produced as a witness and non-production of Jalaluddin as a witness, who was the only person who could have proved that the Petitioner had not handed over all the arms and ammunitions in his possession, is a glaring omission, which vitiates the fairness of the enquiry and its findings.

17. The learned Counsel also refers to the police case registered in connection with the missing pistol and points out that the CID had given a final report in the said case. A fresh investigation under order of the learned SDJM, also led to the same conclusion. But this vital fact was not recorded and in fact disregarded by the Disciplinary Authority.

18. It is also contended on behalf of the Petitioner that it was Jalaluddin Sheikh, who received the arms and ammunitions from the Petitioner by acknowledging receipt on 1.3.96 and the arms went missing while they were under the care of Sheikh Jalaluddin. Therefore he should have been also subjected to the same disciplinary proceeding and enquiry like the Petitioner. But the authorities for reasons best known subjected SI Jalaluddin to a separate enquiry and this too has also resulted in denial of fairness to the Petitioner.

19. The learned Counsel also refers to the communication dated 29.8.02 (Annexure-1 to the counter affidavit) addressed by the Commandant of the 8th A.P. Bn. to Addl. DGP, wherein it was reflected that the Petitioner was temporarily promoted to the post of Armed Branch Inspector of Police and had been posted in the 19th A.P. (IR) Bn. Makum against an existing vacancy and the further W.T. communication (Annexure-ii to the counter affidavit) where directions were given, to keep in abeyance the promotion of the Petitioner, till he is exonerated in the disciplinary proceeding and the criminal case.

The learned Counsel submits that notwithstanding the promotion granted to the post of Inspector in the year 2002, the Petitioner had been denied the benefit of the promotion and was made to retire on 30.6.04, while still serving in the lower rank of Sub Inspector and this has resulted in grave prejudice against the

Petitioner.

20. On careful consideration of the records as well as the submissions of the learned Counsels, it is seen in the instant case that the allegation against the Petitioner pertains to keeping of arms and ammunitions of the platoon in a room, which was not specified as the "kote" of the magazine and also a charge of not taking proper care for security of the platoon armoury, by keeping the key of the locked room, with the Guard Commander.

But it appears from the order of the disciplinary authority dated 26.4.04 that the Petitioner has been found guilty of not depositing his pistol and 20 rounds of ammunition while handing over charge to his successor on 1.3.96 and it is also purportedly found that pistol and the ammunition were lost from the Petitioner's possession because of his negligence. But no such charge of keeping the pistol with himself and the same being lost from the delinquent's possession was levelled against the Petitioner.

Furthermore, there is no explanation anywhere as to how the receipt of pistol and the magazine along with all other arms and ammunitions of the platoon have been acknowledged formally by the receiving officer on 1.3.96 and how the alleged non handing of the pistol and the magazine came to light only after 10 days on 13.3.96.

21. The non-presentation of the receiving officer who took over charge from the Petitioner, as a witness or an accused during the enquiry against the Petitioner appears to me, to be a grave omission since it is not the case of the authorities that the successor had not acknowledged in writing the receipt of the concerned pistol and the magazine along with other arms and articles from the Petitioner. Unless the document certifying handing over and taking over charge is established to be forged or the Receiving Officer himself claims that he had not actually received the articles noted in the documents, it is difficult to comprehend as to how, the Enquiry Officer as well as the disciplinary authority could have concluded that, the concerned pistol and the magazine were never handed over by the Petitioner on 1.3.96, and were in fact lost from the possession of the Petitioner himself.

22. It is on record that the Petitioner handed over all the arms and ammunitions to his successor as per the direction of his superiors and considering the small size of the inventory, it is difficult to accept that the Receiving Officer would have mistakenly acknowledged in writing the receipt of all the articles, as the consequences of arms going missing while the Receiving Officer was in charge, would have been reasonably comprehended by him.

23. No explanation is offered for not accepting the finding of the first enquiry report dated 31.10.99 conducted by R.K. Handique while ordering a second enquiry against the Petitioner. Both the enquiries conducted one after the other continued for about 8 years and strangely the Petitioner was never furnished with either of the enquiry reports.

24. The disciplinary authority never took note of the fact that the CID had given final report in the missing pistol case and although exoneration in a criminal case may not automatically lead to exoneration from similar charge in a disciplinary proceeding, in my view, considering the nature of the charge, due weightage to the finding of the CID should have been given. This was all the more important because the promotion given to the Petitioner was kept in abeyance, because of the turn reason of pendency of the criminal case and for non completion of the enquiry proceeding.

25. With the above infirmities noticed in the proceeding, it is my considered opinion that the Petitioner has not only been denied a fair consideration but has also been subjected to unfair persecution. This has vitiated the entire disciplinary proceedings and the adverse conclusion drawn against the Petitioner does not appear to be reasonable. Accordingly, it is held that the impugned penalty order dated 26.4.04, issued by the Commandant 8th A.P. Bn. is unsustainable in law and the same is accordingly quashed.

26. Having quashed the order of the disciplinary authority and in view of the further fact that the Petitioner has not been found guilty in the criminal case filed in connection with the missing pistol and magazine, I hold that the decision of the authorities in keeping the Petitioner's promotion to the post of ABSI in abeyance was not justified and the same requires correction. Accordingly, it is declared that the Petitioner deserved the benefit of promotion to the post of Inspector in the year 2002 and he had the right to retire from this promoted post.

27. As the penalty order and the disciplinary proceeding initiated against the Petitioner have been declared to be unsustainable in law, this writ petition is allowed by directing the Respondents to treat the Petitioner to have been serving as an Inspector of the Armed Battalion from the day when he was promoted, till he reached his age of superannuation on 30.6.04. But as the Petitioner has already retired, the functioning of the Petitioner, in the rank of Inspector should be considered only on notional basis, for the purpose of granting him all service and retirement benefits.

28. As the Petitioner has not been receiving his pensionary benefits because of the penalty inflicted on him, it is directed that the Respondent authorities will do all that is necessary, to enable the Petitioner to receive his pensionary dues, by treating him to have retired as an Inspector of the Armed Battalion. The necessary steps in this regard should be taken within a period of 4 months from the date of receipt of this Court's order.

29. Since the Petitioner could not serve in the post of Inspector due to intervention of his employers, his entitlement to the higher salary in the post of Inspector, for the concerned period till 30.6.04, shall be determined under F.R. 54 and the same be paid to the Petitioner also within the aforesaid period, as arrear wages.

30. This petition stands disposed of accordingly.