

(2010) 11 GAU CK 0067
In the Gauhati High Court
Case No : Writ Petition (C) No. 47 of 2010

Pawan Kumar

APPELLANT

Vs

State of Mizoram and Others

RESPONDENT

Date of Decision : 04-11-2010

Acts Referred:

Assam Services (Conduct) Rules, 1965 — Rule 12(2)
Central Civil Services (Classification, Control and Appeal) Rules, 1965 — Rule 23(1)

Citation : (2011) 1 GLR 492

Hon'ble Judges : H. Baruah, J

Bench : Single Bench

Advocate : S.N. Meitei, for the Appellant; Biswajit Deb, for the Respondent

Final Decision : Dismissed

Judgement

H. Baruah, J.—By this writ petition, the Petitioner herein has sought for a writ in the nature of certiorari for setting aside and quashment of the impugned order No. 18011/5/2010-P&AR(CSW) dated 29.6.2010 issued by the Additional Secretary to the Government of Mizoram, Department of Personnel and Administrative Reforms (CSW) whereby and where under the Petitioner has been suspended from service with immediate effect in contemplation of disciplinary proceeding against him.

2. The brief facts necessary for the purpose of disposal of the writ petition may be described as under:

The Petitioner was initially appointed as Assistant Engineer on 31.12.1975 in the Public Health Engineering Department (THE"), Government of Mizoram. He was promoted from time-to-time. Vide notification under Memo No. A.22012/8/2008-P&AR(CSW)/1 dated 5.9.2008 issued by the Under Secretary, Government of Mizoram, Personnel and Administrative Reforms (CSW), on the recommendation of Mizoram Public Service Commission Petitioner was promoted to the post of Engineer-in-Chief ("E-IN-C") and posted in the department of PHE which carries

the pay scale of Rs. 16,400 to 20,900 with special allowance of Rs. 1,000 per month plus other allowances as admissible from time-to-time. On the night of 29.9.2009 at about 10.25 p.m. Petitioner received a communication from the Superintendent of Police, Aizawl that the work charged staff and muster-roll labourers of his department were planning an agitation within his office premises on the next day. He (Petitioner) sought for a report from the Chief Engineer of his department, who in turn submitted his report vide letter dated 13.10.2009 contending, inter alia, that such agitation was called by the work charged staff and muster-roll labourers on account of delay in issuing the LOC for two consecutive months. It was informed by the Chief Engineer that he had no prior information of such agitation proposed for the nest day.

3. Agitation called on the next day had been chalked out and on the same day the agitators also submitted a representation to the hon"ble Minister of the Department requesting Petitioner's either dismissal from service or transfer there from. Respondent No. 3 by his letter under memo No. A.19012/111/2007-P&AR(CSW) dated 19.10.2009 directed the Petitioner to take leave from the next day for three months. In the meantime, the appropriate Government created two post of consultant and two post of officer on Special Duty vide notification No. A.11013/a/ 89-SAD/PART dated 14.10.2009. On receipt of the letter dated 19.10.2009, whereby and where under the Petitioner was asked to go on leave for three months, submitted a representation vide letter No. A.43016/2/2009-E-IN-C/PHE/THU dated 22.10.2009 whereby and where under the Petitioner requested the authority to inform the circumstances warranting such direction. Since no reply was communicated to by the concerned authority, he submitted a second representation on 4.11.2009. Respondent No. 3 by letter dated 17.11.2009 under memo No. 19012/11/2007-P&AR(CSW) informed the Petitioner in reply to his representation dated 22.10.2009 that he was unable to control and manage the law and order situation developed within his office premises on 30.9.2009 and a preliminary inquiry is proposed to be held. The aforesaid letter also indicated that he should go on leave on receipt of the same at least for three months to enable the department to conduct the preliminary inquiry in his absence. Petitioner being aggrieved thereby submitted a representation on 27.11.2009 explaining the circumstances of the agitation so ensued/ undertaken on 30.9.2009 and also intimated that there was no valid reason for compelling him to take leave. It would be appropriate to mention that on account of agitation under taken by the work charged and muster-roll employees on 30.9.2009, the Petitioner submitted an explanation to the Principal Secretary, PHE Department vide his letter dated 8.10.2009 explaining the manner of allotment of LOC. But despite such clarification, the Petitioner was advised to take leave. The Joint Action Committee transmitted a letter to the Petitioner on 14.10.2009 to withdraw the explanation submitted to the Principal Secretary, PHE on 8.10.2009 or to face necessary action. While Petitioner was expecting withdrawal of letters dated 19.10.2009 and 17.11.2009 by notification dated 16.4.2010 he was posted to the newly created post of consultant issued by

Respondent No. 3. The notification dated 16.4.2010 also indicated that he should handover the charge to the Chief Engineer, PHE on or before 22.4.2010 positively.

4. Being aggrieved by the order dated 16.4.2010, Petitioner preferred a writ petition being No. WP(C) 23 of 2010 before this Court, however, this Court was pleased to dismiss the said writ petition vide order dated 1.6.2010. A writ appeal was also preferred before a division bench of this Court being No. WA-170 of 2010. Division Bench of this Court by judgment and order dated 14.6.2010 set aside and quashed the judgment of the Single Judge dated 1.6.2010 holding that the transfer was not in exercise of legal powers by the Government.

5. If it is claimed, therefore, that the appropriate Government being failed in its attempt to transfer the Petitioner to the newly created post of consultant, it further to harass the Petitioner issued the impugned order dated 29.6.2010 suspending him from service proposing a disciplinary proceeding against him. It is contended that the facts, narrated even do not justify a departmental proceeding against him rather the impugned order was issued to harass the Petitioner being unsuccessful in their attempt.

6. The Petitioner, therefore, in the facts situation has prayed this Court to set aside and quash the impugned order dated 29.6.2010, whereby and where under he was placed under suspension in contemplation of a departmental proceeding.

7. This writ petition is resisted by the Respondents by filing counter affidavit. In paragraph 6 of the counter it has been contended that the Petitioner was placed under suspension in contemplation of a disciplinary proceeding and his continuance in office would prejudice the inquiry and likely seriously subvert the discipline in the office. Suspension order was issued in accordance with the provision of CCS(CCA) Rules, 1965 without extraneous and vested reasons nor any mala fide intention whatsoever. In paragraph 9 of the counter it has been averred that due to non-release of the fund by the Petitioner the work charged staff and muster-roll labourers could not be paid, which resultantly enraged the work charged staff and muster-roll labourers to go for picketing in the office premises of the Petitioner which unfortunately created law and order situation. It is also contended in paragraph 10 in reply to paragraph 9 of the petition that the Petitioner was never forced to take leave but advised to apply leave for at least three months with a view to find out a solution of the unfortunate incident happened on 30.9.2009, which aggravated the law and order situation in the office premises of the Petitioner. In paragraph 17 of the counter it is, inter alia, stated that the Petitioner being the head of the department was aware of the regular fund allotment, his claim of ignorance about the situation cannot absolve him from responsibility. In paragraph 22 of the counter affidavit it has been averred that due to administrative lapse in the office of the E-in-C, the style of functioning of the Petitioner and for requirement of technical hand in the administrative department of PHE and for public interest, the Petitioner was posted as consultant at Civil Secretariat, PHE Department. Such posting was never actuated by mala fide. It is also contended in paragraph 24 of the counter

affidavit that preliminary inquiry was conducted against the Petitioner to find out whether there is any prima facie case against him or not and it was not meant to harass the Petitioner whatsoever. A charge sheet being framed having prima facie case against him, the impugned order of suspension was made in contemplation of disciplinary proceeding. In reply to paragraph 29 of the writ petition, it is countered that as per Central PWD manual the head of department issues/makes allotment of the fund to his subordinate officers for payment of wages to the work charged staff and muster-roll labourers. It is also contended that the writ petition is not maintainable in view of alternative remedy available at Rule 23(1) of the CCS(CCA) Rules, 1965. The Petitioner, therefore, by passing the alternative statutory remedy has approached this Court which would not be maintainable on his failure to exhaust such remedy. The Respondents, therefore, primarily on this ground averred in the counter affidavit pray this Court to dismiss the writ petition. The Petitioner by filing reply to the affidavit-in-opposition filed by the Respondents also negated the claim of the Respondents contending, inter alia, that no prima facie case is available against him, which makes him liable to put under suspension. The preliminary inquiry and the report thereto cannot be projected as against him since as entire episode is projected against him on extraneous reasons and with mala fide. It is also contended therein that the agitation by the work charged staff and muster-roll labourers cannot be attributed to the Petitioner since such an agitation happened on 30.9.2009 without his prior knowledge/ information. It is also contended that his subordinates when do not had the information/knowledge of such agitation how the Petitioner could be expected to know about the same. The subordinates to him, namely, the Chief Engineer and his subordinates are controlling staff/officers of the work charged staff and muster-roll labourers, such officers are empowered to prepare, verify and pass the bill of the wages of the work charged staff and muster-roll labourers as per provision in para 9.4 of Section 9 of CPWD Manual. Therefore, for the agitation the Petitioner cannot be blamed in any manner whatsoever rather such blame can be attributed to their controlling officers/staff. The agitation that resorted to was unlawful in nature which warrants serious action against the concerned Executive Engineer/Sub-Divisional Officers and the agitators and instead of blaming them he has been made a scapegoat. It is also contended that for agitation that resorted to by the work charged staff and muster-roll labourers, the Petitioner has been victimized with mala fide intention. The action on the part of the Respondents is arbitrary, mala fide and, therefore, the impugned suspension cannot be allowed to sustain and the same is liable to be quashed.

8. During the course of argument Respondents are directed to file an affidavit whether in view of the impugned order a departmental proceeding actually has been commenced or not. Per direction of this Court the State Respondents filed an affidavit stating inter alia that the process for initiation of departmental proceeding actually started on 22.7.2010 against the Petitioner and the draft memorandum of charges also received approval on 26.7.2010 lastly on 3.8.2010

by the Chief Secretary to the State of Mizoram. The process of departmental proceeding being initiated, memorandum of charges would also be finalized and supplied to the writ Petitioner at the earliest as per procedure and, therefore, judicial interference at this stage is not warranted which may vitiate the entire departmental proceeding.

9. This affidavit makes it abundantly clear that the Respondents have already initiated departmental proceeding against the Petitioner and the memorandum of charges have also received approval from the appropriate authority(s).

10. We have heard Mr. S.N. Meitei, learned Counsel for the Petitioner as well as Mr. Biswajit Deb, learned Advocate General, Mizoram for the State Respondents.

11. The core issue to have received attention of this Court is whether the impugned suspension order dated 29.6.2010 is mala fide, arbitrary and also for ulterior purpose. Mr. S.N. Meitei, learned Counsel appearing for the Petitioner at the very threshold argued strenuously that the facts involved in this writ petition do not suggest such nature of action on the part of the State Respondents in the issuance of the impugned order. It was argued by Mr. S.N. Meitei that for the agitation that resorted to by the work charged staff and muster-roll labourers on 30.9.2009 was entirely on account of failure of his subordinates in releasing fund for the preparation of bills for their remuneration. The work charged staff and muster-roll labourers being under the control of his subordinates, he (Petitioner) cannot be blamed for such agitation. For the acts and omissions of his subordinates, the Petitioner could not be blamed for agitation that resorted to by the work charged staff and muster-roll labourers. The work charged staff and muster-roll labourers being deprived of their salaries/wages continuously for two months all blames should be attributed to their controlling officers and not to the Petitioner. It was also argued by Mr. S.N. Meitei that on the previous night, i.e., on 29.9.2010, the Petitioner had the intimation of such agitation for which he had to obtain report from the Chief Engineer. It was also argued that the Petitioner did not have prior intimation of such agitation. Had the Petitioner been prior information about the agitation by the work charged staff and muster-roll labourers on 30.9.2009, appropriate steps could have been resorted to, to dissuade the agitators from resorting such agitation. Further it was argued that he being the head of the department had no responsibility for preparation of the wage bills in respect of the agitators rather his subordinates who are the controlling officers of the work charged staff and muster-roll labourers are the responsible officers to make payment of salaries/wages to such employees. The Petitioner having had no direct authority in payment of wages/salaries to the work charged staff and muster-roll labourers, for non-payment of wages and salaries to them the Petitioner cannot be held liable. It was argued further that the responsible officers who are subordinate to the Petitioners have been left out rather the Petitioner has been axed for no fault of him on account of agitation that resorted to on 30.9.2009.

12. Mr. Meitei also contended that for the purpose of commencement of the

preliminary inquiry to look into the fault of the Petitioner there was no reason on the part of the Respondents, Respondent No. 3 in particular to serve a letter on the Petitioner asking him to go on leave for three months at least. Since the Petitioner refused to go on leave as directed and since the Petitioner had approached the High Court for the alleged action of transfer of the Petitioner from the post of E-in-C to the post of Consultant, newly created and since the High Court gives a finding that the power had not been exercised legally, in order to teach a lesson to the Petitioner, the impugned order of suspension was made stating therein that a disciplinary proceeding is contemplated. Mr. Meitei, therefore, contended that the facts as narrated herein before gives indication that the impugned order dated 29.6.2010 was actuated with mala fide, arbitrariness and with ulterior motive.

13. Mr. Meitei, in support of his contention primarily relied on the decision rendered by this Court in the case between Shri Bimalendu Bhagabati v. The Assam Government Construction Corporation Limited and 2 Ors. 1995 (II) GLT 378. In paragraph 7 of the said judgment it was held as under:

7. Bare perusal of these statements will show that the allegations of mala fide as required to be established have not been established in this case and accordingly the allegations of mala fide falls through. If that being the position, the question of quashing the order of suspension does not arise inasmuch as the court can exercise this power only if the action is actuated by mala fide, arbitrary or for ulterior purpose. I do not find that the order of suspension is actuated by mala fide, arbitrary or for ulterior purpose. So, this prayer stands rejected. But in spite of that I give the liberty to the Petitioner to approach again for appropriate direction if the criminal case is not disposed of expeditiously. The authority shall also do the needful to expedite the criminal trial.

In the case (supra) this Court was of opinion that the allegation of mala fide as required to be established have not been established and, therefore, the allegation of mala fide must falls through. That being the position in the face of the record, this Court held that question of quashment the order of suspension does not arise. Court can only exercise the power if the action is actuated by mala fide, arbitrarily or for ulterior purpose. This Court indicates having not found the statement of allegation of mala fide, arbitrariness has proved refused to act on the prayer. Mr. Meitei, learned Counsel for the Petitioner, therefore, taking note of the ratio laid down in the case (supra) contended that the facts narrated rather projected in the writ petition do suggest that the order of suspension is actuated by mala fide, arbitrariness and for ulterior purpose, which, therefore, cannot sustain in law.

14. In the case of Jatindra Nath Hazarika v. State of Assam and Ors. 2001 (3) GLT 578 the Petitioner was suspended on account of his wife being a partner of a company, which has received allotment of work from the department where the Petitioner was working. Petitioner was placed under suspension pending drawal of the departmental proceeding for violation of Rule 12(2) of Assam Services

(Conduct) Rules, 1965 which requires that a Government servant is to report to the Government if any of his family members is engaged in trade or business. Petitioner was found to have submitted a report to that effect. This Court held that the ground of suspension does not exist, alleged misconduct is not as of very serious nature. Suspension is, therefore, set aside with liberty to the authority to proceed with the departmental inquiry. Taking a cue from the judgment rendered by this Court in the case (supra), Mr. S.N. Meitei, learned Counsel for the Petitioner submitted that the Petitioner on account of resorting of agitation by the work charged staff and muster-roll labourers on 30.9.2009 explained the situation to his superior officer, wherein it was also contended that he cannot be blamed for such agitation. That apart it was also explained that the Petitioner did not have prior knowledge about such agitation nor he had been informed by its subordinates, the controlling officers of the work charged staff and muster-roll labourers. Therefore, it was argued that the suspension of the Petitioner in view of the explanation offered is unwarranted as against the Petitioner and without putting him in suspension, the proposed departmental proceeding can be proceeded with.

15. Another pertinent question also arises, whether the Respondent authority did apply its mind in issuing the impugned suspension order. Power of suspension being discretionary in nature it must be applied keeping itself within its parameters. Before issuing an order of suspension sufficient materials must be placed before it to justify it, where suspension order is challenged, it would be appropriate for the court to see whether the order is free from taint of mala fide, arbitrariness, extraneous consideration and discrimination. If the courts after scrutiny of the materials available and the facts involved come to conclusion that the order is tainted with mala fide, arbitrariness, it would be within the domain of judicial interference. Mr. S.N. Meitei, learned Counsel appearing for and on behalf of the Petitioner strenuously argued that the impugned order does not speak anything about subjective satisfaction of the Respondent authority based on objective consideration of the relevant circumstances and, therefore, the impugned order being naked in nature cannot stand on the way of the writ Petitioner. It was also argued by him that the impugned order if read in toto would go to show that the Respondent authority did not apply its mind to the facts placed before it satisfying itself to order of suspension of the Petitioner except the contemplation of a disciplinary proceeding against the Petitioner. Mr. Meitei, therefore, contended that the facts placed before this Court would justify the mala fide and arbitrariness on the part of the Respondent authority. Mr. Meitei in support of his contention placed reliance in the following decisions:

(1) A.C. Barot v. District Superintendent of Police Panchmahals and Ors. 1990 (5) SLR 724 .

(2) Dr. K.C. Azad v. State of Himachal Pradesh 1991 (3) SLR 326.

(3) R.P. Dubey v. State of M.P. and Ors. 1994 (1) SLR 164

(4) State of Orissa Vs. Bimal Kumar Mohanty,

An order of suspension is not an order imposing punishment on a delinquent servant, found to be guilty. It is an order made against him, before he is found guilty, to ensure smooth disposal of the proceedings, initiated against him, and such proceedings must be expeditiously concluded both in the interest of the public services of the Government as also the Government servant. Although it is not a punishment under the civil service rules yet it should not be lightly passed in a routine manner.

16. This above observation came to be made by this Court while disposing Civil Rule No. 3169 of 1996. Darshan Singh v. The State of Arunachal Pradesh and Ors. 1997 (1) GLT 30.

17. In our present case on account of resorting of an agitation by the work charged staff and muster-roll labourers of the department of PHE within the office premises of the Petitioner for non-payment of their wages/ salaries for consecutive two months due to non-release of LOC, there arose law and order situation as alleged by the Respondents which according to the Respondents, the Petitioner is responsible for which after preliminary inquiry a departmental proceeding against him is contemplated and accordingly by impugned order dated 29.6.2010, he was placed under suspension, however, with certain directions therein. Though it has been claimed by the Petitioner that he is not responsible in any manner whatsoever for the agitation, for extraneous consideration, the impugned order was passed against him which according to him is tainted with mala fide, arbitrariness and with ulterior motive. According to the Petitioner such an order tainted with mala fide, arbitrariness cannot legally stand. That apart as already indicated the Respondents authority before resorting to such action do not apply its mind to the basic facts involved in the case. Therefore, the impugned order appears to be passed without subjective satisfaction on the materials placed before it.

18. The impugned order speaks that the Petitioner has been placed under suspension to proceed with a disciplinary proceeding against him, the affidavit filed by the Respondent-authorities also speaks for commencement of the disciplinary proceeding against the Petitioner. The affidavit indicates that approval has been obtained from the appropriate authorities to the memorandum of charges leveled against the Petitioner. Therefore, this affidavit makes it abundantly clear that the disciplinary proceeding is against the writ Petitioner.

19. Now, another question that arises at this stage whether an employee should continue in office pending departmental inquiry, such a matter is a matter to be considered by the authority and the court should not interfere with the order of suspension unless it is mala fide and without there being even prima facie evidence to connect delinquent with the misconduct charged. It is the case of the Respondents that Petitioner is liable for the agitation that resorted to by the work charged staff and muster-roll labourers for non-release of the LOC by the

Petitioner. A preliminary inquiry being made before proceeding with the disciplinary proceeding gives the idea to the Respondent-authorities that the Petitioner should be placed under suspension for smooth conduct of the disciplinary proceeding without any interference whatsoever from his end. There is no dispute regarding the position of the Petitioner in the department of PHE. He is the E-in-C in the PHE Department.

The agitators are also working under him. Therefore, there is every likelihood of interference by the Petitioner being the head of the office in the departmental proceeding if he sits in the office during the conduct of the proceeding. The Respondent authority, therefore, in order to avoid such difficulty ordered suspension of the Petitioner in contemplation of the disciplinary proceeding. This Court while disposing the Civil Rule No. 3169 of 1996, *Darshan Singh v. The State of Arunachal Pradesh and Ors.* 1997 (1) GLT 30 paragraph 16 observed as under:

16. Whether an employee should or should not continue in office, pending departmental inquiry is a matter to be considered by the authority. As has been pointed out by the Supreme Court in *U.P. Rajua Krishi Utpadan Mandi Parishad v. Sanjib Rajan* (1993) Supp. 3 SCC 482, the court should not interfere with the order of suspension, unless it is mala fide, and without there being even prima facie evidence to connect the delinquent with the misconduct charges.

20. Though it has been strenuously argued/contended by Mr. S.N. Meitei, learned Counsel for the Petitioner that the facts involved in the writ petition give rise a tainted mala fide, discrimination and arbitrariness on the part of the Respondent authorities, such argument cannot be attended to in view of the facts involved. The Petitioner being the head of the department, in a contemplated disciplinary proceeding against him he should not continue in the office attending such departmental inquiry. I find no force in the submission advanced by the learned Counsel for the Petitioner.

21. Further it has been brought to the notice of this Court that Rule 23(1) of the CCS (CCA) Rules, 1965 also provides an alternative statutory remedy of appeal against an order of suspension and such rule is adopted and made available to all State Government employees of Mizoram. The Petitioner being one of the employees of the State Government of Mizoram, however, failed to avail such alternative statutory remedy of appeal against the impugned order dated 29.6.2010 and on that ground also this writ petition is not maintainable.

22. Having given anxious consideration to the facts and the law laid down by the Apex court and the High Court as well, this Court is of the considered view that this writ petition is devoid of merit. It deserves dismissal. The same is accordingly dismissed. No cost.

Petitioner, however, would be at liberty to approach the appellate authority under Rule 23(1) of the CCS (CCA) Rules, 1965, if so advised.