
(1988) 05 GAU CK 0010
In the Gauhati High Court
Case No : Civil Rule No. 36 of 1983

Rajdeo Rai

APPELLANT

Vs

State of Assam

RESPONDENT

Date of Decision : 10-05-1988

Acts Referred:

Assam Administrative Tribunal Act, 1977 — Section 4, 4
Assam Services (Discipline and Appeal) Rules, 1964 — Rule 26, 26

Citation : (1988) 2 GLJ 135 : (1989) 1 GLR 354

Hon'ble Judges : B.L.Hansaria, J and J.Sangma, J

Bench : Division Bench

Advocate : A.C.Sharma, J.Gopal , P.K.Goswami, Advocates appearing for Parties

Judgement

Hansaria, J.—The petitioner is a poor driver. While he was serving as such under the SubDivisional Officer, Nalbari he came to be suspended vide an order passed by the Deputy Commissioner, Kamrup, on 1.8.75 as at Annexure III. He was thereafter dismissed from service on 1.7.76 without holding any enquiry with the aid of clause (b) of the second proviso to Article 311 (2) of the Constitution. He preferred an appeal before the Commissioner who allowed the same and remanded back the matter to the Deputy Commissioner for disposal according to law. An enquiry was thereafter held and the petitioner came to be dismissed again. The petitioner then preferred an appeal to the Commissioner which came to be dismissed. In 1981, he took his first journey to the learned Assam Administrative Tribunal which allowed the appeal and remanded the matter by its order passed on 28.10.81. The Deputy Commissioner after going through the matter again dismissed the petitioner for the third time on 2.12.81. The petitioner this time, instead of preferring appeal before the Commissioner, filed a review petition under Rule 26 of the Assam Services (Discipline & Appeal) Rules, 1964, herein after the Rules. The petitioner took recourse to this remedy available to him, under the law by, stating that he is a poor driver and because of this he was not in a position to bear the heavy cost of appeal and, therefore, he preferred review. The review petition is dated 2.1.82 which would show that it

was within the period of limitation visualised by the Rules for preferring appeal, which is three months from the date on which the appellant had received the copy of the order appealed against. The prayer of review was however not allowed vide order passed on 3.6.82. The petitioner thereafter moved "the learned Assam Administrative Tribunal for the second time and his appeal has been dismissed as not maintainable. Feeling aggrieved, he has approached this Court under Article 226 of the Constitution.

2. The ground on which the appeal was held to be nonmaintainable may be set out in the words of the learned Tribunal itself:

"In a number of cases this, Tribunal has "held that the power of review by the Governor is discretionary power, and review is not one of the remedies available to a civil servant : as a matter of right. Therefore, no appeal, will lie to the Tribunal against an order of review under Rule 26 above.

Besides that the appellant did not avail of the remedy of appeal to the Commissioner?.

The question being of importance, a notice was issued to the learned Advocate General, Assam to appear and assist the Court which the learned Advocate General has done.

3. Learned Advocate General has first drawn our attention to section 4 of the Assam Administrative Tribunal Act, 1977, which reads as below

"4. Jurisdiction(1) Save as otherwise expressly provided in subsection (2) below the Tribunal shall have jurisdiction to entertain and dispose of appeals preferred by civil servant, against any order passed by a competent authority in respect of any condition of service.

(2) Notwithstanding anything contained in subsection (1) above, the Tribunal shall have no jurisdiction with respect to any order passed, when the civil servant has not availed of all the remedies available to him under the relevant service rules, executive instructions or orders.

Provided that notwithstanding anything contained in the above paragraph the Tribunal may entertain an appeal from a civil servant, if any appeal, revision petition or representation filed by him under the relevant service rules before the competent authority has not been finally disposed of by the competent authority within a period of six months from the date of filing such appeal, revision petition or representation."

A reading of this section itself shows that a civil servant before approaching the learned Tribunal has to avail of "all the remedies available to him" under the relevant service rules, executive instructions or orders. In the proviso to subsection (2) it has been stated that if any appeal, revision petition or representation filed by the incumbent under the relevant service rules has not been finally disposed of by the competent authority within a period of six months

from the date of filing of such appeal, revision petition or representation, the appeal by the incumbent may be entertained by the learned Tribunal, Two things come out clearly from the aforesaid provision (1) before a person can approach the Tribunal he has to avail of all the remedies available to him and (2) the proviso itself visualises filing of not only an appeal but of revision petition or representation also. The question is whether invocation of review power is one of the remedies available to a delinquent of which mention has been made in section 4 (2) of the aforesaid Act.

4. According to the learned Advocate General, a review would also be a remedy available to a Government servant. This submission has been made by referring to Rule 26 of the Rules which has spoken about the Governor's power to review and has stated that the Governor may on his motion" or otherwise" call for the records of the case and review any order which is made or is appealable under these Rules. It thus seems that even where an order is appealable, power of review can be exercised. Secondly, power of review can be invoked not only on own motion by the Governor but otherwise also. The word" "otherwise" as is wellknown, takes within its fold approach by the aggrieved person invoking the power of review. It would thus seem that the power of review is available even when an order is appealable and can be invoked by the concerned Government servant as well.

5. Learned Advocate General has also drawn our attention to certain passages finding place in the landmark decision of Union of India vs. Tulsiram Patel, AIR 1985 SC 1416, in para 102 of it was noted that the right to make a representation after an action was taken is also a sufficient remedy and it was further observed that an appeal is much wider and more effective remedy than a right of making representation". In para 123, it was noted that the Government has a remedy by way of an appeal, representation or in some cases also by way of review. In para 127, also it was observed that a Government servant who is aggrieved by the penalty imposed can agitate in appeal, revision or review, as the case may be, that the penalty was too severe or excessive and not warranted by the facts and circumstances of the case."

6. There is thus no manner of doubt that the Rules as well as the Act visualises representation/review as one of the remedies available to a Government servant.

7. The further question is whether this power of review could altogether be regarded as discretionary leaving it entirely to the discretion of the authorities to exercise the same or not even if the circumstances of the case would warrant exercise of the power. To put it differently, whether the remedy of review can be claimed by a Government servant as a matter of right or not. In this connection it would be apposite to refer to the following observations of Lord Cairns, L. C. in Julius vs. Bishop of Oxford (1880) 5 AC 214.

"There may be something in the nature of the thing empowered to be done, something in the object for which it is done, something in the title of person or

persons for whose benefit the power is to be exercised, which may couple the power with a duty, and make it the duty of the person in whom the power is reposed to exercise that power when called upon to do so".

8. This view was cited with approval by the Supreme Court in *Commissioner of Police vs. Goardhandas Bhanji*, AIR 1972 SC 16. In *L. Hirday Narain vs. ITO*, AIR 1971 SC 33, the Court had again relied on what was stated by Cairns, L. C. in *Julius*. The speeches of other Law Lords were also noted. In view of what was stated there, it was held by the Supreme Court that as the exercise of power to rectify an apparent error is conferred upon the I T. O in aid of enforcement of a right, it is implicit that the power shall be exercised when a mistake apparent from the record is brought to his notice by a person concerned with or interested in the proceeding. The aforesaid observations of Lord Cairns were again noted in *S. P. Gupta vs. Union of India*, AIR 1982 SC 149 (See para 1248). In *Pad field vs. Minister of Agriculture*, 1968 AC 997, the House of Lords had drawn very heavily on the above case. Lord Morris of BerthyGest had occasion to refer to the following part of the speech of Lord Blackburn also in *Julius* :

"(1) the object for which the power is conferred is for the purpose of enforcing a right, there may be a duty cast on the donee of the power to exercise it for the benefit of those who have that right when required on their behalf. The law in this regard has been put thus in paragraph 28 of the Halsbury's Law of England, 4th Edition, Vol I :

" A statutory discretion is not, however, necessarily or, indeed, usually absolute^ it may be qualified by express and implied legal duties to comply with substantive and procedural requirements before a decision is taken whether to act and how to act. Moreover, there may be discretion whether to exercise a power, but no discretion as to the mode of its exercise; or a duty to act when some conditions are present, but a discretion how to act. Discretion may thus be coupled with duties."

9. In view of what has been stated above, we are in full agreement with the submission of the learned Advocate General and we , state that the appeal in the present case could not have been held to nonmaintainable merely because of the fact that the petitioner instead of preferring appeal before the Commissioner had thought is fit to approach the Government to exercise its power of review contemplated under Rule 26 of the Rules.

10. The petition is, therefore, allowed and the matter is remanded back to the learned Tribunal for disposal on merit in accordance with law. As the petitioner has been facing dismissal orders right from 1. 8. 76, it is a fit case where the learned Tribunal should dispose of the appeal as expeditiously as possible preferably within a period of two months from the date of receipt of the records by it.

11. Before concluding, we have to enter a caveat. The same is that there may be a case where the power of review is invoked after inordinate delay. This may

occur because Rule 26 of the Rules in terms has not laid down any period of preferring review. But as in the present case review was preferred within the period visualised for appeal, the question of delayed approach to the Governor has not arisen. We are, however, not expressing any opinion as to what would happen to an appeal filed before the learned Tribunal where power of review is invoked after inordinate delay, of say, two or three years.

12. In the result, the petition is allowed as aforesaid. We put on record our appreciation for the assistance rendered by the learned Advocate General.