
(2002) 01 GAU CK 0005

In the Gauhati High Court

Case No : Second Appeal No. 26 of 1994 Re-S.A. No. 42 of 1998

Sailendra Kumar Dey

APPELLANT

Vs

Union of India (UOI)

RESPONDENT

Date of Decision : 28-01-2002

Acts Referred:

Central Reserve Police Force Act, 1949 — Section 10

Citation : (2002) 2 GLT 266

Hon'ble Judges : B.B. Deb, J

Bench : Single Bench

Advocate : B. Das and S. Chakraborty, for the Appellant; P.K. Dhar, Sr. CGSC, for the Respondent

Final Decision : Dismissed

Judgement

B.B. Deb, J.—This Second Appeal is directed against the judgment and decree dated 22.6.1994 passed by the learned District Judge, West Tripura, Agartala being first appellate court in Title Appeal No. 39 of 1994, corrected judgment dated 31.8.1994 allowing the appeal and settling aside the trial court judgment and decree dated 11.5.1984 (decree dated 21.5.1984) passed by the learned Subordinate Judge, West Tripura, Agartala in Title Suit No. 13 of 1981.

2. Briefly stated, the plaintiff-appellant's (hereinafter called the "Plaintiff") case is as follows :

The plaintiff entered into public service under the Union of India on 26.8.1968 as an SSB personnel under the SSB Area Organiser, Tripura. While the plaintiff has been serving as such, he was put under suspension vide order dated 6.12.1977 in contemplation of a departmental proceeding. The back ground leading to suspension was that on 19.11.1977, the plaintiff while was performing Gentry Duty at Coy. HQ. At Baikhora the Commander Shri D.P. Khorana came to the spot and complained that the plaintiff was not discharging his duties. On 2.12.1977, the plaintiff was awarded seven days" confinement for the aforesaid lack of

duties. The plaintiff thereafter requested the Coy. Commander to allow him to prefer an appeal to the Commandant SSB Coy. Tripura, but Instead allowing the plaintiff to avail the appeal opportunity he was kept under suspension. A formal proceeding was drawn up vide Memo. Dated 18.1.1978 against the plaintiff on two heads of charges, firstly for the misconduct in that he refused to accept seven days" confinement awarded upon him and secondly he was not discharging his duties properly. Formal inquiry was held, but the copy of the report was not supplied to the plaintiff, on the contrary the Commandant vide order dated 3.5.1978 inflicted the punishment of seven days" confinement on the plaintiff. The plaintiff was not afforded any reasonable opportunity to defend his case though he was not guilty in any way. The witnesses examined did not support the charge. The authority vide Memo, dated 19.6.1978 initiated another proceeding against the plaintiff on the ground that he refused to accept the punishment. Thereafter, the Divisional Organiser SSB, Siliguri vide order dated 19.10.1979 dismissed the plaintiff from service and that was communicated by the Commandant, SSB Coys, Tripura on 30.10.1979. On 21.11.1979 the plaintiff made a representation to the President of India vindicating his grievances but of no avail, hence the suit challenging the dismissal order.

3. The defendant-respondent (hereinafter called the "respondent") having filed written statement contested the case contending, inter alia, that on 19.11.1977 at about 1215 hours the plaintiff was supposed to be in Sentry Duty at Quarters Guard at Coy. Headquarters, Baikhora, but was found absent from duty spot during the visit of Coy. Commander Shri D.P. Khurana as as such he was awarded seven days" confinement but he did not comply the order and as such he was kept under suspension, ordered for disciplinary proceeding and on conclusion of the disciplinary proceeding he was awarded with punishment of seven days" confinement in Quarters Guard duty. Since the plaintiff refused to carry out the order, Memorandum of Charges was issued but he did not participate in the proceeding even he did not put forward his plea of "not guilty" rather he moved the High Court with a writ petition bearing No. Civil rule 22 of 1979 which was dismissed by this Court on 5.9.1979. Since the plaintiff failed to carry out the lawful order or punishment imposed upon him, he was dismissed from service by the impugned order. Hence according to the respondent, the plaintiff is not entitled to get any relief in the present case. ,

4. The learned trial court vide judgment dated 11.5.1984 decreed the suit partly without cost and the dismissal order dated 19.10.1979 was quashed and set aside. The learned trial court directed the authority to re-instate the plaintiff in service directing withholding of one future increment and the plaintiff was further declared to be entitled 50% of the pay and allowances from the date of termination till the date of re-instatement, but for other purposes the intervening period from the date of termination till re-instatement was ordered to be treated on duty.

5. The authority preferred appeal and the learned first appellate court vide

judgment dated 22.6.1994 subsequently corrected on 31.8.1994 allowed the appeal so preferred by the department and set aside the judgment and decree of the learned trial court. Hence this Second Appeal.

6. At the time of admission of this Second Appeal, the following substantial question of law was formulated on 19.12.1994 :

"Whether the first appellate court committed an error of law in accepting the order of dismissal where appellant was not afforded any reasonable opportunity to defend his case."

7. Heard Mr. B. Das, learned senior counsel appearing on behalf of the plaintiff. Also heard Mr. P.K. Dhar, learned senior counsel Central Govt. Standing Counsel for the respondent.

8. It appears from Exbt. C, the office order dated 3.12.1977 that the plaintiff was found absent on Sentry Duty on 19.11.1977 at 1215 hours while Shri D.P. Khurana. Coy. Commandar visited the Headquarters. For the above lapse in duty the plaintiff was awarded with seven days" confinement in quarters guard, but he refused to obey the order and as such he was placed under suspension vide order dated 3.12.1977 followed by drawing up of formal departmental proceeding dated 18.1.1978. The articles of charges are as follows:

"ARTICLE-I

That the said No. 84344, Constable Sailendra Kumar Dey while on sentry duty at Quarter Guard of "D" Coy. Hqrs., Baikhora on 19.11.1977, at 1215 hours, was found coming out of tent to the place meant for sentry, when Coy. Commander visited, and thus failed to perform his duties properly and left his sentry post without being properly relieved- In that he committed an offence u/s 10(p) of CRPF Act, 1949.

ARTICLE-II

That the said no. 84344, Constable, Sailendra Kumar Dey was ordered Seven Days confinement in Quarter Guard, on 2.12.1977 in the orderly room. no. 84344, Constable, Sailendra Kumar Dey refused to carry out the orders and thus committed an offence u/s 10(p) of CRPF Act, 1949."

Instead of participating in the proceeding, the plaintiff moved a writ petition bearing No. Civil Rule 22 of 1979 before this court challenging the impugned order of suspension dated 3.12.1977 and impugned order of departmental proceeding dated 18.1.1978 and this court vide judgment dated 5.9.1979 dismissed the writ petition meaning thereby drawing up of the proceeding against the plaintiff vide Memo, dated 18.1.1978 was found valid by this court. Despite this, the plaintiff did not participate in the proceeding. The inquiring officer Mr. M.K. Banerjee, Dy. S.P. furnished his report on 8.12.1978 as available under Exbt. 13 wherefrom it appears that the plaintiff was allowed sufficient time and scope enabling him to attend the departmental inquiry but he refused in

writing as well as verbally to participate in the proceeding on the plea that he wanted to take legal action in the court, hence the proceeding was held ex-parte. Having examined the witnesses and considered the materials the Inquiring Officer found both the charges proved and held the plaintiff guilty of the charges levelled against him. The relevant portion of the inquiry report is quoted below for convenience sake :

"(b) The defence of the Government Servant (delinquent) in respect of article of charge :

No. 84344 Constable Sailendra Kumar Dey of "D" Coy, SSB Coys, Tripura was given sufficient time and scope for consideration for attending the departmental enquiry proceedings. He refused, in writing as well as verbally to attend the proceedings of the enquiry on the plea that he wanted to take legal action in the Court. Hence the proceedings of the enquiry was held ex parte."

On accepting the inquiry report, the disciplinary authority vide Memo, dated 9.4.1979 issued a second show cause upon the plaintiff proposing the penalty of dismissal from service and allowed the plaintiff to make representation if any, within fifteen days therefrom (Exbt. 13). The plaintiff vide representation dated 23.5.1979 informed the authority that since his writ petition was pending before the Hon"ble High "Court, he would not make any representation till disposal of the writ petition. On 25.9.1979 the plaintiff made another representation vide Exbt. 10 stating, inter alia, that his writ petition though was dismissed by the Hon"ble Singh Bench, he was contemplating to prefer appeal to the Division Bench. The authority awaited and while it was found that no appeal was filed, no stay was there, no legal impediment appeared for concluding the departmental proceeding, the authority passed the final order dated 19.10.1979 dismissing the plaintiff from service with immediate effect.

9. Mr. B. Das, learned senior counsel for the plaintiff submits that the plaintiff was not afforded the reasonable opportunity of being defended. Mr. Das developed his argument submitting that the plaintiff was never informed of his right to get the service of any other employee to defend himself before the proceeding and he was not supplied with the copy of the inquiry report.

10. So far the first point is concerned, it appears from the record that the plaintiff did not participate in the proceeding. Even the plaintiff did not deny the imputation of misconduct incorporated in the Memorandum of Charges, rather he informed in writing to the inquiring authority that he would not participate in the proceeding as he wanted to move the court of law and actually he moved a writ petition which was dismissed. Thereafter also the plaintiff did not make any attempt to participate in the proceeding. It is correct that in the Memorandum of Charges there was no indication giving caution to the plaintiff that his right to be defendant by any departmental assistant, but on the other hand, it is on record that the plaintiff was adamant in not participating in the proceeding. Had the plaintiff participated in the proceeding then the question of affording reasonable

opportunity by appointing a defence assistant may have risen, but since the plaintiff decided not to participate in the proceeding and since the plaintiff did not even deny the charge framed against him, no question of giving opportunity arose at all.

11. From the Memorandum of Charges dated 18.1.1978 it appears that the formal Memorandum of Charges contained the statement of imputation of misconduct, list of documents to be used against the plaintiff during inquiry and the name of witnesses. On receipt of the Memorandum of Charges, the plaintiff could have denied the same, could have nominated any govt. employee to defend him in course of the inquiry, but he did nothing, rather he informed the inquiring authority that he would not participate in the proceeding as he decided to challenge the Memorandum of Charges in the court of law and in fact he challenged the same, but his writ petition stood dismissed.

12. Mr. Das, learned senior counsel for the plaintiff having relied upon a decision of this court in *Dhananjay Kumar Paul, plaintiff-appellant v. The Union of India, New Delhi*, defendant-respondent under Second Appeal No. 20 of 1994 submits that this court vide " judgment dated 6.9.2001 in the aforequoted case held that any departmental proceeding conducted without having provided defence assistant to the delinquent would vitiate the inquiry and the said decision is squarely applicable to the present case.

13. On perusal of the aforequoted judgment, it appears that in the referred case the plaintiff delinquent approached the authority for providing him with a defence assistant but the inquiring authority rejected the same and this court held as follows :

"Due to non-providing the defence assistant despite the request made by the appellant, the appellant sustained prejudice vitiating the entire proceedings and, as such, the punishment imposed by the disciplinary authority acting upon such enquiry report cannot stand under any valid law."

In the present case, the circumstances is otherwise. The plaintiff on receipt of the Memorandum of Charges never sought for any defence assistant nor he nominated any defence assistant. Mr. Das submits that it was the duty of the disciplinary authority/Inquiring authority to apprise the delinquent of his right to be defended by a defence assistant. The submission is correct. In case a delinquent decides to participate in the departmental proceedings, he may not be made handicapped by not providing a defence assistant, but in the present case, the delinquent declined to participate in the proceeding and as such providing defence assistant to conduct his defence appears to be redundant and uncalled for. The defence assistant is to be provided notwithstanding any request is made or not by the delinquent having regard to the seriousness of charges and having regard to the status of the delinquent and while the delinquent having a lower ranked personnel is not conversant with the departmental procedure like Class-IV employee and/or a Constable, the authority must have to make him aware of

his right to be defended by a departmental assistant, but in case a delinquent adamantly declines to participate in the proceedings at all, appraisal of his aforesaid right is meaningless and in the present case, since the delinquent adamantly declined the participate in the proceeding, non-providing of defence assistant cannot be held to be a factor vitiating the proceeding.

14. Secondly, Mr. Das, learned senior counsel for the petitioner submits that the delinquent was never supplied the copy of the inquiry report and as such he was not apprised of the contents of the report; The same plea was raised In the plaint which stood dented by the respondents in their written statement. From Exbt. G, a letter of the plaintiff dated 1st May 1979 it appears that he received the copy of the inquiry report before making the representation and that was prior to the imposition of punishment of dismissal from service. Acting upon the inquiry report the disciplinary authority issued second show cause dated 9.4.1979 and the delinquent furnished his reply to the second show cause on 1st May, 1979 and in that letter the delinquent impliedly acknowledge the receipt of the inquiry report. The second paragraph of his representation dated 1st May, 1979 is re-produced below :

"In the enquiry report however there is no mention of the earlier correspondence between myself and the commandant and he only refers to the later correspondence when the subsequent proceeding was drawn up and enquiry was arranged."

Having regard to the aforequoted statement of the plaintiff as available from letter dated 1st May, 1979 (Exbt. G) It cannot be said that before imposition of punishment the copy of the inquiry report was not furnished to the delinquent. The delinquent received the copy of the inquiry report and made the second representation and as such the contention of the learned senior counsel for the plaintiff Mr. Das that the plaintiff was not supplied with the copy of the inquiry report cannot stand.

15. Under the aforesaid circumstances, I am not inclined to Interfere with the judgment passed by the learned first appellate court and in my considered opinion, the plaintiff adamantly avoided to get the reasonable opportunity of being defended and as such the substantial question of law so formulated is answered accordingly against the plaintiff.

16. In the result, the appeal stands dismissed. The suit filed by the plaintiff is dismissed and the appellate judgment is upheld. No order as to costs.