
(2018) 05 GAU CK 0048
In the Gauhati High Court
Case No : WP(C) 2532 of 2016

SMT. BIVA DEVI

APPELLANT

Vs

THE STATE OF ASSAM AND 2 ORS

RESPONDENT

Date of Decision : 04-05-2018

Acts Referred:

Constitution of India, 1950 — Article 226, 311, 311(2)

Citation : (2018) 05 GAU CK 0048

Hon'ble Judges : SONGKHUPCHUNG SERTO

Bench : Single Bench

Final Decision : Disposed Of

Judgement

1 Heard Mrs. J.M. Konwar, learned counsel for the petitioner and also heard Mr. M.R.Adhikari, learned Government Advocate who appears on

behalf of all the State respondents.

2. This is a petition under Article 226 of the Constitution of India challenging the dismissal order dated 20.09.2013 (at Annexure-18 of the writ petition)

by which the petitioner's late husband who was an employee as Peon in the department of Panchayat & Rural Development was dismissed from

service, and, at the same time praying for a direction to the respondents to treat the petitioner's husband in service till he died on 20.03.2014 and

grant her family pension and other pensionary benefits as admissible under the rules, and also to issue a direction to the respondents to appoint her in a

Grade-IV post of the Department on compassionate ground.

3. The petitioner's husband was appointed as Peon under the Directorate of Panchayat & Rural Development, Assam as casual employee in the

month of February, 1991 and his service was regularized on 01.03.1994. While

serving, as such, he was found absent from 25.11.2011 to 04.04.2013.

After a show cause notice was issued through newspaper publication on 04.04.2013 he appeared on 05.04.2013, and he was allowed to join his work.

Thereafter, he was issued another show cause notice on 07.05.2013 and the same was replied by him on 17.05.2013 stating that due to his illness from

chronic liver disease with Ulcer syndrome he was under treatment, therefore, he could not attend office during the period mentioned above. He also

informed that he was in touch with the office through telephone now and then about his health condition and his absence from the office was not

intentional or willful. The explanation was not accepted by the department hence, vide order dated 20.09.2013, issued by the Commissioner, Panchayat

& Rural Development, Assam, the petitioner's husband was dismissed from service. The dismissal order as annexed to the writ petition at

Annexure-18 is reproduced here below;

GOVERNMENT OF ASSAM

OFFICE OF THE COMMISSIONER PANCHAYAT & RURAL DEVELOPMENT
PANJABARI ROAD :: JURIPAR :: GUWAHATI-37

No. DRD-2(D)209/95/343

Dated the 20th Sept./2013

ORDER

Perused the Show Cause Notice dated 07-05-2013 served upon Sri. Biswajit Sarma, Peon of this Commissionerate and also perused the replies dated

17-05-2013 submitted by Sri. Biswajit Sarma, Peon. Whereas the Enquiry Officer has submitted the Enquiry report dated 06-08-2013 in which it was

found that the charged leveled against the charged official has been proved and, Whereas, after going through the charges and report of the Enquiry

Officer, the Disciplinary Authority is satisfied with the Enquiry Report and has accepted the finding of the same.

ORDER

Having gone through the Enquiry Report and all relevant documents connected with the instant case and considering the facts and circumstances and

seriousness of the charges, I as the Disciplinary Authority is satisfied that this is a fit case, where major penalty not less than that his dismissal from

Govt. services with meet the end of justice. Hence Sr. Biswajit Sarma, Peon of

this Commissionerate is hereby dismissed from Govt. service under Rule-7(vii) of Assam Services (Discipline and Appeals) Rules, 1964 with immediate effect.

Sd/-

(Dr. K.K. Dwivedi, IAS)

Commissioner, Panchayat & Rural Dev., Assam.â??

4. On 20.03.2014, the petitionerâ?? husband died living behind his wife that is the petitioner and two minor children. After the death of her husband

the petitioner submitted a representation dated 03.04.2014 to the Principal Secretary to the Government of Assam-in-Charge of Panchayat & Rural

Development department praying for revocation of the dismissal order so that she and her minor children may enjoy the pensionary benefits. Since the

representation did not yield any favourable response, the petitioner has approached this Court praying as stated above.

5. The learned counsel of the petitioner at the very outset submitted that though her husband has died being the only wife and affected directly by the

dismissal of her husband from service the petitioner has legal right to claim such reliefs as prayed for in the petition. In support of her submission, the

learned counsel cited the judgment of the Honâ??ble Supreme Court dated 03.10.2001, particularly para-38 of the judgment passed in the case of

Ghulam Qadir â??Vrs- Special Tribunal & Others, reported in (2002) 1 SCC 33. The contents of the para-38 of the judgment are reproduced here

below;

â??38. There is no dispute regarding the legal proposition that the rights under Article 226 of the Constitution of India can be enforced only by an

aggrieved person except in the case where the writ prayed for is habeas corpus or quo warranto. Another exception in the general rule is the filing of

a writ petition in public interest. The existence of the legal right of the petitioner which is alleged to have been violated is the foundation for invoking

the jurisdiction of the High Court under the aforesaid Article. The orthodox rule of interpretation regarding the locus standi of a person to reach the

court has undergone a sea change with the development of constitutional law in our country and the constitutional courts have been adopting a liberal

approach in dealing with the cases or dislodging the claim of a litigant merely on hypertechnical grounds. If a person approaching the court can satisfy

that the impugned action is likely to adversely affect his right which is shown to be having source in some statutory provision, the petition filed by such

a person cannot be rejected on the ground of his not having the locus standi. In other words, if the person is found to be not merely a stranger having

no right whatsoever to any post or property, he cannot be non-suited on the ground of his not having the locus standi??.

Mr. M.R. Adhikari, learned Government Advocate contended that since the delinquent Government servant had already died, the petitioner would not

have a locus standi to approach this Court for the reliefs claim. On this, Mr. Adhikari submitted that he would be submitting a ruling of the Honâ??ble

Supreme Court but did not do so. The fact that the petitioner is wife of the deceased delinquent Government servant his dismissal from service

naturally affects her right to family pension and other benefits provided under the relevant Acts and Rules which are statutory. Therefore, in view of

the principle of law settled by the Honâ??ble Supreme Court in the case cited the objection raised by the learned Government Advocate seems to

have lost its sting.

6. It is also submitted by the learned counsel of the petitioner that petitionerâ??s husband was not given proper opportunity of being heard in the

departmental proceeding, therefore, the enquiry proceeding was conducted in violation of Article 311 of the Constitution of India and, as such, the

same deserves to be quashed and set aside, and, the subsequent actions taken by the concerned authority in dismissing the delinquent Government

servant that is the petitionerâ??s husband, vide order dated 20.09.2013, is also illegal and violative of the fundamental rights of the delinquent

Government servant, therefore, the same also deserves to be quashed and set aside. Furthermore, the learned counsel submitted that husband of the

petitioner was not given copy of the enquiry report, and, contended very strongly that in a disciplinary enquiry proceeding, if the delinquent

Government servant is not provided with a copy of the enquiry report it would be deemed that he or she has not been given opportunity of being heard

and, therefore, there has been violation of principle of natural justice. In support of her submission, the learned counsel cited the contents of

paragraphs-21 & 22 of the judgment of this High Court passed on 16.03.2017, in the case of Foyez Uddin Ahmed Laskar â?"versus-Gauhati High

Court and Others, reported in (2017) 3 GLT 262. In the said judgment, this Court by relying on the principle of law laid down by the Honâ??ble

Supreme Court in the case of Union of India â??versus- Md. Ramzan Khan, reported in (1991) 1 SCC 588, and in the case of Managing Director,

ECIL â??versus- B.Karunakar, reported in (1993) 4 SCC 727, and the judgment of this High Court itself passed in the case of Utpal Rajkonwar â?

versus- Dibrugarh University, reported in (2015) 2 GLR 765, came to the conclusion that non supply or furnishing of a copy of enquiry report to the

delinquent Government servant in a disciplinary enquiry amounts to denial of fair opportunity of being heard. The relevant paragraphs-21 & 22 of the

judgment cited by the learned counsel are reproduced here below;

â??21.â?? Article 311, particularly, the first provision thereto, which was incorporated post 42nd Amendment was the subject

matter of deliberation by the Supreme Court in Union of India â??versus- Md. Ramzan Khan, (1991) 1 SCC 588. Thereafter, a Constitution Bench of

the Supreme Court deliberated upon this provision in the case of Managing Director, ECIL â??versus- B.Karunakar, (1993) 4 SCC 727. Supreme

Court has explained that before arriving at a finding holding the delinquent guilty or otherwise, copy of the enquiry report has to be furnished to the

delinquent and response of the delinquent on the enquiry report is required to be considered. However, once he is held guilty thereafter, no fresh notice

is required to be issued to the delinquent on the question of imposition of penalty. This aspect of the matter was gone into by this Court in a recent

decision in the case of Utpal Rajkonwar v. Dibrugarh University, (2015) 2 GLR 765, relevant portion of which is extracted hereunder with approval;

â??20. Before advertng to other grounds of challenge, it would be opposite to first attend to the challenge made on the ground of non-furnishing of

copy of the enquiry report to the petitioners before acceptance of the findings of the Enquiry Committee as any decision on this ground, one way or

the other, would have a decisive bearing on the outcome of the present proceeding.

21. Article 311 of the Constitution deals with dismissal, removal or reduction or reduced in rank or persons employed in civil capacities under the

Union or the State. Prior to the 42nd Amendment of the Constitution, Sub- article (2) of Article 311 reads as under: â??311(2) No such person as

aforesaid shall be dismissed or removed or reduced in rank except after an inquiry in which he has been informed of the charges against him and given a reasonable opportunity of being heard in respect of those charges and where it is proposed, after such inquiry, to impose on him any such penalty, until he has been given a reasonable opportunity of making representation on the penalty proposed, but only on the basis of the evidence adduced during such inquiry.â??

21. Following the 42nd Amendment made in the year 1976, sub-article (2) now reads as under;

â??311. (2) No such person as aforesaid shall be dismissed or removed or reduced in rank except after an enquiry in which he has been informed of the charges against him and given a reasonable opportunity of being heard in respect of those charges: Provided that where it is proposed, after such inquiry, to impose upon him any such penalty, such penalty may be imposed on the basis of the evidence adduced during such inquiry and it shall not be necessary to give such person any opportunity of making representation on the penalty proposed:â??

23. Prior to the 1976 Amendment, Article 311(2) provided for opportunity of hearing at 2 stages, i.e. at the stage of enquiry into the charges and consequently before imposition of penalty on the basis of findings of the enquiry. The 1976 Amendment eliminated the provision providing for second opportunity of hearing of punishment.

24. In Ramzan Khan (supra), the question, which fell for consideration before the Apex Court was whether after the 42nd Amendment, the delinquent had lost his right to entitlement to a copy of the report of the Enquiry Officer in the disciplinary proceeding. The Apex Court, on due consideration took the view that deletion of the second part of issuing notice did not bring about any material change in regard to the requirement of furnishing a copy of the enquiry report to the delinquent. The Honâ??ble Supreme Court held as under;

â??15. Deletion of the second opportunity from the scheme of article 311(2) of the constitution has nothing to do with providing of a copy of the report to the delinquent in the matter of making his representation. Even though the second stage of the inquiry in Article 311(2) has been abolished by amendment, the delinquent is still entitled to represent against the conclusion of

the Inquiry Officer holding that the charges or some of the charges are established and holding the delinquent guilty of such charges. For doing away with the effect of the enquiry report or to meet the recommendations of the Inquiry Officer in the matter of imposition of punishment, furnishing a copy of the report becomes necessary and to have the proceeding completed by using some material behind the back of the delinquent is a position not countenanced by fair procedure. While by law application of natural justice could be totally ruled out or truncated, nothing has been done here which could be taken as keeping natural justice out of the proceedings and the series of pronouncements of this Court making rules of natural justice applicable to such an inquiry are not affected by the Forty-second Amendment. We, therefore, come to the conclusion that supply of a copy of the inquiry report along with recommendation, if any, in the matter of proposed punishment to be inflicted would be within the rules of natural justice and the delinquent would, therefore, be entitled to the supply of a copy thereof. The Forty-second Amendment has not brought about any change in this position??.

25. The question as to whether the enquiry report of the Enquiry Officer, who was appointed by the Disciplinary Authority to hold enquiry into the charges against the delinquent, was required to be furnished to the delinquent to enable him to make proper representation to the Disciplinary Authority before such authority arrives at its own final decision with regard to the guilt or otherwise of the delinquent and the consequent punishment proposed was referred to the Constitution Bench in *Managing Director, ECIL (supra)*. Reference was made in the view of what was thought to be conflicting decisions in *Ramzan Khan(supra)* and an earlier decision in the case of *Kailash Chander Asthana v. State of U.P., (1988) 3 SCC 600*. The question, which was referred has since been authoritatively decided by the Constitution Bench in *Managing Director, ECIL(supra)*. It has been held that right to receive the Enquiry Officer's report and to show cause against the enquiry report was independent of the right to show cause against the penalty proposed. Acknowledging that there was some between the two rights, the Apex Court clarified that the right to receive the enquiry report and to represent against the findings recorded in it was inexplicably connected with the decision of the Disciplinary Authority and the nature of penalty

proposed. Since the 42nd Amendment dispensed with the requirement of issuance of the notice to show cause against the penalty proposed, the Apex

Court observed that some Courts took the view that the delinquent was deprived of his right to represent against the findings of guilt as well. The

confusion was on account of the failure to distinguish the two rights which were independent of each other. The Apex Court explained the distinction

between the two stages and held as under;

25. While the right to represent against the findings in the report is part of the reasonable opportunity available during the first stage of the inquiry

viz., before the disciplinary authority takes into consideration the findings in the report. the right to show cause against the penalty proposed belongs to

the second stage when the disciplinary authority has considered the findings in the report and has come to the conclusion with regard to the guilt of the

employee and proposes to award penalty on the basis of its conclusions. The first right is the right to prove innocence. The second right is to plead for

either no penalty or a lesser penalty although the conclusion regarding the guilt is accepted. It is the second right exercisable at the second stage which

was taken away by the 42nd Amendment.

26. The reason why the right to receive the report of the enquiry officer is considered an essential part of the reasonable opportunity at the first stage

and also a principle of natural justice is that the findings recorded by the enquiry officer form an important material before the disciplinary authority

which along with the evidence is taken into consideration by it to come to its conclusions. It is difficult to say in advance, to what extent the said

findings including the punishment, if any, recommended in the report would influence the disciplinary authority while drawing its conclusions. The

findings further might have been recorded without considering the relevant evidence on record, or by misconstruing it or unsupported by it. If such a

finding is to be one of the documents to be considered by the disciplinary authority, the principles of natural justice require that the employee should

have a fair opportunity to meet, explain and controvert it before he is condemned. It is the negation of the tenets of justice and a denial of fair

opportunity to the employee to consider the findings recorded by a third party like the enquiry officer without giving the employee an opportunity to

reply to it. Although it is true that the disciplinary authority is supposed to arrive

at its own findings on the basis of the evidence recorded in the inquiry, it is also equally true that the disciplinary authority takes into consideration the findings recorded by the enquiry officer along with the evidence on record. In the circumstances, the findings of the enquiry officer do constitute an important material before the disciplinary authority which is likely to influence its conclusions. If the enquiry officer were only to record the evidence and forward the same to the disciplinary authority, that would not constitute any additional material before the disciplinary authority of which the delinquent employee has no knowledge. However, when the enquiry officer goes further and records his findings, as stated above, which may or may not be based on the evidence on record or are contrary to the same or in ignorance of it, such findings are an additional material unknown to the employee but are taken into consideration by the disciplinary authority while arriving at its conclusion. Both the dictates of the reasonable opportunity as well as the principles of natural justice, therefore, require that before the disciplinary authority comes to its own conclusions, the delinquent employee should have an opportunity to reply to the enquiry officer's findings. The disciplinary authority is then required to consider the evidence, the report of the enquiry officer and the representation of the employee against it.

27. It will, thus, be seen that where the Inquiry Officer is other than the disciplinary authority, the disciplinary proceedings break into two stages. The first stage ends when the disciplinary authority arrives at its conclusions on the basis of the evidence, Inquiry Officer's report and the delinquent employee's reply to it. The second stage begins when the disciplinary authority decides to impose penalty on the basis of its conclusions. If the disciplinary authority decides to drop the disciplinary proceedings, the second stage is not even reached. The employee's right to receive the report is thus, a part of the reasonable opportunity of defending himself in the first stage of the inquiry. If this right is denied to him, he is in effect denied the right to defend himself and to prove his innocence in the disciplinary proceedings.

26. Therefore, from a careful reading of the aforesaid decision of the Apex Court, it is clearly evident that before the Disciplinary Authority comes to its own conclusion whether to accept the enquiry report or not, the delinquent employee should have an opportunity to reply to the Enquiry Officer's findings. Thereafter, the Disciplinary Authority is required to consider

the evidence on record, the report of the Enquiry Officer and the representation of the employee against the report of the Enquiry Officer.â??

22. In other words, the requirement of law is that before a decision is taken by the disciplinary authority whether the enquiry report has to be accepted

or not, the delinquent has to be given a chance to make a representation against the report submitted by the Enquiry Officer. After all, report of the

Enquiry Officer is one of the material documents to be taken into consideration by the disciplinary authority before accepting the guilt or otherwise of

the delinquent. Therefore, as explained in Utpal Rajkonwar (supra), principle of natural justice require that before such decision is taken the delinquent

is required to be afforded an opportunity to make his statement by way of representation on such report. Thereafter, it is for the disciplinary authority

on the basis of the materials on record, including the enquiry report and the response of the delinquent, to take a decision as to whether the delinquent

is guilty or not. Once the disciplinary authority holds the delinquent to be guilty of misconduct and decides to impose penalty, no fresh show cause

notice is required to be given to the delinquent on the point of penalty.â? Mr. Adhikari, learned Government Advocate appearing for the respondents

produced the records of the enquiry conducted against the deceased husband of the petitioner. On perusal of the records there is no sign which would

show that a copy of the enquiry report was given to the deceased husband of the petitioner. The learned Government Advocate however, submitted

that this plea submitted by the petitionerâ??s learned counsel is not a part of the pleading, therefore, it cannot be taken into consideration. The

learned counsel for the petitioner drew my attention to para-19 of the writ petition and submitted that it can be implied from the contents of this

paragraph that the ground taken has been one of the pleaded case of the petitioner. The contents of the para-19 of the writ petition referred to by the

learned counsel for the petitioner are reproduced here below;

â??19. That the petitioner begs to submit that the very fact that the petitionerâ??s husband expired soon after his dismissal from service speaks for

itself that his health condition had already highly deteriorated and therefore he was not in a position to defend himself effectively in the departmental

proceeding; and for the same reason he was not even in a position to prefer a departmental appeal against his dismissal from service.â??

The submission of the learned counsel, Mr. Adhikari that this ground is not a pleaded case of the petitioner, therefore, to accept the same would be

going outside the purview of the pleading of the petitioner cannot be accepted, because this Court can take judicial notice of the same specially when

the records have been placed. Further, in the absence of any evidence in the records to show that a copy of the report of the enquiry was given to the

petitioner's husband before the conclusion on his guilt was drawn by the authority, the departmental proceeding drawn up against the deceased

Government servant has to be deemed vitiated in the light of the principle of law laid down by the Hon'ble Supreme Court and followed by this

High Court. Therefore, the enquiry proceeding and the consequential actions taken thereafter can be quashed and set aside on this ground alone.

7. The third point raised by the learned counsel of the petitioner is that for every absence from duty a delinquent Government servant is not punishable

unless such absence is proven to be willful. The learned counsel on this cited the judgment of the Hon'ble Supreme Court passed on 15.02.2012 in

the case of Krushnakant B. Parmar vs. Union of India and Another, reported in (2012) 3 SCC 176. The relevant paragraphs cited by the

learned counsel are paras-16 to 22 and the contents are reproduced here below;

¶16. The question whether 'unauthorised absence from duty' amounts to failure of devotion to duty or behaviour unbecoming of a Government

servant cannot be decided without deciding the question whether absence is willful or because of compelling circumstances.

17. If the absence is the result of compelling circumstances under which it was not possible to report or perform duty, such absence cannot be held to

be willful.

18. Absence from duty without any application or prior permission may amount to unauthorised absence, but it does not always mean willful. There

may be different eventualities due to which an employee may abstain from duty, including compelling circumstances beyond his control like illness,

accident, hospitalisation, etc., but in such case the employee cannot be held guilty of failure of devotion to duty or behaviour unbecoming of a

Government servant.

19. In a Departmental proceeding, if allegation of unauthorised absence from duty is made, the disciplinary authority is required to prove that the

absence is willful, in absence of such finding, the absence will not amount to misconduct.

20. In the present case the Inquiry Officer on appreciation of evidence though held that the appellant was unauthorisedly absent from duty but failed to hold the absence is willful; the disciplinary authority as also the Appellate Authority, failed to appreciate the same and wrongly held the appellant guilty. Though, I agree with the proposition of law submitted by the learned counsel, I am not inclined to go into the issue any further as the same involves questions of fact.

8. Mr. Adhikari, learned Government Advocate also submitted that the delinquent Government servant, during his lifetime did not prefer the statutory

appeal, therefore, the petitioner has no locus standi to file this writ petition. To this, the learned counsel for the petitioner submitted that the delinquent

Government servant, due to his poor health, was not in a position to file the appeal. In support of her submission, the learned counsel referred to the

medical certificate on the health of the delinquent Government servant which is annexed to the writ petition as Annexure-11. The fact that the

delinquent Government servant was physically sick when the enquiry proceedings were going on and thereafter died is well supported by the facts and

circumstances submitted by the learned counsel of the petitioner and the documents filed along with the writ petition like the medical certificate, which

are not refuted. Therefore, the explanation given for not preferring the statutory appeal is accepted.

9. In view of the above discussions and the conclusions drawn, I am of the view that the petitioner's case is well supported. Therefore, the writ

petition is allowed and the departmental proceedings which culminated in the passing of the impugned dismissal order dated 20.09.2013, is quashed and

set aside together with the impugned order. Further, as in consequence, the respondents are directed to pay all the pensionary benefits including family

pension to the petitioner and her children as per law. The respondents shall also consider appointment of the petitioner to any Government job on

compassionate ground as per the scheme provided by law. Needless to say but since the petitioner and her children have been left behind by their only

bread earner for quite some time, the respondents should complete the whole process within a period of 4(four) months from the date of receipt of a

copy of this judgment and order. Writ petition is disposed.