
(2003) 12 GAU CK 0008
In the Gauhati High Court
Case No : Writ Petition (C) No. 19 of 2002

S.N. Yadav

APPELLANT

Vs

State of Mizoram and Others

RESPONDENT

Date of Decision : 08-12-2003

Acts Referred:

Constitution of India, 1950 — Article 226

Citation : (2005) 1 GLR 265

Hon'ble Judges : S.K. Kar, J

Bench : Single Bench

Advocate : M.M. Ali, for the Appellant; Aldrin Lallawmzuala, Asst. Govt. Advocate, for the Respondent

Final Decision : Dismissed

Judgement

S.K. Kar, J.—The petitioner S.N. Yadav, was serving as an A.S.I. in the Police department, but was removed from service vide order dated 6/10/1995 for which he has approached this court for relief by invoking provision of Article 226 of the Constitution of India alleging violation of natural justice etc.

2. The factual matrix of the case is as follows. The petitioner claims he was initially recruited as Constable on 6.2.1984, promoted to A.S.I. by respondent No. 2 on 20/4/1989, his service was confirmed on 8/10/1990 in the grade of ASI and his service was regularised in the same grade from 27th November, 1991.

3. It is stated that while posted at Sairang Police-Out Post under Bawngkawn Police Station as 2nd O.C. respondent No. 3 directed an inquiry on certain allegations of misconduct against the petitioner and he was put under suspension, memorandum of charges were framed and Enquiry Officer was appointed. On receipt of the inquiry report order of removal was passed illegally on 6.10.1995 by respondent No. 3. Against the said illegal order of removal petitioner preferred his statutory appeal under the rules on 30.10.1995 but the same was kept pending. That in the connected criminal case the petitioner was

acquitted. Enclosing the copy of the order of acquittal he submitted representation before respondent No. 2 for his re-instatement in service. He approach this court earlier with a writ petition, W.P.(C) No. 60/2001 as the appeal was not being decided for a direction to consider his representation and for the disposal of the appeal. The appeal was thereafter dismissed on 6th October, 2001 without giving him any relief. Hence he presented this writ petition.

4. That the allegations on which the inquiry was held was that the petitioner shot at ASI Robert L. Hnamte of Sairang Police Out Post in .the night of 12.3.1995 with his revolver causing injury on the left thigh of the victim consequent to a dispute between them.

5. It is further stated that on the same allegations a criminal case, Bawngkawn P.S. Case No. 142/1995 (GR No. 395/95) u/s 307/326 of IPC was registered and after investigation charge sheet was submitted by the police and petitioner was put into trial before the Court of the ADM(J) at Aizawl. That the petitioner had also lodged an FIR to OC, Bawngkawn P.S. against said A.S.I. Robert L. Hnamte for beating and using abusive language against the petitioner, but the same was not registered by the O.C. concerned.

6. The petitioner contends that although he participated in the departmental inquiry, he was not given any defence assistant and was not given opportunity to cross-examine the witnesses examined by the Enquiry Officer and as such he was "silent spectator" which had vitiated the inquiry which, according to him, is to be deemed to have been held ex-parte. The petitioner raised the following grounds in the petition to assail the impugned order of removal dated 6th October, 1995 passed by respondent No. 3.

(i) That he was removed by an authority subordinate to the appointing authority. That he was appointed by respondent No. 2 but the order of removal was passed by respondent No. 3 is violative of provisions of General Clauses Act, 1897 and Article 311 of the Constitution of India.

(ii) That Section 7 of the Police Act, 1861 is inconsistent with the fundamental rights of the petitioner and violative of Articles 14, 21 and 311 of the Constitution of India and that the provision in the Assam Police Manual which violates Article 13 of the Constitution is to be treated as null and void. That the proceedings against him was illegal for not providing defence assistant and for he not being furnished with a copy of the inquiry report submitted by the Enquiry Officer before imposing punishment on him. That non-consideration and non-acceptance of the order of the criminal court acquitting him by the appellate authority has caused prejudice to him and accordingly the order of removal cannot be sustained being patently illegal and violative of natural justice etc.

Accordingly, he prayed for issuing order quashing the proceedings and the impugned order of removal.

7. The respondents in their counter affidavit have contended, inter alia, that the

misconduct on the part of the petitioner was clearly established by the report submitted by the SDPO, Aizawl, North, in this context. That the incident took place on 12.3.1995 at Sairang Police Out-Post and accordingly the petitioner was put under suspension contemplating departmental proceedings. The memorandum of charges were drawn up against the petitioner. That there is no evidence that the petitioner lodged an FIR against ASI Robert L. Hnamte, for beating and using abusive language to him. That there was no obligation on the part of the Enquiry Officer to appoint defence assistant to defend the petitioner and since the petitioner did not attend the hearing of the departmental inquiry, the inquiry had to be proceeded ex parte. That the petitioner absented himself from the departmental inquiry for which he could not be furnished with a copy of the inquiry report. However, the inquiry report is being attached with the counter affidavit for the examination of the court to determine whether there was any prejudice caused to the petitioner for non-furnishing of the inquiry report. That there was no time limit for deciding the appeal and the petitioner was acquitted on technicalities but not on merit and that the acquittal was for the failure of the prosecution to produce witnesses, particularly the complainant, and it was understood that due to amicable settlement out side the court prosecution withheld the witnesses. That there is no bar in law for parallel criminal prosecution and disciplinary proceedings. The nature of proof in the two cases are also different and the order of removal was passed on the basis of actual evidence on record. That it is not correct to say that the order of removal was passed by an authority subordinate to the appointing authority because Superintendent of Police and Asstt. Inspector General of Police are officers of the same rank and grade and it is the settled position of law that power of removal can be exercised by any officer other than the appointing authority provided that said officer is not subordinate in rank. That there was no violation of Articles 13, 14 and 21 as alleged by the petitioner and Section 7 of the Indian Police Act is not inconsistent to the fundamental rights. That there was a case of delay in approaching the court by the petitioner as admittedly the order of removal was passed on 6th October, 1995 and the petitioner approached before the court only in the year 2001 and accordingly the same suffers from inordinate delay and laches and liable to be dismissed.

8. In his affidavit-in-reply to the counter-affidavit presented by the respondents, the petitioner repeated the facts given in the writ petition and stated further as follows :

"I was a mere spectator in the alleged departmental proceeding conducted against me wherein I was present in all the days of the hearing. Having failed to understand the proceeding as it was proceeded as ex parte because I did not cross examine a single witness despite my presence because the Enquiry Officer did not ask me to cross examine the witnesses present in the alleged proceeding and above all I was given an false hope and impression that until the Criminal case instituted against me was concluded the result of the alleged inquiry would not be announced. I state that the Natural Justice which was to be afforded to

me in the alleged inquiry which was not given to me as such my right to life was taken without application of the mind of the Enquiry Officer that it was his duty to arrange for a defence assistant of mine so that I should not remain to be undefended in the alleged inquiry."

9. I have heard both sides and considered the submissions made by the learned counsel appearing for the both sides. Also perused the document annexed with the affidavit, counter-affidavit etc.

10. Both the sides in their respective affidavit and counter affidavit have created, in my view, unnecessary confusions by making inconsistent and irrelevant statements. The statements given by the petitioner in his affidavit-in-reply, the excerpts of which is quoted above in para 8 of the judgment clearly shows that all along the petitioner as a delinquent officer joined the inquiry. There is thus absolutely no question of terming the inquiry as an ex parte inquiry. The petitioner perhaps intended to mean that since he voluntarily opted not to take active part in the inquiry, irrespective of the reasons for such omission, the inquiry should be termed as ex parte inquiry forgetting blissfully that he was an Asstt. Sub-Inspector of Police and not an ordinary person. On his own admission he was "present in all the days of the hearing" before the Inquiry Officer. But facts remain that he neither cross-examined the witnesses nor produced any defence witness in the inquiry. Therefore, on this ground the inquiry cannot be faulted.

11. The next submission of the petitioner is that he was not given any defence assistant but then he himself being a competent person in the rank of Asstt. Sub-Inspector of Police hardly required any defence assistant. Even then as per the records of the proceedings Annexure-B/1(photocopy) he was asked by the inquiring officer appointed by State to engage defence assistant. The order of Inquiry Officer in this context dated 7.6.1995 goes as follows :

"7.6.1995: Charged officer ASI, S.N. Yadav appeared and held preliminary hearing. Explained the charges and charged officer pleads not guilty. The charged officer have no document to be inspected for his defence and have no defence Assistant. He is informed to engage Defence assistance if deserved."(sic).

In this context it was rightly submitted that there is no obligation on the part of Inquiry Officer to appoint defence Assistant. Therefore, it would not be correct to say that he was not asked to engage the defence assistant.

12. The next objection to assail the inquiry and the order of removal is that there was non-furnishing of the inquiry report to the delinquent officer i.e. the present petitioner. In this context, even if it was a fact, the respondents had subsequently enclosed on 2.7.2002 with their counter-affidavit a photocopy of the papers of the proceedings before the Enquiry Officer along with the inquiry report. After that on 30.7.2002 the petitioner presented his affidavit-in-reply to the counter-affidavit of the respondents wherein he has stated in respect of this Annexure-B/1 as follows :

"I state that I have already stated that I was present in the alleged departmental inquiry in all the days of the hearing which is evident from the Annexure B/1 othe(sic) Counter Affidavit of the respondents but in the counter affidavit of the respondents, the respondents had without going through their own record of Annexure-B/1 has falsely attributed that the enquiry report could not be furnished to me because of my alleged absence from the inquiry."

Therefore, the bonafide of the proceedings and the findings had not been assailed on the ground of either impropriety or bias and the only objection raised is as follows :

"That non furnishing of the enquiry report to me whereby I have been prejudiced and my right have been taken away without any reason and justification to write an effective representation to the Disciplinary Authority before being awarded any punishment."

Therefore, we can safely come to the conclusion that the merit of the inquiry report is not in challenge but what has been contended by the petitioner is that had the copy of the inquiry report been furnished to him he could have been able to make proper representations before the " disciplinary authority against the proposed punishment.

13. The law in this regard has been cited by the petitioner referring to the famous case of Managing Director, ECIL, Hyderabad, Vs. Karunakar, etc. etc., Managing Director, ECIL, Hyderabad and Ors. v. B. Karunakar and Ors., which, I am afraid, on deep scrutiny goes against him. Hon"ble Apex Court held as follows:

"30.....

(V) The next question to be answered is what is the effect on the order of punishment when the report of the Enquiry Officer is not furnished to the employee and what relief should be granted to him in such cases. The answer to this question has to be relative to the punishment awarded. When the employee is dismissed or removed from the service and the inquiry is set aside because the report is not furnished to him, in some cases the non-furnishing of the report may have prejudiced him gravely while in other cases it may have made no difference to the ultimate punishment awarded to him. Hence to direct reinstatement of the employee with back-wages in all cases is to reduce the rules of justice to a mechanical ritual. The theory of reasonable opportunity and the principles of natural justice have been evolved to uphold the rule of law and to assist the individual to vindicate his just rights. They are not incantations to be invoked nor rites to be performed on all and sundry occasions. Whether in fact, prejudice has been caused to the employee or not on account of the denial to him of the report, has to be considered on the facts and circumstances of each case. Where, therefore, even after the furnishing of the report, no different consequence would have followed, it would be a perversion of justice to permit the employee to resume duty and to get all the consequential benefits. It

amounts to rewarding the dishonest and the guilty and thus to stretching the concept of justice to illogical and exasperating limits. It amounts to an "unnatural expansion of natural justice" which in itself is antithetical to justice."

31. Hence, in all cases where the enquiry officer's report is not furnished to the delinquent employee in the disciplinary proceedings, the Courts and Tribunals should cause the copy of the report to be furnished to the aggrieved employee if he has not already secured it before coming to the Court/Tribunal and give the employee an opportunity to show how his or her case was prejudiced because of the non-supply of the report. If after hearing the parties, the Court/Tribunal comes to the conclusion that the non-supply of the report would have made no difference to the ultimate findings and the punishment given, the Court/Tribunal should not interfere with the order of punishment. The Court tribunal should not mechanically set aside the order of punishment on the ground that the report was not furnished as is regrettably being done at present. The courts should avoid resorting to short cuts. Since it is the Courts/ Tribunals which will apply their judicial mind to the question and give their reasons for setting aside or not setting aside the order of punishment, (and not any internal appellate or revisional authority), there would be neither a breach of the principles of natural justice nor a denial of the reasonable opportunity. It is only if the Court/Tribunal finds that the furnishing of the report would have made a difference to the result in the case that it should set aside the order of punishment. Where after following the above procedure, the Court/Tribunal sets aside the order of punishment, the proper relief that should be granted is to direct reinstatement of the employee with liberty to the authority/ management to proceed with the inquiry, by placing the employee under suspension and continuing the inquiry from the stage of furnishing him with the report. The question whether the employee would be entitled to the back-wages and other benefits from the date of his dismissal to the date of his reinstatement if ultimately ordered, should invariably be left to be decided by the authority concerned according to law, after the culmination of the proceedings and depending on the filial outcome. If the employee succeeds in the fresh inquiry and is directed to be reinstated, the authority should be at liberty to decide according to law how it will treat the period from the date of dismissal till the reinstatement and to what benefits, if any and the extent of the benefits, he will be entitled. The reinstatement made as a result of the setting aside of the inquiry for failure to furnish the report, should be treated as a reinstatement for the purpose of holding the fresh inquiry from the stage of furnishing the report and no more, where such fresh inquiry is held. That will also be the correct position in law."

Therefore, I find this objection, i.e., of non-furnishing of the inquiry report, is also of no help to the petitioner, unless and until a specific and definitive case of bias is pleaded and brought out.

14. The further contention of the petitioner in this case is that there was simultaneously criminal prosecution as well as disciplinary proceedings and he

was acquitted in the connected criminal trial for which disciplinary proceedings cannot be sustained. In this context he has referred the citation report in Capt. M. Paul Anthony Vs. Bharat Gold Mines Ltd. and Another, I had gone through the citation. The law pronounced therein by the Hon"ble Apex Court may be succinctly stated as follows :

"13...., there is a consensus of judicial opinion amongst the High Courts whose decisions we do not intend to refer to in this case, and the various pronouncements of this Court, which shall be copiously referred to, on the basic principle that proceedings in a criminal case and the departmental proceedings can proceed simultaneously with a little exception. As we understand, the basis for this proposition is that proceedings in a criminal case and the departmental proceedings operate in distinct and different jurisdictional areas. Whereas in the departmental proceedings, where a charge relating to misconduct is being investigated, the factors operating in the mind of the disciplinary authority may be many such as enforcement of discipline or to investigate the level of integrity of the delinquent or the other staff, the standard of proof required in those proceedings is also different than that required in a criminal case. While in the departmental proceedings the standard of proof is one of preponderance of the probabilities, in a criminal case, the charge has to be proved by the prosecution beyond reasonable doubt. The little exception may be where the departmental proceedings and the criminal case are based on the same set of facts and the evidence in both the proceedings is common without there being a variance."

Therefore, mere acquittal in criminal prosecution is not sufficient to set aside the findings of the disciplinary authority unless it is based on same set of evidence and identical materials. In the instant case it is not so because criminal trial ended and acquittal clearly was on the basis of non-production of evidence from the side of the prosecution. The judgment of the criminal court, Annexure-6, attached to the petition itself in this context opined as follows :

"6. Ld. A.P.P. Pu Vanlalanmawia submitted that the complainant was called through his friends, however, he did not appear before the court. Hence, he is unable to produce the complainant. Ld. D/L submitted that the prosecution was unable to produce their witnesses including the complainant and they completely failed to prove the guilt of the accused and prayed the court to acquitted the accused honourably from the liability of the charge u/s 307/326 IPC."

Moreover, the findings of the Enquiry Officer has nowhere been challenged effectively by the writ petitioner on ground of bias excepting preferring the statutory appeal as stated in his writ petition as well as affidavit-in-reply. Learned Govt. advocate in the context of bias has referred citation Syed Rahimuddin Vs. Director General, C.S.I.R. and Others, The relevant portion of the which are goes as follows :

"5. The further grievance that the findings of the enquiring officer are findings on no evidence is belied by the very report of the enquiring officer. The enquiring

officer has dealt with the articles of charge chronologically and the relevant materials on the basis of which the ultimate conclusion is arrived at. It is well settled that a conclusion or a finding of fact arrived at in a disciplinary enquiry can be interfered with by the court only when there are no materials for the said conclusion, or that on the materials, the conclusion cannot be that of a reasonable man. Having examined the report of the enquiring officer, we are unable to accept the contention of the learned counsel for the appellant that the findings of the enquiring officer cannot be held to be findings based on no evidence."

In the instant case it is to be noted that the petitioner / delinquent officer never assailed all the facts alleged by the disciplinary authority to impute misconduct rather it is the admitted position in the writ petition itself, that there was an incident between writ petitioner and ASI Robert L Hnamte which had given rise to the disciplinary proceedings. To quote from Para 4 of the petition it goes as follows :-

"Your petitioner states that the Article of Charges vide Annexure 3 to this petition allegedly speaks inter alia that your humble petitioner had shot at ASI Robert L Hnamte of Sairang out post at his left thigh on the night of 12.3.1995 with his revolver and for this alleged fact above simultaneously a Criminal Case under Bawngkawn PS Case No. 142 of 1995 vide GR No. 395/95 u/s 307/326 was registered and was investigated into and charge-sheet was accordingly submitted and the same was put to trial in the Court of the ADM(J) at Aizawl. Your humble petitioner further states that he had also lodged an FIR to OC, Bawngkawn PS against the ASI Robert L Hnamte for beating and used abusive language to your petitioner but same was never registered by the OC against said Robert L Hnamte."

It is also another undisputed fact that on the date of occurrence the petitioner was arrested and was forwarded to judicial custody, as per contends of Annexure-4 which is a detailed report in connection with firing incident at Sairang submitted to the Superintendent of Police by SDPO, Aizawl North being asked and this document has been referred to by the petitioner in the statements on the writ petition as well. Annexure-4 has been annexed to the writ petition by the petitioner himself without challenging its contents effectively. Rather it is admitted that the report had mentioned that on the following day of the date of occurrence the petitioner and the said victim ASI Robert L Hnamte both appeared in the office of the SDPO. This, we can summarise safely to say that there was an incident of mutual accusation on the night of 12.3.1995 involving the petitioner and his colleague ASI Robert L Hnamte. The petitioner made an accusation, vide para 5 of the writ petition, that said ASI Robert L. Hnamte battered him and used abusive language against him and he filed an FIR, but it would appear that he did not pursue the matters to reasonable limit and remained satisfied by complaining against the O.C. concerned that the O.C. failed to register his case. The facts given will bring out only a non-cognisable case for which police

cannot take action. There was a scope for the petitioner to approach the court of Magistrate, in case of refusal by the police to take action, in his defence against the charge u/s 307/326 of IPC. Therefore, the cause of petitioner will suffer for default as well, even if he had any valid defence against the charge.

15. A preliminary inquiry report will show that a detailed report (Annexure-4) in connection with firing incident at Sairang submitted by the SDPO concerned immediately and during inquiry, the Enquiry Officer examined 6 (six) witnesses including this SDPO in the very presence of the petitioner. It has been mentioned in orders dated 21.7.1995 and 4.9.1995 of the inquiry proceedings that the delinquent officer was given opportunity to cross examine the witnesses but he declined to do so.

16. Learned Enquiry Officer under heading of "Critical analysis of evidence of both sides and objective assessment" had discussed the evidence thoroughly and I find there is nothing perverse in the discussion and the appreciation of the evidence. It was also recorded in the inquiry report that the petitioner / delinquent officer in his defence stated that ASI, Robert L Hnamte tried to kill him by strangulation and in order to scare him he opened the fire and as the offender ASI did not like to stop there he again fired from his service revolver. There is nothing to show that the petitioner even desired to examine any witnesses in support of any such defence plea.

17. Therefore, I find there is nothing to assail the merit of the inquiry report or to show any case of bias. Equally there is nothing in the petition or in the affidavit-in-reply to show any case of prejudice or bias in holding the inquiry or non-furnishing of the copy of the inquiry report at appropriate time.

18. Lastly, coming to the question of removal of the petitioner by an authority other than appointing authority, it is submitted by the learned Government advocate, referring to citation Indian Bank Vs. K. Usha and Another, in this context that the Asstt. Inspector General of Police who had issued the appointment letter, in fact, is a co-ordinate authority and it is permissible for another co-ordinate authority to pass the order of removal. The case law referred was the case of police Sub-Inspector who was appointed by Principal of Police Training College but was removed by Superintendent of Police and Court held therein that there was no illegality. Rule 16 of part III of Assam Police Manual, deals with appointment and training of Asstt. Sub Inspector of Police. It is stated that Inspector General of Police will make the final selection and post of Asstt. Sub-Inspectors of Police will be filled up entirely by promotion from Constabulary. Schedule attached to Rule 66 shows that in case of Asstt. Sub Inspector of Police both the appointing authority and removal authority is Superintendent of Police. Although Asstt. Inspector General of Police has not been mentioned as an appointing authority in case of Asstt. Sub-Inspector of Police; it is shown as per item 3 of "the Schedule to Para XII of Rule 66 of Assam Police Manual, Part III" that the appointing authority in case of Sub-Inspector of Police is Superintendent of Police as well as Asstt. Inspector General of Police and therefore, it was rightly

submitted that both these persons are equal in rank and not subordinate to each other. Accordingly, the removal by Superintendent of Police cannot be faulted with although the appointment of the petitioner was made along with 33 others by Asstt. Inspector General of Police. It may be mentioned that the suspension " order and the memorandum of charges were framed by the Superintendent of Police, who also directed the inquiry by appointing the Enquiry Officer after getting the preliminary inquiry report from SDPO, Aizawl North.

19. Concluding, I find there is nothing wrong either in the disciplinary proceedings held against the petitioner or in passing the order of his removal from service and thus the interference of the court is not called for. Law is well-settled that High Court, in proceedings under Article 226, does not act as an appellate authority but exercises power within the limits of judicial review to correct errors of law or procedural errors leading to manifest injustice or violation of principle of natural justice, refer *Rae Bareli Kshetriya Gramin Bank Vs. Bhola Nath Singh and other*, In other words, I find no clear case of violation of natural justice or bias could be shown by the petitioner.

20. Petition is dismissed. Under the particular facts and circumstances of the case I make no order as to costs.