
(2008) 04 GAU CK 0005

In the Gauhati High Court

Case No : Writ Petition (C) No's. 50 and 61 of 2007

Vanlallawma and Another

APPELLANT

Vs

State of Mizoram and Others

RESPONDENT

Date of Decision : 10-04-2008

Acts Referred:

Constitution of India, 1950 — Article 14, 16, 226, 311, 311(1)

Citation : (2010) 3 GLT 295

Hon'ble Judges : H. Baruah, J

Bench : Single Bench

Advocate : C. Lalramzauva, A.R. Malhotra, Haulianthanga and Joseph Lalfakawma, for the Appellant; N. Sailo, for the Respondent

Judgement

H. Baruah, J.—By this common judgment, it is proposed to dispose of both the writ petitions (W.P.(C) No. 50/2007 and W.P.(C) No. 61/2007) inasmuch as the facts and law involved in both the writ petitions involved are one and the same.

2. The writ Petitioners, by these writ petitions, under Article 226 of the Constitution of India have challenged the Orders No. 2IR/R-60/2006/2517 dated 30.10.2006 (Annexure-A/7) and Order No. C. 16014/Range/VLL/07/115 dated 16.8.2007 (Annexure-10) in W.P.(C) 50/2007 and, Order Memo No. 2.IR/R/PF/IV-GRD-HLSZ/06/2800 dated 28.11.2006 (Annexure-11) in WPC 61/2007, by which the writ Petitioners were removed from their service by the Deputy Commandant, 2nd IR Battalion, Khawzawl, Mizoram and appeal filed dismissed (in W.P.(C) No. 50/2007).

3. The short question to be decided in both the writ petitions for determination is whether the Deputy Commandant, 2nd IR Battalion Khawzawl had/has the authority to remove an employee from the service, not being the appointing authority under the law, as well as under the provisions of Article 311 of the Constitution.

4. Before adhering to this short question above, it would, perhaps be appropriate

for this Court to put the case of the writ Petitioners separately at this stage.

W.P.(C) No. 50/2007

Writ Petitioner Vanlallawma, who was appointed as Constable against the vacancy in the 2nd Battalion M.A.P. w.e.f. 15.4.1988 in the scale of pay of Rs. 825-15-900-EB-20-1200/- p.m. plus other allowances vide BO No. 208 dated 10.5.88 (Annexure-A/1), and promoted ultimately to the post of Havildar from Naik in the pay scale of Rs. 4000-100-6000/- p.m. plus other allowances as admissible underlie rules, vide Order No. E/PHQ/A/186/42 dated 19.9.2003 posted at 2nd Bn. IR (Annexure-A/3). The writ Petitioner, while, in service was discharging his duties as Havildar suffered from Hypertension and Ureteric Colic and the ailments were certificated by the Medical Officer of the 2nd Bn. IR (Annexure-A/4). A Show Cause Notice vide No. 2IR/R/PF/HAV-VLL/06/2304 dated 28.9.2006 was served on the writ Petitioner and the writ Petitioner submitted a reply on 4.10.2006, wherein it was specifically contended that he was imable to proceed to Chhattisgarh due to hypertension and Kidney disorder. The Deputy Commandant, Respondent No. 6 herein being not satisfied with the Show Cause so submitted by the writ Petitioner imposed penalty of "Removal" from service vide Order No. 2IR/R-60/2006/2517 dated 30.10.2006 without conducting any departmental inquiry (now impugned).

2. An appeal was filed before the Deputy Inspector General of Police (Range), Mizoram, Aizawl. Appeal was, however, dismissed and the appellate authority upheld the impugned order passed by the Deputy Commandant, 2nd IR Battalion, Khawzawl. It is contended that the acts of the State Respondents are ex-facie illegal, arbitrary, unfair, whimsical and capricious. The mandatory provisions of law have been violated by the Respondent authbrities. It was further contended that before imposing the major penalty, it is mandatory/ obligatory on the part of the authority concerned to hold an inquiry against the delinquent officer. Since no inquiry was conducted against the writ Petitioner, the action so adopted by the Respondent No. 6 is illegal and carmot be sustained in law which requires setting aside of the same. It is further contended that the removal order passed by the Deputy Commandant, 2nd IR Battalion Khawzawl is violative of Article 311 of the Constitution and also the provisions of Rule 1044 of the Mizoram Police Mannual. The writ Petitioner, therefore, in view of the above facts situation prayed this Court to set aside and quash the impugned order passed by the Deputy Commandant, 2nd IR Battalion and Deputy Inspector General of Police (Range), Mizoram, Aizawl.

W.P.(C) No. 61/2007

Writ Petitioner H. Lalsangzuala was appointed to a Grade IV post in the 1st IR Battalion under the Government of Mizoram against an existing vacancy in the scale of pay of Rs. 2650-4000/- p.m. plus other allowances as admissible from time to time with certain conditions laid down in his appointment Order No. BN/IR/R-9/2003/5975 dated 27.1.2003 (Annexure-1). On his appointment to the

post, he joined at IR Battalion, Mualvum and discharged his duties to the satisfaction of his superior officers. While he was discharging his duties as such, he fell ill and was not in a position to perform his duties for sometime with effect from the month of April, 2006. For his ailment he consulted medical specialist of Civil Hospital, Aizawl, who diagnosed his ailment as having P-Neuropathy and issued a medical prescription (Annexure-2).

2. In the meantime, some of the Police Officers of IR Battalion and Grade-IV employees working in the said Battalion were deployed to Chhattisgarh for anti-Naxalite Operation. The writ Petitioner, being one of the Grade-IV employees was also selected for the purpose. Being selected, in view of an ailment of P-Neuropathy, his father submitted a representation on 24.7.2006, requesting the Respondent No. 5 not to deploy the writ Petitioner to Chhattisgarh. It is to be noted herein that the representation made/submitted was annexed with a medical certificate dated 13.7.2006 issued by Dr. Zothantluanga, MD (Medicines). In response to the said representation, Respondent No. 5 vide letter dated 28.7.2006 (Annexure-4) directed the writ Petitioner to approach the Unit Doctor of the said Battalion and to submit the Medical Report to the ROs Office of the 1st IR Battalion. Pursuant to the said letter, the writ Petitioner consulted the Medical Officer on 1.8.2006 and submitted a Certificate dated 7.9.2006 before the authority wherein it was certified that the Petitioner was suffering from Chronic low backache (lumber Spondylosis) with radiculopathy and the Petitioner was advised not to involve in heavy exercises and duties and that long travels which might aggravate his problems. Despite having such ailments, the writ Petitioner was deployed to Chhattisgarh along with Police Force on 27.9.2006. But from Gauhati he was unable to proceed further since his ailments aggravated and returned back.

3. A Show Cause Notice was issued for absence from duties (Annexures-8 and 9), reply to the Show Cause was submitted. Not being satisfied with the reply of the Petitioner, a departmental proceeding was initiated and at the conclusion of the departmental proceeding, the writ Petitioner was removed from service vide the impugned order (Annexure-11).

4. It is contended by the writ Petitioner that the removal of the writ Petitioner is violative of the provisions of Article 311(1) of the Constitution of India, since the Respondent No. 6 did not have the power/authority to remove of the writ Petitioner from service by the impugned order. It is further contended by the Petitioner that he was unable to undertake the journey from Gauhati unto Chhattisgarh due to his ailments as a result he had to return back to Aizawl. The fact of his ailment was put before the appropriate authority, but even in spite of that he was not allowed to stay back for which he had to proceed to Chhattisgarh. The impugned order being violative of Article 311 of the Constitution of India and Rule 12 of the Sub-rule 4(a) and (b) of the CCS (CCA) Rules, 1965 the same cannot stand in the eye of law. The writ Petitioner, therefore, in the facts situation and the law prayed this Court to set aside and

quash the impugned order dated 28.11.2006 (Annexure-11).

5. We have heard Mr. Vanlalenmawia and Mr. C. Lalramzauva, learned Counsel for the writ Petitioners and Mr. N. Sailo, learned Addl. AG for the State Respondents.

6. The common arguments advanced by Mr. Vanlalenmawia and Mr. C. Lakamzauva, learned Counsel for the writ Petitioners is that the impugned orders of removal of the writ Petitioners cannot sustain in view of the provisions of Article 311 of the Constitution of India, and also in view of the law laid down by the Hon'ble Supreme Court in the case between Krishna Kumar Vs. Divisional Assistant Electrical Engineer and Others, and Transport Commissioner, Madras-5 Vs. A. Radha Krishna Moorthy, It is submitted by the learned Counsel of the writ Petitioners that Commandant of the Battalion is the appointing authority of the writ Petitioners, removal of the writ Petitioners from their services is vstdthin the jurisdiction of the Commandant himself only. Jurisdiction of removal cannot, however, be delegated to any officer sub-ordinate to the appointing authority i.e. the Deputy Commandant. Thus the impugned orders by which the writ Petitioners were removed from service however, cannot sustain in law inasmuch as the same were passed by the Deputy Commandant, a sub-ordinate officer of the Commandant of the Battalion. Admittedly, Respondent No. 6, Deputy Commandant of the Battalion is not the appointmg authority and he, being situated thus, it was not within his jurisdiction to remove the writ Petitioners from their service by virtue of the impugned orders. It is further submitted by the learned Counsel for the Petitioners that the provisions of Article 311 of the Constitution of India have been violated by removing the writ Petitioners from their service by the Respondent No. 6, who is, admittedly, lower in rank of the Commandant of the Battalion.

7. It is further submitted by the learned Counsel for the Petitioners that in the case of writ Petitioner in WPC 50/2007, no inquiry was held before his removal from service thereby he was not given a reasonable opportunity to justify his cause.

8. Per contra to the submissions, Mr. N. Sailo, learned Addl. AG for the State Respondents submitted that the impugned orders of removal of the writ Petitioners from their service cannot be held to be violative of the provisions of Article 311 of the Constitution since Respondent No. 6 was delegated with the power and function of the Commandant by virtue of an order dated 24.10.2006, issued under the hand and seal of the Secretary, Government of Mizoram, Home Department, communicated vide Memo No. A. 19018/82/90-HMP dated 24.10.2006 (Annexure-VIII). This order was made in exercise of the power conferred by the Government of India's Order under Sub-para 3 II of Sub-rule (4) of Rule 12 of CCS (CCA) Rules, 1965. Thus Deputy Commandant, Respondent No. 6, it is argued by Mr. N. Sailo, being delegated with the power and fimction of the Commandant had exercised the power and function of the Commandant and in exercise of such power, he, removed the writ Petitioner from their services

on the ground of desertion. Thus the action taken and power exercised by Deputy Conunandant, Respondent No. 6 are not violative of Article 311 of the Constitution of India.

9. Further in reply to the submission advanced by Mr. Vanlalenmawia in regard to absence of departmental proceeding in respect of the writ Petitioner in W.P.(C) 50/2007, it is argued that the departmental inquiry was avoided having regard to the urgency of the matter by resorting to the provisions of Article 311(2)(b) of the Constitution. When holding of a departmental proceeding is not practicable, exemption is provided under the above sub-Clauses of Article 311 therefore, it would not be justified for the writ Petitioner in W.P.(C) 50/07 to argue that the order of removal was not legally/justiciably passed by the Respondent No. 6.

10. Mr. N. Sailo, learned Addl. AG in support of his contention submitted that Sub-Rule 2(a) of Rule 12 of the CCS (CCA) Rules provides such authority to any other authority to empower in this behalf by general or special order of the President. Therefore, the delegation of power by virtue of the order dated 24.10.2006 (Annexure-VIII) gave power/authority to the Deputy Commandant of the Battalion to remove the writ petitions from their service. At this stage, it is to be noticed that the above contentions do find place in the affidavit-in-opposition submitted by the Respondent authorities in both the writ petitions. Rule 12(2)(a) of CCS (CCA) Rules, 1965 reads as under:

(2) Without prejudice to the provisions of Sub-rule (1), but subject to the provisions of Sub-rule (4), any of the penalties specified in Rule 11 may be imposed on-

(a)....

From the text of this sub-rule, it appears that the penalty provided in Rule 11 are subject to Sub-rule (4) of the Rule. Now let us see what Sub-rule (4) of Rule 12 speaks for:

(4) Notwithstanding....

(a) except where the penalty specified in Clause (v) or Clause (vi) of Rule 11 is imposed by the Comptroller and Auditor-General on a member of the Indian Audit and Accounts Service, no penalty specified in Clauses (v) to (ix) of that rule shall be imposed by any authority subordinate to the Appointing Authority;

(b) where a Government servant who is a member of a Service other than the General Central Service or who has been substantively appointed to any Civil post in the General Central Service, is temporarily appointed to any other Service or post, the authority competent to impose on such Government servant any of the penalties specified in Clauses (v) to (ix) of Rule 11 shall not impose any such penalties unless it has consulted such authority, not being an authority subordinate to it, as would have been competent under Sub-rule (2) to impose on the Government servant any of the said penalties had he not been appointed to such other Service or post;

(c)....

Thus the penalty provided in Clauses V to IX cannot be imposed by any authority subordinate to the appointing authority, even if the sub-ordinate authority is empowered by general or special order. The penalties provided/specified in Clauses V to IX of Rule 11 are more stringent than the penalties provided in the Clauses I to IV. The penalties provided in Clauses V to IX are branded as "major penalties" when penalties provided in Clauses I to IV are branded as "minor penalties". In case of imposition of major penalty, no delegation of power can be made to a sub-ordinate officer in rank other than the appointing authority. Here in our writ petitions, we have found rather discussed above that both the writ Petitioners were appointed by the Commandant of the Battalion, but major penalties were awarded to them by the Deputy Commandant of the Battalion by virtue of delegation of power vide order dated 24.10.2006. Sub-rule (4) of Rule 12 of the CCS (CCA) Rules, 1965 prohibits imposition of major penalty by the authority subordinate to the appointing authority, therefore, the impugned orders passed by the Deputy Commandant of the Battalion, Respondent No. 6 herein, are not only violative of Article 311 of the Constitution, but also of the provisions of Rule 12(4) of the CCS (CCA) Rules, 1965.

11. It has been discussed herein before that the learned Counsel for the writ Petitioners, in support of their contentions relied on a decision rendered in the case between Krishna Kumar v. Divisional Assistant Electrical Engineer and Ors. reported in (1979) 4 SCC 289. In the said case, the Lordship of the Hon'ble Supreme Court in Paras 4-8 held as under:

4. Article 311(1) of the Constitution provides that no person who is a member of a civil service of the Union or an all-India service or a civil service of a State or holds a civil post under the Union or a State shall be dismissed or removed by an authority subordinate to that by which he was appointed. The simple question for determination is whether, as alleged by the Appellant, he was removed from service by an authority subordinate to that which had appointed him. The relevant facts are but these and these only; The Appellant was appointed as a train Lighting Inspector under an order issued by the Chief Electrical Engineer and was removed from service under an order passed by the Divisional Assistant Electrical Engineer, Central Railway, Nagpur. The narrow question, therefore, for consideration is whether the Divisional Assistant Electrical Engineer is subordinate in rank to the Chief Electrical Engineer. None of the affidavits filed by Shri Sarathy, who passed the order of removal says that the post of Divisional Assistant Electrical Engineer is equivalent to that of the Chief Electrical Engineer in the official hierarchy. That the former is not higher in rank than the latter is self-evident. In the circumstances, it seems clear that the Appellant, was removed from service by an authority which is subordinate in rank to that by which he was appointed.

5. In defence of the legality of the order of removal, counsel for the Respondents relies on paragraph 2 of Respondent 1's affidavit, dated January 7, 1978,

wherein he has stated that the power to make appointments to the post of the Train Lighting Inspector was delegated to certain other officers including the Divisional Assistant Electrical Engineer. It is urged that since the Divisional Assistant Electrical Engineer has been given the power to make appointments to the post of the Train Lighting Inspector, he would have the power to remove any person from that post. We cannot accept this contention. Whether or not an authority is subordinate in rank to another has to be determined with reference to the state of affairs existing on the date of appointment. It is at that point of time that the constitutional guarantee under Article 311(1) becomes available to the person holding, for example, a civil post under the Union Government that he shall not be removed or dismissed by an authority subordinate to that which appointed him. The subsequent authorization made in favour of Respondent 1 in regard to making appointments to the post held by the Appellant cannot confer upon Respondent 1 the power to remove him. On the date of the Appellant's appointment as a Train Lighting Inspector, Respondent 1 had no power to make that appointment. He cannot have, therefore, the power to remove him.

6. Besides, delegation of the power to make a particular appointment does not enhance or improve the hierarchical status of the delegate. An officer subordinate to another will not become his equal in rank by reason of his coming to possess some of the powers of that another. The Divisional Engineer, in other words, does not cease to be subordinate in rank to the Chief Electrical Engineer merely because the latter's power to make appointments to certain posts has been delegated to him.

7. Since the Appellant was appointed by the Chief Electrical Engineer and has been removed from service by an order passed by Respondent 1 who, at any rate, was subordinate in rank to the Chief Electrical Engineer on the date of Appellant's appointment, it must be held that Respondent 1 had no power to remove the Appellant from service. The order of removal is in patent violation of the provisions of Article 311(1) of the Constitution.

8. For these reasons we allow the appeal, set aside the order passed by the High Court and hold that the order dated August 31, 1976 passed by Respondent 1 removing the Appellant from service is unconstitutional and, therefore, of no effect. The Appellant must accordingly be deemed to continue in service until, if so advised, the Government takes appropriate steps to bring his service to an end.

They, (learned Counsel of the writ Petitioners) also relied in the ratio laid down in the case between Transport Commissioner, Madras-5 Vs. A. Radha Krishna Moorthy, In Para 8 of the said judgment, the Lordship of the Hon'ble Supreme Court held as under:

8. Insofar as initiation of enquiry by an officer subordinate to the appointing authority is concerned, it is well settled now that it is unobjectionable. The initiation can be by an officer subordinate to the appointing authority. Only the

dismissal/removal shall not be by an authority subordinate to the appointing authority. According it is held that this was not a permissible ground for quashing the charges by the Tribunal.

12. Facts incorporated in the case between Krishna Kumar v. Divisional Assistant Electrical Engineer and Ors. is some what different from the facts of our present cases. In the reported case Divisional Assistant Electrical Engineer was given power to make appointment to the post of Train Lighting Inspector, who, according to the counsel would have the power to remove any perron from that post. The contention of the learned Counsel was, however, not accepted by the Lordship since the power cannot be conferred to remove inasmuch as on the date of appointment as Train Lighting Inspector, the Respondent No. 1 had no power to make the appointment. In our cases, admittedly, Respondent No. 6 did not appoint the writ Petitioners to their respective posts, therefore, by virtue of delegation of power, the Respondent No. 6 cannot remove the writ Petitioners from their respective posts.

13. In view of the facts situation and law laid down by the Hon''ble Svpeme Court and substantive law under CCS (CCA) Rules, 1965, this Court is of the view that the impugned orders passed by the Respondent No. 6 cannot legally sustain. The orders were passed aparently in violation of the Article 311 of the Constitution of India and Rules 11 and 12 of the CCS (CCA) Rules, 1965. By the impugned orders, Respondent No. 6 also caused violation of the fundamental rights under Articles 14 and 16 of the Constitution available to the writ Petitioners.

14. Having considered all the matters in its entirety, this Court does not see any ground to allow the impugned orders passed by the Respondent No. 6 to stand. The orders are accordingly set aside and quash, the same being unconstitutional.

15. While ordering so the writ Petitioners accordingly be deemed to continue in the service from the date of their dismissal. The writ Petitioners shall also be entitled to all pay benefits. Door is, however, not closed to initiate a Departmental Proceeding to the Respondent authorities against writ Petitioner in W.P.(C) No. 50/2007, if so advised.

16. Both the writ petitions are accordingly disposed of, however, with no cost.