

(1998) 03 GAU CK 0053

In the Gauhati High Court

Case No : Writ Appeal No. 633 of 1996 in Civil Rule No. 429 of 1992

Zakir Hussain Khandakar

APPELLANT

Vs

State of Assam and Others

RESPONDENT

Date of Decision : 05-03-1998

Acts Referred:

Constitution of India, 1950 — Article 311(2), 314(2)

Citation : (1998) 2 GLT 376

Hon'ble Judges : M. Ramakrishna, C.J;P.C. Phukan, J

Bench : Division Bench

Advocate : A.S. Choudhury, R. Majumdar and S. Seal, for the Appellant; S.S. Dey, Addl. Sr. G.A., for the Respondent

Final Decision : Allowed

Judgement

M. Ramakrishna, C.J.—This appeal arises out of the order made by the learned Single Judge in Civil Rule No. 429/92 on 9.9.96, which runs as follows:

In view of the order passed in Civil Rule No. 430 of 1992, this matter is also disposed of. There will be no order as to costs.

Therefore, we will have to see the actual order passed by the learned Single Judge in Civil Rule No. 430/92, passed on the same date (9.9.96). That petition was disposed of by the following order:

The Petitioner was a Constable working in Kokrajhar DEF under Gossaigaon Police Station during the relevant period. Subsequently an information being received that a dacoity was being committed and after following certain procedures the Constable left for the place of occurrence where instead of firing at the miscreants, he fired an outsider who was coming in a Maruti Car and shot him dead by firing six rounds of fire. On the basis of the aforesaid allegations the matter was considered at the highest level and the Secretary to the Govt. of Assam, Home Department, one Shri Baruah passed an order dismissing the services of the said Petitioner under Article 311(2)(c) of the Constitution of India

by order in the name of the Governor of Assam. On the facts of the case I find no infirmity in the order. The matter is disposed of. There will be no order as to costs.

It is this order that is called in question in this appeal for the grounds taken by the Appellant in the memorandum of appeal.

2. We have heard Mr. A.S. Choudhury, learned Counsel for the Appellant and Mr. S.S. Dey, learned Addl. Senior Govt. Advocate appearing on behalf of the State, who at our request has produced the original records of the case.

3. The Appellant has, inter alia, taken a specific ground, viz., referring to the provisions of Article 311(2)(c) of the Constitution of India that, in a case where a mere disclosure might affect the security of the State, either the President of India or the Governor of the State might exempt the holding of an enquiry as contemplated under Article 311(2) of the Constitution.

In this context, the legal contention urged by Mr. A.S. Choudhury, the learned Counsel for the Appellant, is that, in the event of the said competent authority intends to exercise the powers under Article 311(2)(c) of the Constitution, it must be done in the manner as contemplated under that provision of the law. In other words, the argument of Mr. Choudhury is that since there is no specific order made by the Governor in exercise of such powers, exempting from a detailed enquiry as contemplated under Article 311(2) of the Constitution with regard to the Government servant (Petitioner/Appellant), the observation of the learned Single Judge while dismissing the petition that there is an order of exemption invoking Article 311(2)(c) of the Constitution is wholly erroneous and cannot be sustained in law.

4. With a view to examine this aspect of the legal contention, we have perused the original records produced by Mr. S.S. Dey, learned Addl. Senior Govt. Advocate, By a careful consideration of the operative portion of the order made on 29th November, 1991, it is not possible for us to concede to the submission of Mr. S.S. Dey and to reject the legal contention of the writ Petitioner/Appellant.

5. Regard being had to the language employed in the aforesaid paragraph, the competent authority arrived at a conclusion that:

Constable Rabin Das and Constable Jairam Gogoi including ASI Zakir Hussain Khandakar may be dismissed from service under Article 314(2) of the Constitution of India so that they face the trial as criminals.

The learned Single Judge perhaps had no occasion to refer to this aspect, perusing the original records, nor was there the counsel for the writ Petitioner to drive home this point in the writ Court. Therefore, we have to have a second look in this writ appeal.

6. Mr. S.S. Dey, learned Addl. Senior Govt. Advocate fairly submits that he cannot improve upon the materials found in the original records, nor would it be

possible for him to argue contrary to what is available in the records. He has fairly submitted that the Court may construe the order in its proper perspective and to give an opportunity to the Government to reconsider the whole thing, if the State so desires.

7. As we have already indicated in the earlier paragraph that Article 311(2)(c) of the Constitution clearly confers a specific power on the Governor of the State to dispense with or exempt the holding of an enquiry as required under Article 311(2) of the Constitution, and in the event of that authority intending to pass such an order in respect of a Government servant for the purpose of imposing punishment, he may do so. But in the instant, case unfortunately, the order is otherwise. In other words, as we have indicated, in the language employed in paragraph six extracted above, the conclusion clearly goes to show that the competent authority intended to dismiss the Petitioner/Appellant from service under Article 311(2) of the Constitution which means they want to take action to dismiss the Appellant as contemplated under Article 311(2) of the Constitution. In other words, the law contemplates under the said provision of law to hold a detailed enquiry providing opportunity for the Government servant to defend himself following the principle of natural justice. Therefore, it is not possible for us to take the view that the competent authority intended to exempt the application of Article 311(2) for the purpose of holding an enquiry and to dismiss the Petitioner.

Therefore, the conclusion reached by the learned Single Judge in the course of the order on the presumption that there is exemption exempting the application of Article 311(2) of the Constitution of India, is factually incorrect and erroneous. Therefore, we have no alternative but to allow the appeal.

8. In the result, the appeal is allowed. The order of the learned Single Judge made in Civil Rule No. 429/92 on 9.9.96 dismissing the services of the Petitioner/Appellant in terms of the order made in Civil Rule No. 430/92, are set aside. The order impugned in the writ petition, made by the Government, Annexure-3 to the writ petition, is also set aside.

Ordered accordingly.

Let a copy of this order be given to Mr. S.S. Dey, learned Addl. Sr. Govt. Advocate, forthwith.